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

AMAZON EU S.À.R.L.,

Claimant,

v.

INTERNATIONAL CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR Case No. _______________

Expert Report of Heather Ann Forrest

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ICANN

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

New gTLD Program

New gTLD Program in Brief

Since ICANN was founded in 1998 as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles has been to promote competition in the domain name marketplace while ensuring Internet security and stability. The expansion of the generic top-level domains (gTLDs) will allow for more innovation, choice and change to the Internet's addressing system, now represented by 21 gTLDs.

The decision to introduce new gTLDs followed a detailed and lengthy consultation process with all constituencies of the global Internet community represented by a wide variety of stakeholders – governments, individuals, civil society, business and intellectual property constituencies, and the technology community. Also contributing to this policy work were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO), and Security and Stability Advisory Committee (SSAC). The policy was completed by the Generic Names Supporting Organization (GNSO) in 2007, and adopted by ICANN's Board in June, 2008. The program is expected to launch in calendar year 2010.

The ICANN team continues to share with the Internet community the ongoing program developments through the release of draft Applicant Guidebooks, excerpts, explanatory memoranda and in-person meetings. All details can be found on this page.

In a world with over 1.6 billion Internet users – and growing – diversity, choice and competition are key to the continued success and reach of the global network.

New gTLD History at a Glance

- Eight gTLDs predated ICANN's creation – dot-com, dot-edu, dot-gov, dot-int, dot-mil, dot-net, dot-org and dot-arpa.
- ICANN has successfully carried out two previous application rounds for new gTLDs: 2000 (dot-aero, dot-biz, dot-coop, dot-info, dot-museum, dot-name and dot-pro); and 2004 (dot-asia, dot-cat, dot-jobs, dot-mobi, dot-tel, dot-travel).
- The Generic Names Supporting Organization (GNSO) has developed policy recommendations that are the foundation guiding ICANN in introducing new gTLDs. The policy work started in December 2005 and concluded in September 2007.
- In June 2008, during ICANN's Paris meeting, ICANN Board approved the GNSO recommendations for introducing New gTLDs to the Internet's addressing system.

Fast Facts

- According to Internet World Stats, there are an estimated 1.6 billion Internet users worldwide.
- An Internet address is made up of a series of characters separated by dots. For example, in the website address www.icann.org, the top-level domain is ".org" and the second-level domain is "icann". In some cases, you can also find third-level domain names.
- There are currently 21 gTLDs. A gTLD can, in some cases, identify the nature of an organization operating a specific website. For example, a website with a dot-com address usually indicates a commercial organization: dot-museum is dedicated to museums, dot-mobi for mobile phone users, dot-aero for the aviation industry, and so on.
- There are around 250 two-letter country-code TLDs (ccTLDs), which identify a country or territory. For example, the Internet extension dot-jp corresponds to Japan, while dot-eu corresponds to the European Union.
- The year 2008 ended with a total base of 177 million domain name registrations across all of the top-level domains (TLDs). This represents 16 percent growth over the previous year and 2 percent growth over the third quarter of 2008. Of the 177 million second-level domain name registrations, 96 million are gTLD registrations.

Did you know?

- The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for introducing new generic top-level domains (gTLDs). The priority is to ensure that new gTLDs are awarded in a fair and transparent process to organizations that can effectively manage them on behalf of Internet users.
- ICANN is currently developing the program that facilitates the creation of new Internet extensions, or gTLDs. Under this new process, more extensions will be created, and with them, potentially a whole new way of using the Internet. Also, for the first time, Internationalized Domain Names (IDNs) will be available at the top level, enabling new extensions in different scripts such as Arabic, Chinese, Greek, Hindu, and more. Millions of people around the world will be able to use the Internet's naming system in their own languages.
- The Internet's fundamental protocol – TCP/IP – has passed its 30th birthday, and the naming system on top of it – DNS – has passed its 25th birthday. The Internet has gone from a few networked computers to a network accessed by a billion people, from a Western phenomenon to a truly global one, and from research roots to an engine of commerce accounting for trillions of dollars in commerce.
- During that time, the use of top-level domain (TLD) identifiers, such as dot-com, dot-net, dot-uk, has actually changed very little. The most widely recognized global TLD is dot-com. While the scale of these TLDs has changed dramatically since their inception – more than 20 years ago for dot-com – the availability and usage of these top-level names has been permitted to change very little.
- The entity responsible for operating a gTLD is called a registry. Depending on the kind of gTLD, these organizations are referred to as registry operators or sponsors. New gTLD registries must sign agreements with ICANN to meet technical requirements and comply with applicable policies.

What are gTLDs?

gTLD stands for generic top-level domain – what Internet users see as an Internet extension like dot-com, dot-org or dot-info – and they are part of the structure of the Internet's domain name system.

Why are new gTLDs being introduced?

The wider Internet community that takes part in the ICANN policy development process has advocated for new gTLDs. Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market.

In addition the Joint Project Agreement that ICANN has with the US Department of Commerce says, "ICANN shall maintain and build on processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs."

Opening the top-level space so that names can be proposed rather than be restricted to the existing 21 gTLDs could open up a new wave of innovation. Competition and innovation best occur when a stable and open platform is available and the barriers to entry are reduced.

Will this change how the Internet operates?

This planned increase of the number of gTLDs is not expected to affect the way the Internet operates, but it will potentially change the way people find information on the Internet.

What is ICANN doing to protect trademark holders?

First, an objection-based process will enable rightsholders to demonstrate that a proposed gTLD would infringe their legal rights. Second, applicants for new gTLDs will be required to describe in their applications the rights protection mechanism they propose for second-level registrations, which must be made public. Third, all new gTLDs must ensure that second-level registrations are subject to ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP), a process that has worked well to protect rights for many years. Finally, ICANN has been working closely with the trademark community to find additional solutions to potential issues for trademark holders in implementing new gTLDs.

Will ICANN prevent the registration of objectionable or racist extensions?

Offensive names could be subject to an objection-based process based on public morality and order. This process will be conducted by an international arbitration body using criteria drawing on provisions in a number of international treaties.

How are IDNs related to gTLDs?

IDN is the short name for Internationalized Domain Name. IDNs are domain names with characters in addition to a, b…, z; 0, 1,…, 9; and "-".

Such domain names could contain characters with diacritical marks as required by many European languages, or characters from non-Latin scripts; for example, Arabic or Chinese. During the 2010 application round, IDN gTLDs will be allowed for the first time in the history of the Internet. The IDN top-level domain names will offer many new opportunities and benefits for Internet users around the world by allowing them to establish and use top-level domains in their native languages and scripts.

How many new gTLDs are expected?

There is no way of knowing the exact number of applications ICANN will receive during the 2010 application round or how many of these applications will qualify and become gTLD registries. Market speculations have estimated anything from hundreds to thousands of applications.

Is applying for a new gTLD the same as buying a domain name?

No. Nowadays, organizations and individuals around the world can buy second-level and, in some cases, even third-level domain names. They simply need to find an accredited registrar or reseller, comply with the registrant terms and conditions and pay annual fees. The application for a new gTLD is a much more complex process. An applicant for a new gTLD is, in fact, applying to create and operate a registry business and sign a contract with ICANN.

Can I register my idea for a new gTLD with ICANN in advance of the next application period?

No, ICANN will not be taking reservations or pre-registrations of new gTLDs.

Can I simply reserve a gTLD and decide later whether or not to use it?

One of the reasons ICANN is opening the top-level space is to allow for competition and innovation in the marketplace. The application process requires applicants to provide a detailed plan for the launch and operations of the proposed gTLD. ICANN expects new gTLDs to be operational shortly after the registry agreement is signed.

How and when can I see which TLDs are being applied for and who is behind the applications?

After the application period is closed, ICANN will verify all applications for completeness and then release on its website the list of TLDs, applicant names and nonconfidential information about the applications.

Is this the only opportunity to apply for a new gTLD?

No. ICANN plans to hold additional rounds in the future. The exact dates for these future rounds are not yet available. "Applicants who are unsuccessful may re-apply in future rounds.

Application Process

Who can apply for a new gTLD?

Any public or private organization from any part of the world can apply to create and operate a new gTLD. Applicants will need to demonstrate the operational, technical and financial capability to run a registry and comply with additional specific requirements.

What is the New gTLD Applicant Guidebook?

The Applicant Guidebook is a step-by-step guide for future applicants for a new gTLD to understand what to expect during the application and evaluation periods and how the process works. Since late 2008, the Applicant Guidebook has been released in drafts posted for public comment. This is part of ICANN's bottom-up decision-making model and is a great opportunity for the Internet community to weigh in on the final set of criteria and processes. The final Applicant Guidebook is expected in 2010 and will contain a definitive set of rules and requirements.

Why is ICANN asking for so much information from the applicants?

One of ICANN's core missions is to preserve the security, stability and global interoperability of the Internet. Future new gTLD registries are expected to comply with ICANN's contract and follow all best practices and standards to ensure this mission is fulfilled.

Can I apply for more than one gTLD?

Yes. However, each application will be treated individually and there is no discounted application fee.

Can I apply for any kind of gTLD or are there any specific restrictions?

ICANN has a set of specific rules for gTLD strings that each applicant must carefully consider. For example, an application for a gTLD composed of numbers only will be rejected. Applicants for IDN gTLDs must carefully follow the additional technical specifications for IDNs outlined in the Applicant Guidebook.

Applicants representing a community-based TLD or a geographic TLD must meet additional specific requirements.

What will happen during the application period and how long will it take?

The application period will likely last for several weeks. Applicants will use a dedicated interface named TAS (TLD Application System) to answer questions about the applied-for TLD and their business and technical capability to operate a registry. The interface will also allow applicants to upload supporting documents and serve as a tracking and workflow management tool for ICANN staff, applicants and the various service providers supporting the evaluation or objection processes.

What happens if there are other applications for the same gTLD?

ICANN does not allow for two or more identical gTLDs. If there are two or more applications for the same gTLD, applicants will be required to follow the string contention procedures outlined in the Applicant Guidebook. Applicants should also be aware that the same specific rules will apply if two or more gTLD strings are considered to be highly similar by a panel of experts. The two processes proposed by ICANN to deal with the identical and similar gTLD applications are auctions and community priority (comparative) evaluation. The latter applies only in cases where there is a community-based applicant.

What can I do if someone applies for a gTLD that represents my brand or trademark?

ICANN will have a dispute resolution mechanism managed by a dispute resolution service provider (DRSP) that will process objections from third-parties that feel that their legal rights are being infringed upon.

Can third parties prevent an applicant from getting a new gTLD?

After the list of all gTLD applications is published on ICANN's website, there will be an open objection period followed by established dispute resolution procedures. Objections can be filed only on four specific enumerated grounds. Details about these procedures, such as who has standing, where and how objections are filed, and how much objections will cost, among other, can be found in the Applicant Guidebook.

Timeline and Fees

When can I apply?

The application period is expected to take place in 2010. The application period will have specific open and close dates and times.

How much is the application fee?

The application fee is estimated at US$185,000. There is also a US$100 user registration fee to access the TAS. All applicants will be required to pay the same initial application and user registration fees. Various methods of payment will be accepted. Because an application might follow different paths, such as going through an objection or auction process, additional fees may apply to some applicants.

Will ICANN issue refunds?

Yes, refunds will apply in specific circumstances. Details about refund conditions are specified in the Applicant Guidebook.

Are there any ongoing fees once a gTLD is approved by ICANN?

Yes. Once an application successfully passes all evaluation steps, the applicant must sign a Registry Agreement with ICANN. Under the agreement, there are two fees: a fixed fee of US$6,250 per calendar quarter and a transaction fee of US$0.20 on future domain registrations and renewals.

The information presented here about the application and evaluation process is the most up-to-date available. However, it is a high-level summary and is subject to change. For exact details about the program please review the actual text of the Applicant Guidebook with the proposed Registry Agreement as it is being revised and finalized. For information about the New gTLD Program, please visit www.icann.org or email ICANN staff at newgltd@icann.org.

Where can I find more information?

For current information on the New gTLD Program, go to *http://www.icann.org/en/topics/new-gtld-program.htm*

To learn about GNSO Policy Development, go to *http://gnso.icann.org/*

To learn about IDNs, go to *http://www.icann.org/en/topics/idn/*

A full list of current gTLDs is available at *http://www.icann.org/registries/listing.html*

Glossary and useful terms

Applicant – an entity that has applied to ICANN for a new gTLD by submitting its application form through the online application system.

Application – an application for a new gTLD. An application includes the completed application form, any supporting documents and any other information that may be submitted by the applicant at ICANN's request.

Applicant Guidebook – a step-by-step guide for future applicants for a new gTLD to understand what to expect during the application and evaluation periods and how the process works.

Auction – a method for allocating property or goods to the highest bidder.

Community priority (comparative) evaluation – a process to resolve string contention, which may be elected by a community-based applicant.

Community-based TLD – a community-based gTLD is one operated for the benefit of a defined community consisting of a restricted population. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application.

TCP/IP -Transmission Control Protocol/Internet Protocol – the Internet's basic communication language or protocol. The communications protocol underlying the Internet, IP allows large, geographically diverse networks of computers to communicate with each other quickly and economically over a variety of physical links. An IP address is the numerical address by which a location in the Internet is identified. Computers on the Internet use IP addresses to route traffic and establish connections among themselves; people generally use the human-friendly names made possible by the Domain Name System.

Objection – a formal objection filed with a dispute resolution service provider in accordance with that provider's procedures.

DNS – Domain Name System – helps users find their way around the Internet. Every computer on the Internet has a unique address – just like a telephone number – which is a rather complicated string of numbers. It is called its IP address. IP addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the domain name) to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a mnemonic device that makes addresses easier to remember.

DRSP – dispute resolution service provider – An entity engaged by ICANN to adjudicate dispute resolution proceedings in response to formally filed objections.

TAS – TLD Application System – The online interface for submitting applications to ICANN.

Registry – is the authoritative, master database of all domain names registered in each top-level domain. The registry operator keeps the master database and also generates the zone file that allows computers to route Internet traffic to and from top-level domains anywhere in the world.

Registry Agreement – The agreement executed between ICANN and successful gTLD applicants, which appears in draft form at *http://www.icann.org/en/topics/new-gtlds/*.

Registrar – currently, a domain name in gTLDs can be registered with a registrar. The registrar can provide a variety of contact and technical information that makes up the domain name registration, keep records of the contact information and submit the technical information to a central directory, the registry. Registrants are required to enter a registration contract with the registrar that sets forth the terms under which the registration is accepted and will be maintained.

TLD – top-level domains are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (rightmost) dot, such as "net" in "www.example.net". The administrator for a TLD controls what second-level names are recognized in that TLD. The administrators of the root domain or root zone control what TLDs are recognized by the DNS. Commonly used TLDs include dot-com, dot-net, dot-edu, dot-jp, dot-de, and the like.

GAC – Governmental Advisory Committee – is an advisory committee composed of appointed representatives of national governments, multinational governmental organizations and treaty organizations, and distinct economies. Its function is to advise the ICANN Board on matters of concern to governments.

ALAC – At-Large Advisory Committee – considers and provides advice on the activities of the ICANN as they relate to the interests of individual Internet users.

ccNSO – Country-Code Names Supporting Organization – engages and provides leadership in activities relevant to country-code top-level domains (ccTLDs). This is achieved by developing policy recommendations to the ICANN Board, nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs, and coordinating with other ICANN SOs, committees or ICANN constituencies.

SSAC – Security and Stability Advisory Committee – the standing committee on the security and stability of the Internet's naming and address allocation systems. Its charter includes a focus on risk analysis and auditing. SSAC consists of approximately 20 technical experts from industry and academia as well as operators of Internet root servers, registrars and TLD registries.

GNSO – Generic Names Supporting Organization – one of ICANN's supporting organizations, formed of six constituencies: commercial and business constituency, gTLD registry constituency, ISP constituency, non-commercial constituency, registrar constituency, and IP constituency.

ISP – Internet Service Provider – An ISP provides access to the Internet to organizations or individuals. These services may include web hosting, email, VoIP (voice over IP), and support for many other applications.

String – the set of characters comprising an applied-for gTLD.

String Contention – The scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are so similar that user confusion would result if more than one were to be delegated to the root zone.

Script – a collection of symbols used for writing a language. There are three basic kinds of scripts. Alphabetic (Arabic, Cyrillic, Latin) has individual elements termed letters. Ideographic (Chinese) has elements that are ideographs. Syllabary (Hangul) has individual elements that represent syllables. The writing systems of most languages use only one script but there are exceptions. For example, Japanese uses four different scripts representing all three categories. Scripts that do not appear in the Unicode code chart are completely unavailable for inclusion in IDNs.

About ICANN

To reach another person on the Internet you have to type an address into your computer - a name or a number. That address has to be unique so computers know where to find each other. ICANN coordinates these unique identifiers across the world. Without that coordination we wouldn't have one global Internet. ICANN was formed in 1998. It is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers. ICANN doesn't control content on the Internet. It cannot stop spam and it doesn't deal with access to the Internet. But through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet. For more information please visit: ***www.icann.org***.

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Protection of Geographic Names in International Law and Domain Name System Policy

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case of trademarks but require in respect of other intellectual property subject matter.[555] Geographic names have nevertheless not historically been considered registrable as trademarks, as will be explained in detail in the next section of this chapter.

5.1.2 INTELLECTUAL PROPERTY SUBJECT MATTER

With the exception of geographical indications, which are a specifically defined category of origin-connoting geographic names (these are discussed in detail in Chapter 7), geographic names are not expressly stated to fall within the scope of the TRIPS Agreement's definition of 'intellectual property' in Article 1(2) as: 'all categories of intellectual property that are the subject of sections 1 through 7 of Part II.' This definition has been characterized as 'pragmatic', but it 'excludes from general TRIPS obligations forms of intellectual property (or of protection that some would consider as being a part of intellectual property) not covered by TRIPS. Certain *sui generis* or new forms of protection may be concerned.'[556] Geographic names generally, not simply the narrow sub-set in geographical indications, may be one such exclusion. It is also relevant to note as a tangential matter that in terms of the ownership of rights recognized under the TRIPS Agreement, governments' claims as rights holders under that agreement are not contemplated in the wording of Article 1(3) or 42.[557]

The interpretation of the definition of 'intellectual property' in Article 1(2) was directly at issue in the WTO dispute *United States – Section 211 Omnibus Appropriations Act of 1998*.[558] The Panel in that case concluded that trade names did not fall within the list of categories articulated in Article 1(2), but the Appellate Body disagreed, interpreting 'intellectual property' to

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[555] See Rosemary J. Coombe, *The cultural life of intellectual properties: authorship, appropriation, and the law* 61 (Duke University Press 1998). Coombe explains: 'Although trademarks are not conventionally understood to have "authors" because they require no necessary genius, originality, or creativity, the legal recognition that trademark "owners" have a proprietary interest in marketing signs increasingly relies upon a reenactment of the author-function as described by Foucault. This is evident in judicial acceptance of the belief that through investment, labor, and strategic dissemination, the holder of a trademark creates a set of unique meanings in the minds of consumers and that this value is produced solely by the owner's efforts' (internal citations omitted).

[556] Daniel Gervais, *The TRIPS Agreement: Drafting history and analysis* 166 (3d ed. revised, Sweet & Maxwell 2008).

[557] Art. 1(3) of the TRIPS Agreement identifies beneficiary rights holders as 'the nationals of other Members.' Note 1 to Art. 1 indicates that 'nationals' means 'persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.' Note 11 to Art. 42 of the TRIPS Agreement clarifies that 'federations and associations having legal standing to assert' rights are considered rights holders for the purposes of enforcement.

[558] *United States – Section 211 Omnibus Appropriations Act of 1998*, 41 I.L.M. 654 (W.T.O. D.S.B. App. Body 2 Jan. 2002).

include not only the categories indicated in each title of each Section of Part II of the TRIPS Agreement but also categories of intellectual property subject to each Section of Part II. Applying this reasoning, trade names can be distinguished because geographic names (other than geographical indications) are not even mentioned in the TRIPS Agreement. Furthermore, as the Appellate Body pointed out, trade names are expressly recognized in Article 8 of the Paris Convention for the Protection of Industrial Property, which is incorporated into the TRIPS Agreement by reference.

Geographic names, by contrast, are not expressly provided for in the Paris Convention, the definition of 'industrial property'[559] in which is considered:

> a traditional but not entirely exact denomination for certain exclusive rights, resembling property rights, regarding creative ideas or distinguishing signs or designations in the industrial or commercial field, supplemented by certain rules against unfair behavior in the same field. The term is inexact because 'industrial property' presents no more than an analogy with normal property; further, because it covers more than industrial subjects only; and, finally, because the rules against unfair behavior are not necessarily related to property at all.[560]

This interpretation allows for the recognition of rights in non-commercial names by the Paris Convention, but beyond their possible recognition as trademarks, geographic names fall within that agreement's covered subject matter only insofar as they constitute indications of source or appellations of origin, or give rise to an unfair competition claim. Their ability to do this is explored in detail in Chapter 8 of this book, but at this stage it can be concluded that geographic names are not provided for as such within the protected subject matter of the Paris Convention.

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[559] **Paris Convention Art. 1**

> ...
>
> (2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.
>
> (3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers and flour.
>
> ...

[560] Bodenhausen, 20. See also WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Report Adopted by the Standing Committee*, WIPO Doc. SCT/21/8 (26 Nov. 2009) para. 317 (comments of South Africa) (available at http://www.wipo.int/edocs/mdocs/sct/en/sct_21/sct_21_8.pdf).

Nor do geographic names as such fall expressly within the scope of the broader definition of 'intellectual property' set out at Article 2 of the Convention Establishing the World Intellectual Property Organization:[561]

> (viii) 'intellectual property' shall include the rights relating to:
> - literary, artistic and scientific works,
> - performances of performing artists, phonograms, and broadcasts,
> - inventions in all fields of human endeavor,
> - scientific discoveries,
> - industrial designs,
> - trademarks, service marks, and commercial names and designations,
> - protection against unfair competition,
>
> and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Their primarily non-commercial use separates geographic names from classification as 'industrial' alongside trade and service marks, while the fact that their creation requires no particularly creative or inventive thought isolates them from the other catch-all 'intellectual' fields.

There is therefore scant express support for a claim to rights in the nature of intellectual property in geographic names at the international level. This does not stop WTO Member States from treating geographic names as protectable intellectual property, yet for this to be considered a general principle of international law it must be relatively consistent and widespread. The most obvious means by which States might do so is through registrability as a trademark.

5.2 GEOGRAPHIC NAMES AS TRADEMARKS

The recognition of rights in names under international law has historically focused primarily on the intellectual property subject matter of trademarks and trade names; these have been expressly protected since 1883 by the Paris Convention on the Protection of Industrial Property (the 'Paris Convention'). In addition to the minimum standards framework laid down in the Paris Convention, trademarks' protection at the international level was helpfully clarified[562] and harmonized by the TRIPS Agreement, while administrative measures pertaining to the international recognition of rights in trademarks are provided for by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of

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[561] Convention Establishing the World Intellectual Property Organization (14 Jul. 1967, entered into force 26 Apr. 1970), 828 U.N.T.S. 3.

[562] See Thomas Cottier, *The Prospects for Intellectual Property in GATT*, 28 Common Mkt. L. Rev. 383, 403-404 (1991).

prohibit registration as a trademark of emblems of national significance such as armorial bearings and national flags. Article 6*ter* (1)(b) contains a similar proscription in relation to IGOs except that it also expressly excludes the names of such organizations from trademark registration. This serves to highlight the absence of States' names in the wording of sub-section (1)(a).[598] Relying on the principle of *expressio unius exclusio alterius*, WIPO has interpreted this subtle yet significant difference as not requiring that Member States exclude country names from registration as trademarks.[599] This interpretation is consistent with:

> the duty of a treaty interpreter to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[600]

Interpretations of the terms 'armorial bearings', 'other State emblems', 'official signs and hallmarks indicating control and warranty', and 'heraldic symbols' as including country names have been rejected. South Africa was an enthusiastic proponent of this interpretation, but the remark that this 'view has not been universally and definitely accepted'[601] suggests rather more support than may actually exist and conflicts with the acknowledgement made elsewhere that:

> other members of the Paris Union had made very laudable efforts at ensuring protection against the use of official State names as elements of

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organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection. (emphasis added)

[598] See WIPO, *WIPO II Report*, paras 278-285. See also Bodenhausen, 94-99.

[599] WIPO, *WIPO II Report*, para. 281.

[600] *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS50/AB/R (W.T.O. App. Body Report 19 Dec. 1997). See also Susy Frankel, *WTO Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property*, 46 Va. J. Int'l L. 365, 388-389 (2005-2006). An alternative interpretation of Art. 6*ter* (1) is defended by Matthew Rimmer in *Virtual Countries: Internet Domain Names and Geographical Terms*, February 2003 Media Int'l Austl. Incorp. Culture & Pol'y 124, 132 (2003). Rimmer posits that an alternate interpretation of Art. 6*ter* 'is justified, on the one hand, in light of its spirit and underlying objectives, and, on the other hand, in view of recent technological evolutions, in particular the emergence of the Internet as a commercial medium and the importance of domain names as valuable signposts in this context.'

[601] WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *The Protection of Country Names in the Domain Name System: Comments Submitted by the Government of the Republic of South Africa*, WIPO Doc. SCT/S2/6 (17 May 2002) (available at www.wipo.int/edocs/mdocs/sct/en/sct_s2/sct_s2_6.doc).

that a flag, once adopted, is assumed to be easily and immediately identifiable as a particular State's own, not only by other heads of State and the diplomatic community but by people all over the world near or far from the State in question who would otherwise have contact with the flag if used as a trademark. Exclusion of flags from registration as a trademark is justified because their 'registration or use would violate the right of the State to control the use of symbols of its sovereignty'.[635] Yet are not country names symbols of sovereignty just as much as, if not more so than, flags? If so, is there a custom or general principle of international law recognizing States' rights in country names, even if the Paris Convention does not explicitly require this? To answer this question, this study now turns to a fundamental principle of international law that is the cornerstone of the international legal order itself: sovereignty.

6.3 SOVEREIGNTY AND COUNTRY NAMES

Both the proposal made by the Jamaican delegation to the WIPO Standing Committee to expand the scope of Paris Convention Article 6*ter* (1) and the recommendation made by ICANN's GAC to limit applications for new geographic gTLDs rely on sovereignty to justify restricting others' use of country names.[636] Sovereignty has also been asserted as a basis for national control of country code top-level domains.[637] Acknowledging the imprecision with which the term 'sovereignty' is used, as will be discussed further below, the impression one gets is that these are assertions of an inherent right of States to possess and control the use of their representative symbols, including their name. The seemingly inherent nature of the right suggests that it is derived from principles of natural law and the very conceptual and philosophical underpinnings of the international legal order. This is at least

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the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. *Nevertheless such communication is not obligatory in respect of flags of States.* (emphasis added)

[635] Bodenhausen, 96.

[636] See comments of the Delegation of Jamaica 'that its proposal was intended to protect the integrity and sovereignty of a State' in WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Report Adopted by the Standing Committee*, WIPO Doc. SCT/21/8 (26 Nov. 2009) para. 311. The GAC's view is expressed in the context of Internationalized Domain Names (IDNs) that 'ICANN should consult with the Government or relevant public authority of the territory concerned to determine whether there may be any potential infringement of their sovereign rights regarding their country or territory name'. GAC, *GAC Communiqué: New Delhi*, 2, https://gacweb.icann.org/display/gacweb/GAC+31+Meeting+New+Delhi%2C+India+9-14+February+2008 (February 2008, accessed 15 Oct. 2012).

[637] See Von Arx & Hagen, 68.

how the protection of State emblems by means of Article 6*ter* of the Paris Convention has been explained.[638]

Even if the protection of State emblems has as its origin the principle of sovereignty, one need look no further than the Paris Convention in order to identify international law expressly recognizing States' rights. It has been determined in the preceding section of this chapter that country names do not fall within this ambit; they are not specifically recognized in the Paris Convention or indeed any other international convention of universal scope as symbols of sovereignty meriting protection as such by means of an exclusion from trademark registration or other form of proprietary rights. States' names are nevertheless just as powerful and likely more universally recognizable identifiers than flags or other national symbols. The question therefore arises as to whether possession and protection of States' rights in their names can alternatively be based on the status of statehood, either as a condition of statehood or a consequence of it.

Various sources identify a link between national flags as expressions or 'emblems' of sovereignty and national identity,[639] but less clearly articulated is a link between country names and sovereignty. If it were clear that sovereignty encompasses a right to possess and prevent others' use of a name, the issue of States' rights in country names would not be the open question that it is today. An answer can only be reached by piecing together historical and contemporary understandings of statehood in order to demarcate the legal connection, if any, between sovereignty, statehood and country name. This section of this chapter considers first whether having a name is a condition of statehood, and second, whether having a name is a right of statehood.

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[638] See Bodenhausen, 96.

[639] See *for example*, Am. Jur. 2d *Flag* §1 ('A national or state flag is an emblem of that nation or state's sovereignty and authority.'); Michael Billig, *Banal Nationalism* 40-41 (Sage Publications 1995) (discussing the powerful impact of even unwaved flags as symbols of nationality and nationhood); Arundhati Virmani, *National Symbols Under Colonial Domination: The nationalization of the Indian flag, March-August 1923*, 164 Past & Present 169 (1999); Yael Navaro-Yashin, *Confinement and the Imagination: Sovereignty and Subjectivity in a Quasi-State*, in *Sovereign bodies: citizens, migrants and states in the postcolonial world* 103-104 (Thomas Blom Hansen & Finn Stepputat eds., Princeton University Press 2005) (discussing the importance of the flag of the Turkish Republic of Northern Cyprus to its sovereignty); *Sovereignty flag should fly, says Maori Party*, nzherald.co.nz (31 Jan. 2007) (available at http://www.nzherald.co.nz/waitangi-day/news/article.cfm?c_id=1500878&objectid=10421769).

6.3.1 NAME AS A CONDITION OF STATEHOOD

6.3.1.1 Statehood and Possession of a Name

Foundational historical works on sovereignty and statehood offer little support for the position that statehood is conditioned on having a name. For example, Emerich de Vattel, whose seminal work *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduit et aux affaires des nations et des souverains* is considered one of the foundations of modern nation-State theory, saw only self-government as necessary.[640] Yet where specific territories are identified as having achieved the status of sovereign statehood, they are commonly referred to by name. For example, Franciscus de Vittoria, another influential early contributor to international legal theory, described a 'perfect State' as 'one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castille and Aragon and the Republic of Venice and the like'.[641] Little can be drawn from this, however, because the examples to which Vittoria points are States in possession of a name rather than States lacking names. The latter situation is not contemplated.

Contemporary scholars have experienced difficulty in articulating a definition or identifying attributes of statehood. This is at least partly due to the traditionally complex question of the need for recognition; that issue[642] must be set aside as separate from a possible link between statehood and country name.[643] The definition of 'State' provided by Article 3 of the Montevideo Convention on Rights and Duties of States[644] (hereinafter the 'Montevideo Convention') is viewed as setting the standard despite that convention being a regional agreement only.[645] From it can be extrapolated

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[640] Emerich de Vattel, *Le Droit des Gens, ou Principes de la loi Naturelle, Appliqués à la conduite aux affaires des Nations et des Souverains*, vol. 1 Introduction, Bk I, ch I, §4 (1758).

[641] Franciscus de Vittoria, *De Indis et de Iure Belli Relectiones*, in *Relectiones Theologicae XII* (Ernest Nys ed.), reprinted in *The Classics of International Law* 169 para. 7 §§425-426 (James Brown ed., 1917).

[642] On recognition, see James Crawford, *The creation of states in international law* 38, 89-95 (2d ed., Clarendon Press 2007).

[643] See Matthew C. R. Craven, *What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood*, 16 Austl. Y.B. Int'l L. 199, 238 (1995) (arguing that a link between name choice and recognition 'offends the notion of sovereignty itself'). See also Louis Henkin et al., *International Law: Cases and Materials* 253 (3d ed., West 1993).

[644] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (26 Dec. 1933, entered into force 26 Dec. 1934), 165 L.N.T.S. 19.

[645] The definition of 'State' in the Restatement (Third) of Foreign Relations Law of the United States almost precisely mirrors that of the Montevideo Convention, and in comments to the Restatement it is said that this definition 'is well-established in international law'. See *Restatement (Third) of the Foreign Relations Law of the United*

four principal criteria: a permanent population; a defined territory; government; and capacity to enter into relations with other States.[646] Clearly, possession of a name is not one of these four criteria. Nor is it one of the other criteria that have been suggested over time, including permanence, willingness and ability to observe international law, civilization, and legal order.[647] The requirements of membership in the United Nations are based first and foremost on having achieved statehood, but even these do not expressly require that aspiring members have a name.[648]

It is only plausible to take the position that possession of a name is a condition of statehood if it can be said that having a name, while not an express criterion of statehood, is a necessary or inherent aspect of a criterion of statehood. Considering in turn the four criteria identified by the Montevideo Convention as just noted, it could only be possible to interpret possession of a name as a necessary aspect of having the capacity to enter into relations with other States; the crux of this argument is that having a name is a necessary aspect of legal personality.[649] This will now be considered.

6.3.1.2 Name as a Necessary Aspect of Legal Personality

Having legal personality means being treated by the law as possessing the capacity to enter into formal relations with other legal persons and be held

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States § 201 Comment a (1987). As to the effectiveness of the definition, see John Dugard, *Recognition and the United Nations* 123 (Cambridge University Press 1987) ('Although Rhodesia, Transkei, Boputhatswana, Venda, Ciskei and, possibly, the Turkish Republic of Northern Cyprus met or meet the traditional requirements of statehood expounded in the Montevideo Convention of 1933, it is absurd to contend that any of these entities […] acquired the status of "State".')

[646] Even those who deem it inappropriate to view determinations of statehood as a checklist-based activity nevertheless tend to accept that certain fundamental characteristics 'constitute in legal terms the core of the concept of statehood'. Crawford, 42. Crawford qualifies this by arguing that the strictness of the elucidation of these characteristics in individual cases depends upon context and 'that the exclusive attributes of States do not prescribe specific rights, powers or capacities that all States must, to be States, possess: they are presumptions as to the existence of such rights, powers or capacities, rules that these exist unless otherwise stipulated. This must be so, since the actual powers, rights and obligations of particular States vary considerably. The legal consequences of statehood are thus seen to be—paradoxically—matters of evidence or rather of presumption.'

[647] *Ibid.*, 89-95.

[648] Art. 4(1) of the Charter of the United Nations requires that applicants: (1) be a state; (2) be peace-loving; (3) accept the obligations of the UN Charter; (4) be able and willing to carry out these obligations.

[649] See Igor Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 93 Am. J. Int'l L. 155, 160 (1999).

accountable for one's actions, as are natural, living persons.[650] States are 'the principal examples of international persons.'[651]

Without a name, it has been argued, it is not possible to be identified and therefore not possible to engage and transact with others:

> From the point of view of legal theory, the inherent right of a state to have a name can be derived from the *necessity* for a juridical personality to have a *legal identity*. In the absence of such an identity, the juridical person (such as a state) could – to a considerable degree (or even completely) – lose its capacity to conclude agreements and independently enter into and conduct its relations with other juridical persons. Therefore, the name of a state appears to be an *essential element of its juridical personality* and its statehood.[652] (emphasis in original)

This use of the term 'legal identity' helps to highlight that beyond their undeniably symbolic function, names primarily play a practical function in serving to identify things and distinguish them from others. Having some means by which to be identified and differentiated is certainly facilitative of engaging in relations with others, and contract law seeks as a general matter that parties be identifiable. A name is one means of distinguishing a party from another, but it is certainly not the only means; reference to geographical location, numbers and symbols could all be used, even if not as easily and memorably as names.[653] Each State could, for example, be assigned a number according to its order of accession to the United Nations, or it could be identified by its longitudinal and latitudinal coordinates or an image of its national flag. It could also be assigned a completely random and meaningless number. An analogy can be drawn with transactions between persons, in which context it is not strictly necessary that a party be referred to by name as opposed to another identifier or that the identifiers used have semantic value or be unique as against all others. It is simply necessary to provide sufficient information to distinguish one from others.[654]

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[650] See *Restatement (Third) of the Foreign Relations Law of the United States* § 206 comment c.

[651] Henkin et al., 241. See also Vattel, I §2 ('[L'Etat] deviant une personne morale, qui a son etendement et sa volonté proper, et qui est capable d'obligations et de droits').

[652] Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 160; Igor Janev, *Some Remarks of the Legal Status of Macedonia in the United Nations Organization*, 53 Rev. Int'l Aff. 1108 (2002).

[653] Reference can be made here to domain names and the early decision to assign a name in addition to a number to identify hosts in the network. This is discussed in detail in Part I, Chapter 2, section 2.1.3 above.

[654] See Janev, *Some Remarks on Legal Status*, 2 ('In the absence of such an identity, the juridical person, such as a state, could to a large extent (or even completely) loose [sic] its capacity to interact with other such juridical persons (e.g., conclude agreements, etc.) and independently enter into and conduct its external relations. The name of a state is, thus, an essential element of its juridical personality and, consequently, of its statehood.').

Nor is a name required of a legal person in order to express consent to be bound, bearing in mind that the voluntary expression of State consent is the cornerstone of positive international law. Just as illiterate persons can indicate their willingness to be bound to a legal instrument by stamping their fingerprint upon it or inscribing the letter 'X', so too could States communicate consent to be bound in a variety of visible ways. It is the expression of consent that is of consequence, not the form that expression takes or the possibility that others' expression of consent takes a similar form.

Another key aspect of relations between legal persons is participation in dispute resolution. In the international context one can look to the Statute as well as the Rules of the ICJ (hereinafter, the 'ICJ Rules'),[655] the latter of which specify the manner in which proceedings are to be initiated and conducted. Article 38(1) of the ICJ Rules requires in relevant part that an application to commence proceedings before the Court must 'indicate the party making it, the State against which the claim is brought, and the subject of the dispute'. Considering subject matter first, the *Island of Palmas Case (or Miangas)*[656] demonstrates that territorial disputes are resolvable even where the territory the subject of the dispute is referred to by multiple names.

Turning to the naming of State parties, while Article 38(1) of the ICJ Rules does not expressly require that State parties have a name, names are typically used for this purpose. Article 38(1) does not preclude commencing proceedings before the Court against, for example, 'the State whose application for membership in the United Nations was made' on a particular date or in a particular numbered document or 'the fiftieth State to join the United Nations', but these are not things that ordinarily occur in practice. One need look no further than the ICJ's docket for evidence of the practice and consistency of the use of States' names in proceedings.[657] It must be noted, however, that not all States have come before the ICJ and its predecessor, the Permanent Court of International Justice,[658] with a name of their own choosing. An example of this is the ongoing case brought by the

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[655] Rules of Court (14 Apr. 1978, entered into force 1 Jul. 1978, as amended 14 Apr. 2005), I.C.J. Acts & Docs 4.

[656] *Island of Palmas Case (or Miangas)*, Hague Court Reports 2d. 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

[657] On the significance of practice in treaty interpretation, see Vienna Convention on the Law of Treaties, Art. 31(3)(b). The ICJ docket is available at ICJ, *List of Cases referred to the Court since 1946 by date of introduction: List of contentious cass and advisory proceedings*, http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (accessed 15 Oct. 2012).

[658] Publications of the Permanent Court of International Justice are available at ICJ, *Permanent Court of International Justice: Publications of the Permanent Court of International Justice (1922-1946)*, http://www.icj-cij.org/pcij/index.php?p1=9 (accessed 15 Oct. 2012).

'former Yugoslav Republic of Macedonia' against Greece,[659] a dispute which is comprehensively discussed in the next section of this chapter. The applicant's name in that case is a provisional one recommended by the UN Security Council, and not the name under which that country sought membership in the United Nations. The relevant question at this point in the enquiry is whether, without the provisional name, this country would have been prevented from raising its claim against Greece. In other words, was possession of a name (provisional or permanent) procedurally necessary to commencing the case?

Article 38(1) of the ICJ Rules requires identification of 'the party making' the application. It does not demand a particular format that identification must take. Identification of a party other than by its name would not run counter to ordinary meaning or defeat the object and purpose of the treaty as prescribed by Article 31(1) of the Vienna Convention, but the existence of a consistent subsequent practice 'in the application of'[660] Article 38(1) of the ICJ Rules supports an interpretation of this as calling for use of a State party's name.[661] Because all parties before the Court have had names, it is difficult to envisage what might otherwise occur. Presumably, names are used unless the party in question does not have a name, in which case some other identifier must – from a purely practical standpoint – be an acceptable substitute. Unless otherwise specified in the Rules, standing could not logically be denied of the basis of non-possession of a name if possession of a name is not itself a condition of statehood.

This discussion reveals that a distinction must be made between practical necessity and legal necessity. It is undeniably the case that names facilitate the functions of the UN, and so much so that this could be characterized as necessary (as opposed to simply desirable) from a perspective of operational convenience. Yet from the ease of using names does not automatically follow a legal obligation. Neither can a general sense of legal obligation be easily inferred from existing evidence of practice in the functions of the UN. Rights in country names as such derived from States' possession of legal personality, or indeed derived from any other condition or right of statehood, cannot be based upon practicality or '(mere) comity (*courtoisie, comitas gentium*)'.[662]

Even if it is the case that State parties are required to be referred by name in ICJ proceedings, this does not equate to a strict prohibition against nameless parties' participation in proceedings, nor does it speak to exclusive

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[659] *Case Concerning the Application of Article 11, Paragraph 1, of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Memorial (I.C.J. 20 Jul. 2009) (available at http://www.icj-cij.org/docket/files/142/16354.pdf).

[660] Vienna Convention on the Law of Treaties, Art. 31(3)(b).

[661] See Gardiner, 225-232.

[662] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law: Final Report of the Committe on Formation of Customary (General) International Law*, Commentary to section 2(vi).

rights of States in their names. There is no clear evidence of a felt sense of legal obligation to possess a name in order to participate as a UN member, and such a legal obligation is not expressly articulated in UN instruments. From these things and from the fungible nature of identifiers in legal transactions it can be concluded that possession of legal personality does not require possession of a name, and thus that States' claims to exclusive rights in country names should not be based upon their possession of legal personality.

6.3.2 NAME AS A RIGHT OF STATEHOOD

6.3.2.1 A Right of States to Select a Name

Even if not required in order to achieve the status of statehood, possession of a name may alternatively be a right that accrues as a consequence of having achieved statehood. This reasoning makes a distinction between the capacities that must be possessed in order to achieve the status of statehood from capacities or rights that, once statehood is achieved, are imputed to the State. This bifurcated approach is reflected, for example, in the Restatement (Third) of the Foreign Relations Law of the United States[663] (the 'Restatement'), which sets out the required elements of statehood in § 201 and then separately in § 206 the 'capacities, rights and duties of States' as:

> (a) sovereignty over its territory and general authority over its nationals;
> (b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;

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[663] The Restatements are treatises prepared and published by the American Law Institute on a variety of legal topics. They have the primary aim of providing guidance to judges and lawyers by clarifying and explaining fundamental legal subjects. The Third Restatement of the Foreign Relations Law of the United States captures international law as applicable to the United States, which 'stems largely from customary international law and international agreements to which the United States is a party.' ALI, *Publications Catalog: Restatements of the Law – Foreign Relations Law of the United States*, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=33 (accessed 15 Oct. 2012). The Restatement of the Foreign Relations Law of the United States of course offers the perspective of only the United States as to international law, but the high regard in which its reporters are held mean that it has significance beyond that one country's borders: 'It should and will be consulted by lawyers in all parts of the world. For the lawyer in the United States, it may be a kind of authoritative codification. For lawyers in other countries, it is a valuable source of information about the foreign relations power in the United States and prevailing American views on international law.' Rudolf Bernhardt et al., *Book Review*, 86(3) Am. J. Int'l L. 608, 609 (1992) (reviewing *Restatement (Third) of the Foreign Relations Law of the United States*).

(c) capacity to join with other states to make international law, as customary law or by international agreement.

The wording of § 206 of the Restatement is illustrative of the general absence in international law and scholarship of an express attribution to States of a right to select or use a name. It is necessary, therefore, to consider whether such a right is implied because it is inherently an aspect of sovereignty, bearing in mind that sovereign rights derive from the 'simple fact' of the State's 'existence as a person under international law.'[664]

In determining whether possession and exclusive use of a name is a sovereign right of States, the advice offered by Justice Haynes of the High Court of Australia should be borne in mind: 'Sovereignty is a concept that legal scholars have spent much time examining. It is a word that is sometimes used to refer to very different legal concepts and for that reason alone, care must be taken to identify how it is being used.'[665] Similar concern is expressed, for example, in the comments to § 206 of the Restatement, which specify that its use in this context of States' rights 'implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there.'[666] The exercise of this control is a core right to inhere in all States.

As to whether there are more specifically articulated rights of States (which could include a right to a name), there are divergent views. Vattel's reliance in the eighteenth century on natural law to explain the origin of States' rights echoes in modern arguments supporting an inherent, 'inalienable right' of States to select and use a name.[667] These arguments can also be linked to a right to culture and heritage, similar to what was termed by an early twentieth century diplomat the right to 'national distinctiveness'.[668] Contrasting with these is the view that 'statehood does not involve any inherent substantive rights' but is 'rather a form of standing'.[669] The works of historical and contemporary scholars who support the notion of States' rights offer little support for a specific right of States to select and use a name. Nevertheless, it is difficult to oppose the idea that a State may choose and use a name by virtue of the exercise of sovereignty and further that when it does so, it is free by virtue of that authority to place restrictions on others'

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[664] Convention on the Rights and Duties of States, Art. 4.

[665] *Joosse v. Australian Securities and Investment Commission*, 159 A.L.R. 260, 263-264 (High Ct. Aust'l 1998).

[666] *Restatement (Third) of the Foreign Relations Law of the United States* §206 comment (b).

[667] See *for example*, Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 160.

[668] F.A. Pezet, *The Future Relations of the United States with Latin America from the Latin American Viewpoint*, 7(2) Nat'l Conf. Foreign Rel. U.S. 287, 287 (1917).

[669] Crawford, 44-45.

use of its chosen name within its sovereign territory. The same can be said of national flags and domestic laws prohibiting their desecration.[670]

In other words, sovereignty does not require that a State select and use a name to identify itself, but rather bestows States with the inherent authority to do so if they so choose.[671] In practice, States do select a name. This is evidenced by the United Nations Terminology Bulletin Country Names (from which, not coincidentally, the names of ccTLDs are derived).[672] Though not expressly required under the UN Charter or the Rules of Procedure of the General Assembly to do so, applications for UN membership refer to applicants by name:[673] indeed, compliance with Rule of Procedure 134[674] would be difficult as a practical matter if this were not done. The would be UN member is then acknowledged by that name on acceptance.[675]

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[670] An interesting comparative analysis of flag desecration laws is provided by Ute Krüdewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19(2) Ariz. J. Int'l & Comp. L. 679 (2002).

[671] See Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 160 ('every state naturally has an inherent right to a name').

[672] UN Terminology Bulletin No. 347/Rev. 1, *United Nations Terminology Bulletin Country Names* (available at http://unstats.un.org/unsd/methods/m49/m49alpha.htm). On the naming of ccTLDs, see Part I, Chapter 2, section 2.4.2 above.

[673] Recent examples include the Application of the Republic of Bosnia and Herzegovina at U.N. Doc. A/46/921 S23971 Annex (19 May 1992) ('On behalf of the Presidency of the Republic of Bosnia and Herzegovina and in conformity with the United Nations Charter, I am submitting the request of the Republic of Bosnia and Herzegovina to be admitted to the United Nations Organization as a full Member State.'); Application of the Democratic Republic of East Timor at U.N. Doc. A/56/953-S/2002/558 Annex (20 May 2002) ('In connection with the application by the Democratic Republic of East Timor for membership in the United Nations, we have the honour, on behalf of the Democratic Republic of East Timor and in our capacities as the President of the Republic and the Prime Minister, to declare that the Democratic Republic of East Timor accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them.'); Application of the Republic of Montenegro, U.N. Doc. A/60/890-S/2006/409 Annex (16 Jun. 2006) ('In line with the results of the referendum held in the Republic of Montenegro on 21 May 2006, organized in accordance with Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, in my capacity as President of the Republic of Montenegro, I have the honour to request the admission of the Republic of Montenegro to membership in the United Nations.').

[674] Rule 134 of the Rules of Procedure of the General Assembly of the United Nations provides: 'Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. Such application shall contain a declaration, made in a formal instrument, that the State in question accepts the obligations contained in the Charter.'

[675] Continuing with the above examples, see the Admission of the Republic of Bosnia and Herzegovina to membership in the United Nations, U.N. Doc. A/Res/46/237 (22 May 1992); Admission of the Democratic Republic of East Timor for admission to membership in the United Nations, U.N. Doc. A/Res/57/3 (2 Oct. 2002); Admission of

Sovereignty gives the State not only the authority to choose a name, but also to limit others' use of the selected name within its territory. There are, for example, reportedly 'thousands' of laws in Canada and 'probably millions' in the United States, that 'bestow upon "public authorities" (which are often not elected bodies but government agencies, state-owned corporations, or non profit organizations) an absolute right to control particular signifiers.'[676] All States have the authority to select names and regulate their domestic use in this way, and have this authority equally, as articulated in the Montevideo Convention at Article 4: 'States are juridically equal, enjoy the same rights, and have equal capacity in their exercise.' Yet equality among States raises certain challenges in this context in that it does not prevent a State from selecting another State's name as its own; indeed, equality suggests that they are each equally entitled to make a particular selection.

The question of States' rights in country names therefore does not end with name selection and use within the sovereign territory. It must further be considered whether States' authority to select a name is somehow limited by the rights of other States and relatedly, whether States have a right to be referred to by their chosen name.

6.3.2.2 A Right of States to Object to Another State's Name

It is entirely possible that one State might choose to be identified in the same or similar way as another. This duplication of identifiers could be said to have a direct impact on the States in question and those transacting with them. While on the one hand it might be said that the only limit to name choice is imagination, in practice, geographic name choices are drawn from a relatively limited field of reference that is, by its very nature, shared with neighbouring States: 'The names of the countries are usually associated with their geographical location and dimension. Geography, at any rate, political geography, as reflected in the boundary making and delimitation of frontiers, territorial, maritime and aerial or atmospheric, changes with time.'[677] As borders fluctuate and time passes, so too are history, culture, language and environmental conditions shared, and it is from this pool of shared experience that geographic names are often drawn. Thus the very same reasoning behind one State's choice of name could also underpin another (particularly neighbouring) State's choice of name.

It is clear why a State would prefer that other States not choose the same name, and this bears out in practice. The relative infrequency with which naming conflicts have arisen is nevertheless surprising when one considers

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the Republic of Montenegro for admission to membership in the United Nations, U.N. Doc. A/Res/60/264 (12 Jul. 2006).

[676] Coombe, 135-136.

[677] Sompong Sucharitkul, *The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 Am. J. Comp. L. 3, 10 (2002).

the frequency with which new States have been created and old ones extinguished in modern times: it has been noted that more than 125 new States have been created or reconstituted since the coming into force of the United Nations Charter in 1945, not including name changes.[678] Even in this highly dynamic environment, the only major conflict is the ongoing dispute between Greece and the country provisionally referred to as the 'former Yugoslav Republic of Macedonia', or 'FRYOM'. This dispute will next be critically analysed, but first, some comments must be made about its uniqueness. One conclusion to potentially be drawn from the scarcity of name choice disputes is that there is a customary rule of avoiding selecting a conflicting State name. The existence of such a rule is undermined, however, by the number of States with shared names[679] and the simple fact that in none of these cases has conflict arisen to the level of the Macedonia name dispute. What drives name choice (and, by corollary, avoidance of choosing what others have already chosen) may not be a sense of legal obligation but rather simply an overriding interest in avoiding confusion with other States – a practical preference to not be confused with others. Although (as concluded in the previous section of this chapter) possession of a name is not a necessary aspect of legal personality, it does make transacting with other legal persons more convenient. Where similar names can be differentiated, these can be used without serious issue.

What then would lead a State to select a name insufficiently distinctive from or objectionable to others? One possibility already alluded to in the previous paragraphs is that shared history and experiences could lead multiple States to select the same or similar representations and symbols of their sovereignty. Objection on this basis is defensible in principle only for neighbours or States otherwise currently or historically related. Exemplary of such a situation are neighbours Greece and the FRYOM, one of the new nations borne out of dismembered Yugoslavia.

Responding to Greece's objection to Macedonia's application[680] for UN membership, the UN Security Council recommended that the country be 'provisionally referred to for all purposes within the United Nations as "the Former Yugoslav Republic of Macedonia" pending settlement of the difference that has arisen over the name of the State'.[681] The name is but one

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[678] See Crawford, 715 and Appendix 1.

[679] Examples of identical or materially similar country names include: (a) the Democratic Republic of the Congo and Republic of the Congo, (b) the Republic of Equatorial Guinea, the Republic of Guinea, the Republic of Guinea-Bissau, and the Independent State of Papua New Guinea, (c) the Democratic People's Republic of Korea and the Republic of Korea, and (d) Niger and Nigeria.

[680] U.N. Doc. A/47/876-S/25147 (1992), discussed in detail in Michael C. Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, in *Max Planck Y.B. U.N. L.* 236-241 (Armin von Bogdandy ed., Martinus Nijhoff Publishers 1997).

[681] S.C. Res. 817, 7 Apr. 1993, U.N. Doc. S/INF/49 (1993), at para. 2.

aspect of this now long-running dispute; in earlier proceedings before the European Court of Justice (ECJ) Greece complained of large scale efforts to promote 'the idea of a unified Macedonia' through that country's chosen name (Republic of Macedonia), the wording of its constitution, and such activities as 'the circulation of maps, calendars and car stickers' and 'school history books' depicting the FYROM as encompassing Greek territory.[682] Also concerning to Greece was the FRYOM's adoption of the 'Sun of Vergina' on its flag, this emblem having been discovered in excavations on Greek territory.[683] Greece demanded that the FRYOM cease use of its chosen name and symbols and related activities, all of which it interpreted as territorial claims amounting to a threat of war.[684]

The ECJ's decision went not to resolving the name dispute but rather to interim measures requested by the European Commission to suspend economic sanctions imposed by Greece against the FRYOM, which request was ultimately rejected by the Court.[685] A subsequent Interim Accord between Greece and the FRYOM required only undertakings to continue negotiation 'with a view to reaching agreement' on this matter.[686] In 2008, the FRYOM instituted proceedings before the ICJ asserting that the Interim Accord had been breached by Greece by its objection to the FRYOM's application to join the North Atlantic Treaty Organization.[687] In December 2011, the Court found[688] that Greece's objection violated the Interim Accord. The applicant's clear intentions to refer to itself by its constitutionally chosen name within NATO (which ultimately resolved to delay a decision on admission pending resolution of the name dispute) was considered not to render Greece's objection lawful. The Court seized the opportunity to highlight the fact that the dispute has been ongoing for sixteen years, and to remind the parties of their obligation under the Interim Accord to make good faith efforts towards its resolution.

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[682] *Commission of the European Communities v. Hellenic Republic*, C-120/94 R I-03037 (E.C.J. 29 Jun. 1994), at para. 8.

[683] *Ibid.*, para. 9.

[684] *Ibid.*, para. 31.

[685] *Ibid.*, para. 48.

[686] Interim Accord (with related letters and translations of the Interim Accord in the Languages of the Contracting Parties), Greece-the former Yugoslav Republic of Macedonia, signed in New York 13 Sep. 1995, 1891 U.N.T.S. I-32193; 34 I.L.M. 1461 (13 Oct. 1995).

[687] ICJ, Press Release, *The former Yugoslav Republic of Macedonia institutes proceedings against Greece for a violation of Article 11 of the Interim Accord of 13 September 1995*, No. 2008/40 (17 Nov. 2008) (available at http://www.icj-cij.org/docket/files/142/14881.pdf).

[688] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 Dec. 2011.

This dispute is a unique constellation[689] and though it remains unresolved, an attempt can be made to draw conclusions from the legality of Greece's demand that its neighbour avoid adopting the name 'Macedonia' in order to broadly articulate limitations upon States' sovereign rights to select a name. Notably, leading scholars have avoided doing so.[690] One highly regarded text characterizes the matter as one of 'political guarantees ensuring that [the FRYOM] had no territorial claims towards a neighbouring Community state'.[691] Another sees the dispute as illustrative of the potential problems inherent in States' sovereign authority, but makes no statement as to the legality of Greece's demands.[692] The problem, it has been said, is that this dispute:

> both clarifies and obscures the status of country names in international law. On the one hand, both the UN's and the EU's reactions suggest that Greece's claim that a country's choice of name could be a form of aggression was not, as an abstract matter, per se unreasonable. Thus, it appears that international law recognizes the theoretical possibility that a country's choice of name might amount to hostile propaganda against a neighbour, such as in 'the use of a denomination which implies territorial claims.' In so doing, it suggests that the presumed norm that countries control their names has been weakened; conversely, it suggests that the idea that one country has rights regarding another country's use of names might theoretically have more merit than many had previously suspected.[693]

These comments attribute to States a right to select a name, but posit that this right is not absolute. This is consistent with the principle of sovereignty, which gives the State supreme but not absolute authority within its territory. Interference in domestic matters is permitted by Article 2(7) of the United Nations Charter, as well as by customary international law. Further, the Friendly Relations Declaration requires that 'every State shall refrain from any action aimed at the partial or total disruption of the national unity or

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[689] Craven, *What's in a Name?*, 238 (characterizing this as 'the first occasion in which it has ever been suggested that a State, or for that matter a people, should not be the exclusive determinants of their own cultural and political symbols').

[690] See Demetrius Andreas Floudas, *Pardon? A Name for a Conflict? FRYOM's Dispute with Greece Revisited*, in *The new Balkans: disintegration and reconstruction* (George A. Kourvetaris et al. eds., East European Monographs 2002).

[691] Malcolm N. Shaw QC, *International Law* 452 (6th ed., Cambridge University Press 2008).

[692] Colin Warbrick, *States and Recognition in International Law*, in *International Law* 241 (Malcom D. Evans ed., Oxford University Press 2006).

[693] Froomkin, *When We Say US™, We Mean It!*, 856, quoting the European Commission's 16 Dec. 1991 Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, as reprinted in Danilo Türk, *Declaration on Yugoslavia*, 4(1) Eur. J. Int'l L. 73, 73 (1993).

territorial integrity of any other State or country.'[694] If the right of a State to select and use a name is based on sovereignty, then this limitation must correspondingly apply, meaning that one State's name choice cannot constitute an unlawful interference with the sovereignty of another State. Such an interpretation is supported by the general principle of abuse of rights, which serves to limit a State's choice of name to the extent that the choice had the effect of 'inflict[ing] upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.'[695] A link to the general principle of good faith is equally clear given that '[a] state that acts in good faith is unlikely to abuse its rights.'[696] A related principle of 'good neighbourliness' was raised by Judge ad hoc Roucounas and suggested in his dissenting opinion to have been breached by the FRYOM.[697]

The determination of whether one State's choice of name constitutes an unlawful interference with the sovereignty of another State or a breach of the principles of good faith, abuse of rights or good neighbourliness depends entirely on the facts in question.[698] As a result, it is impossible to develop universal rules around the selection of country names. In the Macedonia dispute, the European Commission Declaration on Yugoslavia required each former Yugoslav republic to declare that it had agreed, *inter alia*, 'to adopt constitutional and political guarantees "ensuring that it has no territorial claims" against a neighboring E.C. country and that it would not use a name (e.g., Macedonia) that implied such claims and would conduct "no hostile propaganda activities" against a neighbouring E.C. country.'[699] This is likely as precise as rules could be articulated. This difficulty, along with the infrequency with which naming disputes have arisen,[700] may help to explain

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[694] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA/RES/2625(XXV), U.N. Doc. A/8082 (1970).

[695] L. Oppenheim, *International Law: A Treatise* 345 (8th ed., H. Lauterpacht ed., Longmans, Green & Co. 1955).

[696] M. Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill L.J. 389, 406 (2002).

[697] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 Dec. 2011 (Dissenting opinion of Judge ad hoc Roucounas).

[698] See Craven, *What's in a Name?*, 234, citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Rep. 1986 (I.C.J. 27 Jun. 1986).

[699] European Community, *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (Extraordinary European Political Cooperation Ministerial Meeting, Brussels, 16 Dec. 1991)*, 31 I.L.M. 1485 (1992).

[700] There is another reported instance of a naming dispute in recent history, in which proposed changes to the name of the country of Uzbekistan were rejected on the basis of their being interpreted as territorial claims. See Crawford, 68 n. 141, citing Karen Dawisha & Bruce Parrott, *Russia and the new states of Eurasia: the politics of upheaval* 85 (Cambridge University Press 1995).

the non-existence of expressly acknowledged, detailed rules of international law on name selection.

There is no denying the potential for the choice of name by a State and even the purely internal, domestic use of the name to provoke (intentionally or unintentionally) changes in the world order. That part of the population in State A might be motivated by State B's choice of name to exercise a right of self-determination is a realistic possibility. Yet self-determination in its contemporary form is a right of peoples to be involved in a meaningful way in the constitution and maintenance of the systems that govern their lives.[701] The possibility that, as a right of peoples, self-determination encompasses a right to self- or group-identify using geographic names is explored in Chapter 9, below, along with other potential human rights bases of rights in geographic names.

6.3.2.3 A Right of States to be Referred by Their Chosen Name

A separate but related question is whether States have a right to be referred to by their chosen name. As discussed above, there is a strong practical and diplomatic incentive for States to have a name, but this does not necessarily speak to the existence of a legal obligation to have a name either generally or for a particular purpose. It has been noted earlier in this chapter that there is a practice of using names in the functions of the UN, though there are no provisions in the UN Charter that require members to have a name. The use of names is directed in certain UN procedures, for example in General Assembly plenary voting.[702] Yet use of *a* name is one matter, while use of a State's *chosen name* is another; the issue here is specifically whether, to give one specific example, the United States of America is obliged to use the name 'Russian Federation' when referring to that country within or even beyond the UN context.

For the most part, the practice of using names in the UN is axiomatic. Names are ordinarily used – and without any special emphasis on their being used – in accordance with the wishes of the named UN member. One notable instance of special emphasis is the General Assembly's pronouncement 'that, in accordance with the desires of its people, South West Africa shall henceforth be known as "Namibia".'[703] Applications are ordinarily accepted using standardized language,[704] and the new member is then referred to by

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[701] See Rupert Emerson, *Self-Determination*, 65 Am. J. Int'l L. 459, 465-466 (1971).

[702] General Assembly of the United Nations, *Rules of Procedure and Comments*, Rule 87.

[703] *Question of South West Africa*, G.A. Res. 2372(XXII), U.N. Doc. A/Res/2372(XXII) (12 Jun. 1968).

[704] General Assembly resolutions on administration are worded as follows:
The General Assembly,
Having received the recommendation of the Security Council of [date] that [State name] should be admitted to membership in the United Nations,

other members accordingly. The case of the FRYOM is in this context again a unique constellation: the UN Security Council avoided making use of that country's chosen name when resolving on its membership application, instead recommending admission of the 'State whose application is contained in document S/25147', and then recommending the use of a provisional name.[705] The General Assembly then admitted the so-called 'former Yugoslav Republic of Macedonia' using the standardized language just noted.

The Russian Federation provides an example of a different situation, that of an existing UN member changing its name. Leaving aside questions of continuation of membership[706] which lie outside the scope of this study, the Russian Federation's assumption of the Union of Soviet Socialist Republics' seat at the United Nations was characterized by then-President Yeltsin as a simple name change. He simply requested 'that the name "Russian Federation" should be used in the United Nations in place of the name "the Union of Soviet Socialist Republics".'[707] There is no record of objection to this request,[708] and the name 'Russian Federation' has accordingly since been used in the UN General Assembly and Security Council.[709]

Looking beyond these forums to the ICJ, it has been noted in the previous section of this chapter in the context of legal personality that there is uniform practice in referring to parties by name in ICJ disputes, and that this practice is supported at least to some extent by the wording of Article 38(1) of the ICJ Rules. That Article does not expressly require that an official name be used, but presumably the name of a UN member as per its admission is the name that will be used. The 'Macedonia' case is illustrative: it was docketed as '*the former Yugoslav Republic of Macedonia v. Greece*'. That case nevertheless offers no particular support to the existence of a legal obligation to refer to parties by their chosen name except insofar as it evidences a sense of felt obligation on the FRYOM's part to refer to itself by its provisional name as recommended by the UN Security Council. More assistance would have been offered were the roles of the parties in that case reversed (in other words, it would be interesting to see whether Greece would identify the respondent as something other than the 'former Yugoslav Republic of Macedonia'). Greece's counter-memorial and rejoinder did refer

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Having considered the application for membership of [State name],
Decides to admit [State name] to membership in the United Nations.
See *for example*, Admission of the Republic of Montenegro to membership in the United Nations.

[705] S.C. Res. 817, para. 2.

[706] On continuation, see Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3(2) Eur. J. Int'l L. 354 (1992).

[707] U.N. Doc. 1991/RUSSIA. 1, excerpted in Blum, at 356.

[708] See Crawford, 677.

[709] See *for example*, U.N.G.A. Res. A/RES/65/281 (17 Jun. 2011).

to the 'former Yugoslav Republic of Macedonia',[710] which is procedurally sensible, given that Greece was the respondent, but not expressly required by Article 49 of the ICJ Rules. It is also interesting to note that the respondent in the case against Greece before the ECJ was not identified as 'Greece' but rather as the 'Hellenic Republic' (the name under which it entered the Treaty Establishing the European Community).[711]

Of these instances just discussed, the language that is most strongly supportive of a right of members to be referred to by their chosen name is that of the UN Security Council in directing other members to refer to the 'former Yugoslav Republic of Macedonia' and do so 'for all purposes within the United Nations'.[712] This, ironically, is not a case of a State being referred to by its chosen name, but rather a provisional name to be used pending a dispute involving the name. Even if this or perhaps the Namibia case or standard practice offers a basis upon which a right of States to be referred to by their chosen name can be asserted, this is an extremely limited right which would prevent only alternative name use within and for UN purposes. This would not prevent the use of alternative names (e.g., a reference to the United Kingdom of Great Britain and Northern Ireland by the slang name 'Old Blighty',[713] or even a reference to that country as 'Britain' or 'the UK') by a member of the GAC in ICANN discourse, a government official from commenting to the press, or even in international relations outside of the UN context, while acknowledging the potential detriment such actions might in some instances have in terms of good international relations. Much of State conduct around naming appears to have as its basis not clearly identifiable legal rules but rather good international relations with the aim of avoidance and resolution of disputes through good faith negotiations. The United Nations Security Council has encouraged this from Greece and the FRYOM,[714] though as-yet those States have been unable to achieve resolution of their dispute.

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[710] *Case Concerning the Application of Article 11, Paragraph 1, of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Counter-Memorial by Greece (I.C.J. 19 Jan. 2010) (available at http://www.icj-cij.org/docket/files/142/16356.pdf); *Case Concerning the Application of Article 11, Paragraph 1, of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Rejoinder of Greece (I.C.J. 27 Oct. 2010) (available at http://www.icj-cij.org/docket/files/142/16356.pdf).

[711] Treaty Establishing the European Community (Consolidated Version) (25 Mar. 1957).

[712] S.C. Res. 817, para. 2.

[713] Michael Quinion, *World Wide Words: Blighty*, http://www.worldwidewords.org/qa/qa-bli1.htm (accessed 15 Oct. 2012).

[714] See S.C. Res. 817.

6.4 CONCLUSIONS ON RIGHTS IN GEOGRAPHIC NAMES AS SUCH

Two related bases have been explored in this chapter as potential sources of rights in geographic names under international law: Article 6*ter* of the Paris Convention for the Protection of Industrial Property and the principle of sovereignty. First, Article 6*ter* requires that States prohibit the registrability as trademarks of State flags and other emblems, as well as the emblems of IGOs. In this chapter, the interpretation of Article 6*ter* (1)(a) by WIPO has been confirmed with reference to recent survey evidence and as-yet unsuccessful attempts to amend that Article. The results of the questionnaire drafted by the WIPO Standing Committee indicate that many States are reserving country names from trademark registration even though they are not obliged under Article 6*ter* to do so. An isolated instance of the use of the notification procedure specified in Article 6*ter* (3) by Iceland has also been highlighted, but other actions in this space suggest that this is a unique interpretation of Article 6*ter* which does not constitute evidence of a custom of reserving rights in country names.

From discussions around proposed amendments to widen the scope of Article 6*ter* to include country names can be extrapolated the conclusion that there currently is no international law recognizing rights in country names as such that could be called upon to justify their exclusive use by States and the prevention of their use by others. The analysis documented in this chapter supports that view. It is only logical to reach the same conclusion as respects sub-national names. That said, Article 6*ter* does not prevent States from reserving rights in geographic names as such; it simply does not require that they do so. The protection offered by ICANN through the *gTLD Applicant Guidebook* is therefore not inconsistent with Article 6*ter*.

The second basis of rights evaluated in this chapter is the foundational international law principle of sovereignty. Governments have looked to the principle of sovereignty in order to justify what they view as an inherent right to prevent others' use of 'their' names. While there may be a growing body of examples of conflict over private parties' use of geographical names,[715] there are surprisingly few examples of name conflicts between States. As a result, there are very few constellations from which support of States' rights in country names can be drawn. In this chapter it has been considered that there are actually three rights potentially encompassed in a right of States to country names: a right to select a name, a right to object to another State's name, and a right to be referred to by a chosen name. In relation to none of these is there an express right contained in any international convention, though the ICJ Rules do refer to the identification of party names, while the UN General Assembly Rules refer to plenary voting according to name. At

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[715] For examples, see discussion of UDRP cases involving geographic names at Part II, Chapter 3, section 3.3.1.2 above.

the same time, in relation to none of these is there an express denial of a corresponding right in any international convention.

From the as-yet unresolved dispute between Greece and the FRYOM over the name 'Macedonia' can be extracted certain conclusions about States' rights to select and object to a name. This dispute is the manifestation of a rational tendency to select a name that happens to be based upon an identity or history shared with neighbouring States. The escalation of this dispute into an international legal dispute is, however, unique. From it and other instances of name similarity not escalated into international disputes it can be deduced that there is no rule of international law preventing one State from selecting the same or similar name as another State's. This dispute suggests that a State's right to select a name is not absolute, but rather is limited by obligations not to encroach upon another State's sovereignty and to act in good faith. There are no clear rules to determine when this occurs, nor is it practicable to attempt to develop rules beyond the general proscription imposed upon the FRYOM not to interfere with the territorial integrity of another State. Nor for the same reasons is it practicable to develop rules around objections to States' choice of name. These situations can only be resolved on a case-by-case basis, having due regard to the facts at issue.

As to the implications of these conclusions in the context of domain names, conflicting applications for new geographic gTLDs are inevitable: there are already in existence several constellations of similar country names which, although they have not previously been disputed in the offline context, could be the subject of a future challenge in the online context due to the technical requirement of absolute name uniqueness and the policy decision to prevent confusingly similar TLD strings. Although conflicting applications for a .macedonia new gTLD were not made in the initial round of top-level expansion under the New gTLD Program, these remain a real possibility in future expansion rounds if the prohibition on applications for country and territory names is lifted. It would be inappropriate to develop a single rule of priority on the basis of sovereignty, simply because sovereignty does not support such a rule. On this basis, as a matter of policy and to preserve the stability of the internet and its DNS, ICANN should consider refusing the creation of any geographic new gTLD for which competing applications have been submitted.

Finally, to the extent that a right to be referred to by one's chosen name can be derived from practice within the UN and before the ICJ, these are limited to those specific contexts and will not serve to prevent failures to properly identify a State in other contexts such as the DNS. Further, the recognition of a right in that limited context is not alone determinative of the exclusivity of a State's rights in a particular name in that particular context, or certainly in any other context.

Summary of Conclusions

The internet makes information easily, cheaply and instantaneously accessible without regard to borders, language or cultural differences. As a result, there is wider use and a correspondingly higher likelihood that others will have exposure to uses of geographic names. This is precisely the situation that ICANN attempts to manage in the internet Domain Name System through the policy on geographic names documented in the *gTLD Applicant Guidebook*. The approach taken is to bar applications constituted of country and territory names and to require the authorization of relevant governments to applications for new gTLDs constituted of many other types of geographic names. This approach is based on untested assumptions about governments' rights in geographic names.

This study has been undertaken to remove the need for policy-making on the basis of assumptions about States' rights in geographic names. The legal bases of rights examined in this study fall into two broad, overlapping categories: bases that recognize rights of States to geographic names and bases that recognize rights of non-State others to geographic names. Importantly, none of the bases within the first category prove or disprove the exclusivity of States' rights. Within the second category, certain bases impliedly disprove the exclusivity of States' rights, while others neither prove nor disprove the exclusivity of States' rights. As to each, the following findings have been made and conclusions reached:

(1) Within the first category of bases recognizing rights of States to geographic names fall trademarks, the principle of sovereignty, geographical indications, the right to prevent confusion with a competitor and the protection against dilution afforded well-known trademarks. While rights are available to States under each of these bases, none proves their exclusivity. In particular, while the principle of sovereignty recognizes States' rights in geographic names,

it notably disproves exclusivity as against other States while offering scant guidance as to how disputes between States can be resolved. Further, the recognition of States' rights in geographic names on the basis of sovereignty does not speak to the exclusivity of States rights as against non-State others. None of the other bases of legal rights falling within this category expressly demand the recognition of States' rights in geographic names. Rather, they all offer the possibility of recognition provided that certain criteria are met or factual circumstances are established.

(2) Within the second category of bases recognizing rights of others to geographic names and therefore weighing against a finding of exclusivity of States' rights fall trademarks, geographical indications, and human rights to expression and culture. The human rights to expression and culture are expressly unavailable to States, with the result that States' rights in geographic names cannot be considered exclusive. The fact that many countries do not prohibit the use or registration of geographic terms as a trademark and the recognition (albeit limited) afforded geographical indications under international law further support a finding that States' rights in geographic names are not exclusive. With the exception of geographical indications, none of these bases of rights expressly cover geographic names, but all offer the possibility of recognition provided that certain criteria are met or factual circumstances are established.

(3) Also falling within the second category of bases recognizing rights of others to geographic names are bases that neither specifically prove nor disprove the exclusivity of States' rights because they do not recognize rights in geographic names as such, but rather only place limitations upon uses of or actions affecting geographic names. Into this grouping fall the right to prevent confusion with a competitor and the protection against dilution afforded well-known marks, as well as the human rights to nationality, self-determination, language and property.

(4) Not falling within either of these two broad categories because of their current lack of recognition at the international level are State personality rights and cultural property rights.

(5) The application of these findings leads to the conclusion that ICANN's policy of recognizing exclusive rights of States in geographic names fails to acknowledge the recognition under international law of non-State others' rights in geographic names. Such an acknowledgement is called for by the adoption by ICANN's Board of Directors of the recommendation of the Generic Names Supporting Organization, an internal ICANN advisory body, to ensure that new gTLDs added to the DNS do not 'infringe the existing legal rights of others that are recognized or enforceable

under generally accepted and internationally recognized principles of law'.[1132]

(6) The application of these findings additionally leads to the conclusion that although rights of others in geographic names are recognized under international law, in particular through the human rights of expression and culture, those bases of recognition do not require the recognition in DNS policy of private property rights in geographic names as such. This being the case, it is appropriate that geographic names as such are not mandatorily actionable under new gTLD rights protection measures (the Legal Rights Objection, the Trademark Claims service and the Uniform Rapid Suspension procedure).

(7) It has also been shown that geographic names receive the greatest protection under international law and in DNS policy when they satisfy the criteria for registration as trademarks. The conclusions reached in this study lead to the prediction that the New gTLD Program will be the catalyst for significant changes in domestic trademark laws, with Switzerland as a model. These changes will have the effect of bringing geographic names within the scope of trademark subject matter, which will have the concomitant effect of bringing geographic names within the scope of legal rights recognized and protected in DNS policy.

This book began by quoting the words of Timothy Denton, a lawyer and consultant specializing in internet domain name policy. His words appear at the start of this work as a prompt not to simply accept assumptions about legal rights in geographic names, but they could just as logically be placed here as an overarching summary of the delicate interplay between legal rights and internet DNS policy at this critical juncture in the system's development. Lawyers and technologists may debate the theoretical need to do something about the inconsistencies identified in this book between geographic names' treatment in DNS policy and international law, but in practice it is impossible to divorce the DNS from the 'real'[1133] (or 'offline') world in which it operates. Contemporary society may be in a transition period between the supremacy of law and the supremacy of technology, but for now the two are inextricably intertwined. Questions about technology cannot be answered without an understanding of the impact of law, and vice versa. States' reactions to proposed new internet top-level domains may result in changes to the recognition of rights under international law in geographic names through custom or general principles of international law. ICANN's *gTLD Applicant Guidebook* may at some point in the future be considered evidence

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[1132] GNSO, *Final Report on the Introduction of New Generic Top-Level Domains*, Recommendation 3, http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (8 Aug. 2007, accessed 15 Oct. 2012).

[1133] WIPO, *WIPO I Report*, para. 22.

of the crystallization of recognition in international law of rights in geographic names. The two processes – development of domain name policy and development of international law – are interrelated, and are likely to remain so for the foreseeable future.

From Denton's words can be distilled a need for dialogue within the internet community to ensure that the conflicts that arise along the path of DNS development do not result in its stagnation. In a similar vein it was once remarked in the ISOC: 'If the Internet stumbles, it will not be because we lack for technology, vision, or motivation. It will be because we cannot set a direction and march collectively into the future.'[1134] This study has been undertaken with the intention of informing policy development in relation to geographic names and their treatment in DNS, with the hope that the conclusions that have been reached will facilitate future progress rather than create obstacles to the internet's continued development.

[1134] Leiner et al., 8.

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NEW GTLD REVEAL DAY - APPLIED-FOR STRINGS

New Top-Level Domain Name Applications Revealed

Historic Milestone for the Internet's Domain Name System

The Internet Corporation for Assigned Names and Numbers (ICANN) today revealed who has applied for which generic Top-Level Domain (gTLD) names in what is expected to become the largest expansion in the history of the Internet's Domain Name System.

A total of 1,930 new gTLD applications were received during the application period of the new generic Top-Level Domain program.

"We are standing at the cusp of a new era of online innovation," said Rod Beckstrom, President and Chief Executive Officer. "That means new businesses, new marketing tools, new jobs, and new ways to link communities and share information."

Beckstrom made the comments during a London news conference, where it was revealed which organizations have applied for which specific domain names.

Senior Vice President Kurt Pritz noted that the applications will now be subject to a public comment and objection period, and a rigorous, objective and independent evaluation system.

"A 60-day comment period begins today, allowing anyone in the world to submit comments on any application, and the evaluation panels will consider them," said Pritz. "If anyone objects to an application and believes they have the grounds to do so, they can file a formal objection to the application. And they will have seven months to do that."

Of the 1,930 applications received:

- 66 are geographic name applications.
- 116 applications are for Internationalized Domain Names, or IDNs, for strings in scripts such as Arabic, Chinese, and Cyrillic.

Applications were received from 60 countries and territories, broken down by ICANN's geographic regions;

- 911 from North America.
- 675 from Europe.
- 303 are from Asia-Pacific.
- 24 from Latin America and the Caribbean.
- 17 from Africa.

Beckstrom noted that the applications from Latin America/Caribbean and Africa would be the first gTLDs ever from those regions.

He also pointed out that the new gTLD program is the result of seven years of international consultation and debate among a wide variety of Internet stakeholders.

###

To listen to the audio file from the London Reveal Day event, go here: http://www.icann.org/en/news/press/kits/reveal-day-audio-13jun12-en.htm

To see who has applied for which generic Top-Level Domain, go here: http://newgtlds.icann.org/en/program-status/application-results

To post comments on applications, go here: http://newgtlds.icann.org/en/program-status/application-comments

To file an objection, go here: http://newgtlds.icann.org/en/program-status/objection-dispute-resolution

To obtain background information on the new generic Top-Level Domain program, go here: http://www.icann.org/en/news/press/kits/reveal-day-13jun12-en.htm

For information on ICANN's geographic regions, go here: http://archive.icann.org/en/meetings/montreal/geo-regions-topic.htm

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
    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.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

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 interests 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.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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.

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.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of Article III, Section 6, the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

Section 2. RESTRICTIONS

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to preventICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a

Registry or Registrar or other emergency.

Section 3. NON-DISCRIMINATORY TREATMENT

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.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Section 2. WEBSITE

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information aboutICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

Section 3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public

Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 5. MINUTES AND PRELIMINARY REPORTS

1. All minutes of meetings of the Board and Supporting Organizations(and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.
2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.
3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the

location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges,ICANN shall:
    a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

    b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

   c. in those cases where the policy action affects public policy concerns, to request the opinion of the GovernmentalAdvisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committeeon its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described inSection 6(1)(b) of this Article, prior to any final Board action.
3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN budget, ICANNshall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth inArticle I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
    a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

    b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

    c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
    a. evaluate requests for review or reconsideration;

    b. summarily dismiss insufficient requests;

    c. evaluate requests for urgent consideration;

    d. conduct whatever factual investigation is deemed appropriate;

    e. request additional written submissions from the affected party, or from other parties;

    f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

    g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
   a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or

   b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

   c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on theICANN website. athttp://www.icann.org/en/groups/board/governance/reconsideration. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced,

12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.

10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.

11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A

requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.

14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall

be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.

18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
    a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;

b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;

c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and

d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected byICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the

circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), 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 of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
   a. did the Board act without conflict of interest in taking its decision?;

   b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

   c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge ofICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must

be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.
8. 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.
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
    a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
    b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
    c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
    d. 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;

   e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
   f. determine the timing for each proceeding.

12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement withICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing

party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANNin the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel 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 Panel 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.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting

OrganizationCouncil, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee shall provide its own review mechanisms.

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN budget recommended by the ICANN President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or anICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of

complaints that are insufficiently concrete, substantive, or related toICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANNstaff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN);
4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all ICANN conflicts-of-interest and confidentiality policies.

Section 4. INTERACTION WITH ICANN AND OUTSIDE ENTITIES

1. No ICANN employee, Board member, or other participant inSupporting Organizations or Advisory Committees shall prevent or impede the Ombudsman's contact with the ICANN community (including employees of ICANN). ICANN employees and Board members shall direct members of the ICANN community who voice problems, concerns, or complaints about ICANN to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.
2. ICANN staff and other ICANN participants shall observe and

respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

3. Contact with the Ombudsman shall not constitute notice to ICANNof any particular action or cause of action.

4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

5. The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies.

Section 5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE VI: BOARD OF DIRECTORS

Section 1. COMPOSITION OF THE BOARD

The ICANN Board of Directors ("Board") shall consist of sixteen voting members ("Directors"). In addition, four non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in Section 9 of this Article. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN Board.

Section 2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIRMAN AND VICE-CHAIRMAN

1. The Directors shall consist of:

   a. Eight voting members selected by the Nominating Committee established by Article VII of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.

   b. Two voting members selected by the Address Supporting Organization according to the provisions of Article VIII of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and Seat 10.

   c. Two voting members selected by the Country-Code NamesSupporting Organization according to the provisions of Article IX of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 11 and Seat 12.

   d. Two voting members selected by the Generic Names Supporting Organization according to the provisions of Article X of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 13 and Seat 14.

   e. One voting member selected by the At-Large Community according to the provisions of Article XI of these Bylaws. This seat on the Board of Directors is referred to in these Bylaws as Seat 15.

   f. The President ex officio, who shall be a voting member.

2. In carrying out its responsibilities to fill Seats 1 through 8, the Nominating Committee shall seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At no time when it makes its selection shall the Nominating Committee select a Director to fill any vacancy or expired term whose selection would cause the total number of Directors (not including the President) from countries in any one Geographic Region (as defined in Section 5 of this Article) to exceed five;

and the Nominating Committee shall ensure when it makes its selections that the Board includes at least one Director who is from a country in eachICANN Geographic Region ("Diversity Calculation").

For purposes of this sub-section 2 of Article VI, Section 2 of the ICANNBylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this sub- section 2 of Article VI, Section 2 of theICANN Bylaws, a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

3. In carrying out their responsibilities to fill Seats 9 through 15, theSupporting Organizations and the At-Large Community shall seek to ensure that the ICANN Board is composed of members that in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At any given time, no two Directors selected by a Supporting Organizationshall be citizens from the same country or of countries located in the same Geographic Region.

For purposes of this sub-section 3 of Article VI, Section 2 of the ICANNBylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Supporting Organization or the At-Large Community to use for selection purposes. For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN Bylaws, a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

4. The Board shall annually elect a Chairman and a Vice-Chairman from

among the Directors, not including the President.

Section 3. CRITERIA FOR SELECTION OF DIRECTORS

ICANN Directors shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
2. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;
3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;
4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and
5. Persons who are able to work and communicate in written and spoken English.

Section 4. ADDITIONAL QUALIFICATIONS

1. Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.
2. No person who serves in any capacity (including as a liaison) on

any Supporting Organization Council shall simultaneously serve as a Director or liaison to the Board. If such a person accepts a nomination to be considered for selection by the Supporting Organization Council or the At-Large Community to be a Director, the person shall not, following such nomination, participate in any discussion of, or vote by, the Supporting Organization Council or the committee designated by the At-Large Community relating to the selection of Directors by the Council or Community, until the Council or committee(s) designated by the At-Large Community has selected the full complement of Directors it is responsible for selecting. In the event that a person serving in any capacity on aSupporting Organization Council accepts a nomination to be considered for selection as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's selection process. In the event that a person serving in any capacity on the At-LargeAdvisory Committee accepts a nomination to be considered for selection by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the Community's selection process.

3. Persons serving in any capacity on the Nominating Committee shall be ineligible for selection to positions on the Board as provided byArticle VII, Section 8.

Section 5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the selection of Directors by the Nominating Committee, each Supporting Organization and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any Memorandum of Understanding referred to in these Bylaws concerning the Supporting Organization. One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "Geographic Region": Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section shall be reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN. Each Director shall be responsible for disclosing to ICANN any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law ("CNPBCL"). In addition, each Director shall disclose toICANN any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CNPBCL. The Board shall adopt policies specifically addressing Director, Officer, andSupporting Organization conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.

Section 8. TERMS OF DIRECTORS

1. The regular term of office of Director Seats 1 through 15 shall begin as follows:
    a. The regular terms of Seats 1 through 3 shall begin at the conclusion of ICANN's annual meeting in 2003 and eachICANN annual meeting every third year after 2003;

    b. The regular terms of Seats 4 through 6 shall begin at the conclusion of ICANN's annual meeting in 2004 and eachICANN annual meeting every third year after 2004;

   c. The regular terms of Seats 7 and 8 shall begin at the conclusion of ICANN's annual meeting in 2005 and eachICANN annual meeting every third year after 2005;

   d. The terms of Seats 9 and 12 shall continue until the conclusion of ICANN's ICANN's annual meeting in 2015. The next terms of Seats 9 and 12 shall begin at the conclusion of ICANN's annual meeting in 2015 and eachICANN annual meeting every third year after 2015;

   e. The terms of Seats 10 and 13 shall continue until the conclusion of ICANN's annual meeting in 2013. The next terms of Seats 10 and 13 shall begin at the conclusion ofICANN's annual meeting in 2013 and each ICANN annual meeting every third year after 2013; and

   f. The terms of Seats 11, 14 and 15 shall continue until the conclusion of ICANN's annual meeting in 2014. The next terms of Seats 11, 14 and 15 shall begin at the conclusion ofICANN's annual meeting in 2014 and each ICANN annual meeting every third year after 2014.

2. Each Director holding any of Seats 1 through 15, including a Director selected to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been selected and qualified or until that Director resigns or is removed in accordance with these Bylaws.

3. At least two months before the commencement of each annual meeting, the Nominating Committee shall give the Secretary ofICANN written notice of its selection of Directors for seats with terms beginning at the conclusion of the annual meeting.

4. At least six months before the date specified for the commencement of the term as specified in paragraphs 1.d-f above, any Supporting Organization or the At-Large community entitled to select a Director for a Seat with a term beginning that year shall

give the Secretary of ICANN written notice of its selection.

5. Subject to the provisions of the Transition Article of these Bylaws, no Director may serve more than three consecutive terms. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. (Note: In the period prior to the beginning of the first regular term of Seat 15 in 2010, Seat 15 was deemed vacant for the purposes of calculation of terms of service.)

6. The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 9. NON-VOTING LIAISONS

1. The non-voting liaisons shall include:
    a. One appointed by the Governmental Advisory Committee;

    b. One appointed by the Root Server System Advisory Committee established by Article XI of these Bylaws;

    c. One appointed by the Security and Stability Advisory Committee established by Article XI of these Bylaws;

    d. One appointed by the Internet Engineering Task Force.

2. The non-voting liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a non-voting liaison shall give the Secretary of ICANNwritten notice of its appointment.

3. Each non-voting liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the liaison resigns or is removed in accordance with these Bylaws.

4. The non-voting liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations

and meetings, but shall otherwise not have any of the rights and privileges of Directors. Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

Section 10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CNPBCL, any Director or non-voting liaison may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of ICANN) or by giving written notice thereof to the President or the Secretary ofICANN. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective. The successor shall be selected pursuant to Section 12 of this Article.

Section 11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

1. Any Director may be removed, following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a voting member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director. If the Director was selected by a Supporting Organization, notice must be provided to that Supporting Organization at the same time notice is provided to the Director. If the Director was selected by the At-Large Community, notice must be provided to the At-Large Advisory Committee at the same time notice is provided to the Director.

2. With the exception of the non-voting liaison appointed by the Governmental Advisory Committee, any non-voting liaison may be removed, following notice to that liaison and to the organization by which that liaison was selected, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly

remove that liaison following such notice. The Board may request the Governmental Advisory Committee to consider the replacement of the non-voting liaison appointed by that Committee if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 12. VACANCIES

1. A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation, or removal of any Director; if the authorized number of Directors is increased; or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors shall be filled by the Nominating Committee, unless (a) that Director was selected by a Supporting Organization, in which case that vacancy shall be filled by that Supporting Organization, or (b) that Director was the President, in which case the vacancy shall be filled in accordance with the provisions of Article XIII of these Bylaws. The selecting body shall give written notice to the Secretary of ICANN of their appointments to fill vacancies. A Director selected to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been selected and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

2. The organizations selecting the non-voting liaisons identified inSection 9 of this Article are responsible for determining the existence of, and filling, any vacancies in those positions. They shall give the Secretary of ICANN written notice of their appointments to fill vacancies.

Section 13. ANNUAL MEETINGS

Annual meetings of ICANN shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting for ICANN shall be held at the principal office of ICANN, or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN.

Section 15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the members of the Board or by the Chairman of the Board or the President. A call for a special meeting shall be made by the Secretary of ICANN. In the absence of designation, special meetings shall be held at the principal office of ICANN.

Section 16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and non-voting liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and non-voting liaison at the Director's or non-voting liaison's address as it is shown on the records of ICANN. In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time, or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Members of the Board or any Committee of the Board may participate in a meeting of the Board or Committee of the Board through use of (i) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (ii) electronic video screen communication or other communication equipment; provided that (a) all Directors participating in such a meeting can speak to and hear one another, (b) all Directors are provided the means of fully participating in all matters before the Board or Committee of the Board, and (c) ICANN adopts and implements means of verifying that (x) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (y) all actions of, or votes by, the Board or Committee of the Board are taken or cast only by the members of the Board or Committee and not persons who are not members. Participation in a meeting pursuant to this Section constitutes presence in person at such meeting. ICANN shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

Section 19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board

Section 20. ELECTRONIC MAIL

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 21. RIGHTS OF INSPECTION

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN. ICANN shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 22. COMPENSATION

1. Except for the President of ICANN, who serves ex officio as a voting member of the Board, each of the Directors shall be entitled to receive compensation for his/her services as a Director. The President shall receive only his/her compensation for service as President and shall not receive additional compensation for service as a Director.

2. If the Board determines to offer a compensation arrangement to one or more Directors other than the President of ICANN for services to ICANN as Directors, the Board shall follow a process that is calculated to pay an amount for service as a Director that is in its entirety Reasonable Compensation for such service under the standards set forth in §53.4958-4(b) of the Treasury Regulations.

3. As part of the process, the Board shall retain an Independent

Valuation Expert to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion from such expert regarding the ranges of Reasonable Compensation for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

4. After having reviewed the expert's written opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

5. The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

6. In addition to authorizing payment of compensation for services as Directors as set forth in this Section 22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by non-voting liaisons performing their duties as Directors or non-voting liaisons.

7. As used in this Section 22, the following terms shall have the following meanings:
    a. An "Independent Valuation Expert" means a person retained by ICANN to value compensation arrangements that: (i) holds itself out to the public as a compensation consultant; (ii) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN; (iii) is qualified to make valuations of the type of services involved in any engagement by and forICANN; (iv) issues to ICANN a Reasoned Written Opinion

regarding a particular compensation arrangement; and (v) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (i) through (iv) of this definition.

b. A "Reasoned Written Opinion" means a written opinion of a valuation expert who meets the requirements of subparagraph 7(a) (i) through (iv) of this Section. To be reasoned, the opinion must be based upon a full disclosure by ICANN to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, and the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding the whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

c. "Reasonable Compensation" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

8. Each of the non-voting liaisons to the Board, with the exception of the Governmental Advisory Committee liaison, shall be entitled to receive compensation for his/her services as a non-voting liaison. If the Board determines to offer a compensation arrangement to one or more non-voting liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

Section 23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary of ICANN immediately after the adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

ARTICLE VII: NOMINATING COMMITTEE

Section 1. DESCRIPTION

There shall be a Nominating Committee of ICANN, responsible for the selection of all ICANN Directors except the President and those Directors selected by ICANN's Supporting Organizations, and for such other selections as are set forth in these Bylaws.

Section 2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

1. A non-voting Chair, appointed by the ICANN Board;
2. A non-voting Chair-Elect, appointed by the ICANN Board as a non-voting advisor;
3. A non-voting liaison appointed by the ICANN Root Server SystemAdvisory Committee established by Article XI of these Bylaws;
4. A non-voting liaison appointed by the ICANN Security and StabilityAdvisory Committee established by Article XI of these Bylaws;
5. A non-voting liaison appointed by the Governmental Advisory Committee;
6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory

Committeeestablished by Article XI of these Bylaws;

7. Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization, established byArticle X of these Bylaws, as follows:
   a. One delegate from the Registries Stakeholder Group;
   b. One delegate from the Registrars Stakeholder Group;
   c. Two delegates from the Business Constituency, one representing small business users and one representing large business users;
   d. One delegate from the Internet Service Providers Constituency;
   e. One delegate from the Intellectual Property Constituency; and
   f. One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
8. One voting delegate each selected by the following entities:
   a. The Council of the Country Code Names Supporting Organization established by Article IX of these Bylaws;
   b. The Council of the Address Supporting Organizationestablished by Article VIII of these Bylaws; and
   c. The Internet Engineering Task Force.
9. A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 3. TERMS

Subject to the provisions of the Transition Article of these Bylaws:

1. Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.

2. The regular term of each voting delegate shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the immediately following ICANN annual meeting.

3. Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the nextICANN annual meeting.

4. It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.

5. Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to paragraph 4 of this Article, or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 2(9) of this Article.

6. The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN Nominating Committee shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;

2. Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN;

3. Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;

4. Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;

5. Persons with an understanding of ICANN's mission and the potential impact of ICANN's activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and

6. Persons who are able to work and communicate in written and spoken English.

Section 5. DIVERSITY

In carrying out its responsibilities to select members of the ICANN Board (and selections to any other ICANN bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the ICANN Board (and such other bodies), and seek to ensure that the persons selected to fill vacancies on the ICANN Board (and each such other body) shall, to the extent feasible and consistent with the other criteria required to be applied by Section 4 of this Article, make selections guided by Core Value 4 inArticle I, Section 2 .

Section 6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for selection by any means to any position on the Board or any other ICANN body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of anICANN annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 2 of this Article.

ARTICLE VIII: ADDRESS SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

1. The Address Supporting Organization (ASO) shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

2. The ASO shall be the entity established by the Memorandum of

Understanding entered on 21 October 2004 between ICANN and the Number Resource Organization (NRO), an organization of the existing regional Internet registries (RIRs).

Section 2. ADDRESS COUNCIL

1. The ASO shall have an Address Council, consisting of the members of the NRO Number Council.
2. The Address Council shall select Directors to those seats on the Board designated to be filled by the ASO.

ARTICLE IX: COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (ccNSO), which shall be responsible for:

1. developing and recommending to the Board global policies relating to country-code top-level domains;
2. Nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and
3. Coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN.

Policies that apply to ccNSO members by virtue of their membership are only those policies developed according to section 4.10 and 4.11 of this Article. However, the ccNSO may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD managers, assisting in skills building within the global community of ccTLD managers, and enhancing operational and technical cooperation among ccTLD managers.

Section 2. ORGANIZATION

The ccNSO shall consist of (i) ccTLD managers that have agreed in writing to be members of the ccNSO (see Section 4(2) of this Article) and (ii) a ccNSO Council responsible for managing the policy-development process of the ccNSO.

Section 3. ccNSO COUNCIL

1. The ccNSO Council shall consist of (a) three ccNSO Council members selected by the ccNSO members within each of ICANN's Geographic Regions in the manner described in Section 4(7) through (9) of this Article; (b) three ccNSO Council members selected by the ICANN Nominating Committee; (c) liaisons as described in paragraph 2 of this Section; and (iv) observers as described in paragraph 3 of this Section.

2. There shall also be one liaison to the ccNSO Council from each of the following organizations, to the extent they choose to appoint such a liaison: (a) the Governmental Advisory Committee; (b) the At-Large Advisory Committee; and (c) each of the Regional Organizations described in Section 5 of this Article. These liaisons shall not be members of or entitled to vote on the ccNSO Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO Council. Appointments of liaisons shall be made by providing written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.

3. The ccNSO Council may agree with the Council of any otherICANN Supporting Organization to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSOCouncil, but otherwise shall be entitled to participate on equal footing with members of the ccNSO Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO Council at any time by providing written notice to the ICANN Secretary, with a notification

copy to the ccNSO Council Chair.

4. Subject to the provisions of the Transition Article of these Bylaws: (a) the regular term of each ccNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the third ICANN annual meeting thereafter; (b) the regular terms of the three ccNSO Council members selected by theccNSO members within each ICANN Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (c) the regular terms of the three ccNSO Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

5. A ccNSO Council member may resign at any time by giving written notice to the ICANN Secretary, with a notification copy to theccNSO Council Chair.

6. ccNSO Council members may be removed for not attending three consecutive meetings of the ccNSO Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO Council.

7. A vacancy on the ccNSO Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN Secretary written notice of its selection, with a notification copy to the ccNSOCouncil Chair. Vacancies in the positions of the ccNSO Council members selected by ccNSO members shall be filled for the unexpired term by the procedure described in Section 4(7) through (9) of this Article.

8. The role of the ccNSO Council is to administer and coordinate the

affairs of the ccNSO (including coordinating meetings, including an annual meeting, of ccNSO members as described in Section 4(6) of this Article) and to manage the development of policy recommendations in accordance with Section 6 of this Article. TheccNSO Council shall also undertake such other roles as the members of the ccNSO shall decide from time to time.

9. The ccNSO Council shall make selections to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO Council then in office. Notification of theccNSO Council's selections shall be given by the ccNSO Council Chair in writing to the ICANN Secretary, consistent with Article VI,Sections 8(4) and 12(1).
10. The ccNSO Council shall select from among its members theccNSO Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO Council then in office. The term of office of the ccNSO Council Chair and any Vice Chair(s) shall be as specified by the ccNSO Council at or before the time the selection is made. The ccNSO Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.
11. The ccNSO Council, subject to direction by the ccNSO members, shall adopt such rules and procedures for the ccNSO as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO membership and operating procedures adopted by theccNSO Council shall be published on the Website.
12. Except as provided by paragraphs 9 and 10 of this Section, theccNSO Council shall act at meetings. The ccNSO Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO Council, meetings may be held in person or by other means, provided that all ccNSO Council members are permitted to participate by at least one means described in paragraph 14 of this Section. Except

where determined by a majority vote of the members of the ccNSOCouncil present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO Council meetings should be held in conjunction with meetings of the Board, or of one or more ofICANN's other Supporting Organizations.

13. Notice of time and place (and information about means of participation other than personal attendance) of all meetings of theccNSO Council shall be provided to each ccNSO Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

14. Members of the ccNSO Council may participate in a meeting of theccNSO Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (a) all ccNSO Council members participating in the meeting can speak to and hear one another, (b) all ccNSO Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO Council, and (c) there is a reasonable means of verifying the identity of ccNSOCouncil members participating in the meeting and their votes. A majority of the ccNSO Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO Council members present at any meeting at which there is a quorum shall be actions of the ccNSO Council, unless otherwise provided in these Bylaws. The ccNSO Council shall transmit minutes of its meetings to the ICANN Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 4. MEMBERSHIP

1. The ccNSO shall have a membership consisting of ccTLDmanagers. Any ccTLD manager that meets the membership qualifications stated in paragraph 2 of this Section shall be entitled to be members of the ccNSO. For purposes of this Article, a ccTLDmanager is the organization or entity responsible for managing anISO 3166 country-code top-level domain and referred to in theIANA database under the current heading of "Sponsoring Organization", or under any later variant, for that country-code top-level domain.

2. Any ccTLD manager may become a ccNSO member by submitting an application to a person designated by the ccNSO Council to receive applications. Subject to the provisions of the Transition Article of these Bylaws, the application shall be in writing in a form designated by the ccNSO Council. The application shall include theccTLD manager's recognition of the role of the ccNSO within theICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO membership fees established by theccNSO Council under Section 7(3) of this Article.
   A ccNSO member may resign from membership at any time by giving written notice to a person designated by the ccNSO Council to receive notices of resignation. Upon resignation the ccTLD manager ceases to agree to (a) adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by theccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSOmembership fees established by the ccNSO Council under Section 7(3) of this Article. In the absence of designation by the ccNSOCouncil of a person to receive applications and notices of resignation, they shall be sent to the ICANN Secretary, who shall notify the ccNSO Council of receipt of any such applications and notices.

3. Neither membership in the ccNSO nor membership in any Regional Organization described in Section 5 of this Article shall be a condition for access to or registration in the IANA database. Any individual relationship a ccTLD manager has with ICANN or theccTLD manager's receipt of IANA services is not in any way contingent upon membership in the ccNSO.

4. The Geographic Regions of ccTLDs shall be as described in Article VI, Section 5 of these Bylaws. For purposes of this Article, managers of ccTLDs within a Geographic Region that are members of the ccNSO are referred to as ccNSO members "within" the Geographic Region, regardless of the physical location of theccTLD manager. In cases where the Geographic Region of accNSO member is unclear, the ccTLD member should self-select according to procedures adopted by the ccNSO Council.

5. Each ccTLD manager may designate in writing a person, organization, or entity to represent the ccTLD manager. In the absence of such a designation, the ccTLD manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA database.

6. There shall be an annual meeting of ccNSO members, which shall be coordinated by the ccNSO Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD managers that are not members of the ccNSOas well as other non-members of the ccNSO to address the meeting. To the extent practicable, annual meetings of the ccNSOmembers shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN's otherSupporting Organizations.

7. The ccNSO Council members selected by the ccNSO members from each Geographic Region (see Section 3(1)(a) of this Article) shall be selected through nomination, and if necessary election, by the ccNSO members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO-member-selected member of the ccNSO Council, or upon the occurrence of a vacancy in the seat of such a ccNSO Council member,

theccNSO Council shall establish a nomination and election schedule, which shall be sent to all ccNSO members within the Geographic Region and posted on the Website.

8. Any ccNSO member may nominate an individual to serve as accNSO Council member representing the ccNSO member's Geographic Region. Nominations must be seconded by anotherccNSO member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO Council agree to support the policies committed to by ccNSO members.

9. If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO Council members from among those nominated (with seconds and acceptances), with ccNSOmembers from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast byccNSO members within the Geographic Region. The ccNSOCouncil Chair shall provide the ICANN Secretary prompt written notice of the selection of ccNSO Council members under this paragraph.

10. Subject to clause 4(11), ICANN policies shall apply to ccNSOmembers by virtue of their membership to the extent, and only to the extent, that the policies (a) only address issues that are within scope of the ccNSO according to Article IX, Section 6 and Annex C; (b) have been developed through the ccPDP as described inSection 6 of this Article, and (c) have been recommended as such by the ccNSO to the Board, and (d) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall,

at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

11. A ccNSO member shall not be bound if it provides a declaration to the ccNSO Council stating that (a) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in paragraph 10 of this Section), and (b) failure to implement the policy would not impair DNS operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO Council will provide a response to the ccNSO member's declaration. If there is a ccNSO Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO Council, the response shall state the ccNSO Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSOCouncil's agreement with the declaration. If the ccNSO Council disagrees, the ccNSO Council shall review the situation after a six-month period. At the end of that period, the ccNSO Council shall make findings as to (a) whether the ccNSO members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in paragraph 10 of this Section) and (b) whether failure to implement the policy would impair DNS operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO Council shall proceed by consensus, which may be demonstrated by a vote of 14 or more members of theccNSO Council.

Section 5. REGIONAL ORGANIZATIONS

The ccNSO Council may designate a Regional Organization for eachICANN Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO Council and shall be subject to review according to procedures established by the Board.

Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow theccNSO Policy-Development Process (ccPDP). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 7. STAFF SUPPORT AND FUNDING

1. Upon request of the ccNSO Council, a member of the ICANN staff may be assigned to support the ccNSO and shall be designated as the ccNSO Staff Manager. Alternatively, the ccNSO Council may designate, at ccNSO expense, another person to serve as ccNSOStaff Manager. The work of the ccNSO Staff Manager on substantive matters shall be assigned by the Chair of the ccNSOCouncil, and may include the duties of ccPDP Issue Manager.

2. Upon request of the ccNSO Council, ICANN shall provide administrative and operational support necessary for the ccNSO to carry out its responsibilities. Such support shall not include an obligation for ICANN to fund travel expenses incurred by ccNSOparticipants for travel to any meeting of the ccNSO or for any other purpose. The ccNSO Council may make provision, at ccNSOexpense, for administrative and operational support in addition or as an alternative to support provided by ICANN.

3. The ccNSO Council shall establish fees to be paid by ccNSOmembers to defray ccNSO expenses as described in paragraphs 1 and 2 of this Section, as approved by the ccNSO members.

4. Written notices given to the ICANN Secretary under this Article shall be permanently retained, and shall be made available for review by the ccNSO Council on request. The ICANN Secretary shall also maintain the roll of members of the ccNSO, which shall include the name of each ccTLD manager's designated representative, and which shall be posted on the Website.

ARTICLE X: GENERIC NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

There shall be a policy-development body known as the Generic NamesSupporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

Section 2. ORGANIZATION

The GNSO shall consist of:

i. A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 5 of this Article;

ii. Four Stakeholder Groups organized within Houses as described inSection 5 of this Article;

iii. Two Houses within the GNSO Council as described in Section 3(8) of this Article; and

iv. a GNSO Council responsible for managing the policy development process of the GNSO, as described in Section 3 of this Article.

Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the ICANN Board of Directors.

Section 3. GNSO COUNCIL

1. Subject to the provisions of Transition Article XX, Section 5 of these

Bylaws and as described in Section 5 of Article X, the GNSO Council shall consist of:

a. three representatives selected from the Registries Stakeholder Group;

b. three representatives selected from the Registrars Stakeholder Group;

c. six representatives selected from the Commercial Stakeholder Group;

d. six representatives selected from the Non-Commercial Stakeholder Group; and

e. three representatives selected by the ICANN Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSOCouncil including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee Appointee voting representative shall be assigned to each House (as described in Section 3(8) of this Article) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSOCouncil at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO Council is as diverse as possible and practicable, including considerations of geography, GNSO Constituency, sector, ability and gender.

There may also be liaisons to the GNSO Council from other ICANNSupporting Organizations and/or Advisory Committees, from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO Council by providing written notice to the Chair of the GNSOCouncil and to the ICANN Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO Council.

2. Subject to the provisions of the Transition Article XX, and Section 5 of these Bylaws, the regular term of each GNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the second ICANN annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO Operating Procedures.

3. A vacancy on the GNSO Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSOCouncil member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO Council member selected by the Nominating Committee may be removed for cause: i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 3(8) of this Article). Such removal shall be subject to reversal by the ICANN Board on appeal by the affected GNSO Council member.
4. The GNSO Council is responsible for managing the policy development process of the GNSO. It shall adopt such procedures (the "GNSOOperating Procedures") as it sees fit to carry out that responsibility, provided that such procedures are approved by a majority vote of each House. The GNSO Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO Council, the applicable procedures shall be as set forth in Section 6 of this Article.

5. No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO Council at any given time.

6. The GNSO shall make selections to fill Seats 13 and 14 on the ICANNBoard by written ballot or by action at a meeting. Each of the two voting Houses of the GNSO, as described in Section 3(8) of this Article, shall make a selection to fill one of two ICANN Board seats, as outlined below; any such selection must have affirmative votes compromising sixty percent (60%) of all the respective voting House members:

a. the Contracted Party House shall select a representative to fill Seat 13; and

b. the Non-Contracted Party House shall select a representative to fill Seat 14

Election procedures are defined in the GNSO Operating Procedures.

Notification of the Board seat selections shall be given by the GNSO Chair in writing to the ICANN Secretary, consistent with Article VI, Sections 8(4)and 12(1).

7. The GNSO Council shall select the GNSO Chair for a term the GNSOCouncil specifies, but not longer than one year. Each House (as described in Section 3.8 of this Article) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO Council, for a term the GNSO Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO Operating Procedures. In the event that the GNSO Council has not elected a GNSOChair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO Co-Chairs until a successful election can be held.

8. Except as otherwise required in these Bylaws, for voting purposes, theGNSO Council (see Section 3(1) of this Article) shall be organized into a bicameral House structure as described below:

a. the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANNNominating Committee for a total of seven voting members; and

b. the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before theGNSO Council.

9. Except as otherwise specified in these Bylaws, Annex A, Annex A-1 andAnnex A-2 hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO actions:

a. Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

b. Initiate a Policy Development Process ("PDP") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

c. Initiate a PDP Not Within Scope: requires an affirmative vote ofGNSO Supermajority.

d. Approve a PDP Team Charter for a PDP Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

e. Approve a PDP Team Charter for a PDP Not Within Scope: requires an affirmative vote of a GNSO Supermajority.

f. Changes to an Approved PDP Team Charter: For any PDP Team Charter approved under d. or e. above, the GNSO Council may approve an amendment to the Charter through a simple majority vote of each House.

g. Terminate a PDP: Once initiated, and prior to the publication of a Final Report, the GNSO Council may terminate a PDP only for significant cause, upon a motion that passes with a GNSOSupermajority Vote in favor of termination.

h. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

i. Approve a PDP Recommendation With a GNSO Supermajority: requires an affirmative vote of a GNSO Supermajority,

j. Approve a PDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded.

k. Modification of Approved PDP Recommendation: Prior to Final Approval by the ICANN Board, an Approved PDPRecommendation may be modified or amended by the GNSOCouncil with a GNSO Supermajority vote.

l. Initiation of an Expedited Policy Development Process (EPDP): requires an affirmative vote of a GNSO Supermajority.

m. Approve an EPDP Team Charter: requires an affirmative vote of aGNSO Supermajority.

n. Approval of EPDP recommendations: requires an affirmative vote of a GNSO Supermajority.

o. Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded.

p. Initiation of a GNSO Guidance Process (GGP): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

q. Rejection of initiation of a GGP requested by the ICANN Board: requires an affirmative vote of a GNSO Supermajority.

r. Approval of GGP recommendations: requires an affirmative vote of a GNSO Supermajority.

s. A "GNSO Supermajority" shall mean: (a) two-thirds (2/3) of the Council members of each House, or (b) three-fourths (3/4) of one House and a majority of the other House."

Section 4. STAFF SUPPORT AND FUNDING

1. A member of the ICANN staff shall be assigned to support theGNSO, whose work on substantive matters shall be assigned by the Chair of the GNSO Council, and shall be designated as theGNSO Staff Manager (Staff Manager).

2. ICANN shall provide administrative and operational support necessary for the GNSO to carry out its responsibilities. Such

support shall not include an obligation for ICANN to fund travel expenses incurred by GNSO participants for travel to any meeting of the GNSO or for any other purpose. ICANN may, at its discretion, fund travel expenses for GNSO participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 5. STAKEHOLDER GROUPS

1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the Transition Article XX, Section 5 of these Bylaws:

   a. Registries Stakeholder Group representing all gTLD registries under contract to ICANN;

   b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN;

   c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and

   d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with Section 3(1) of this Article.

3. Each Stakeholder Group identified in paragraph 1 of this Section and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

4. Any group of individuals or entities may petition the Board for

recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

a. A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO to carry out its policy-development responsibilities;

b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;

c. A recommendation for organizational placement within a particular Stakeholder Group; and

d. A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

5. The Board may create new Constituencies as described in Section 5(3)in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN. In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 3(4) of this Article.

ARTICLE XI: ADVISORY COMMITTEES

Section 1. GENERAL

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.

Section 2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

    a. The Governmental Advisory Committee should 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.

    b. Membership in the Governmental Advisory Committee shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee through its Chair.

    c. The Governmental Advisory Committee may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

    d. The chair of the Governmental Advisory Committee shall be elected by the members of the Governmental Advisory Committeepursuant to procedures adopted by such members.

    e. Each member of the Governmental Advisory Committee shall appoint one accredited representative to the Committee. The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

g. The Governmental Advisory Committee may designate a non-voting liaison to each of the Supporting Organization Councils andAdvisory Committees, to the extent the Governmental Advisory Committee deems it appropriate and useful to do so.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANNBoard 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 ICANNBoard will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of GovernmentalAdvisory Committee members with regard to public policy issues falling within their responsibilities.

2. Security and Stability Advisory Committee

   a. The role of the Security and Stability Advisory Committee ("SSAC") is to advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:
      1. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS and address allocation and those engaged in operations planning.

      2. To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN community accordingly. The Committee shall recommend any necessary audit activity to assess the current status of DNS and address allocation security in relation to identified risks and threats.

      3. To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF, RSSAC, RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly

synchronized with existing standardization, deployment, operational, and coordination activities. The Committee shall monitor these activities and inform the ICANN community and Board on their progress, as appropriate.

4. To report periodically to the Board on its activities.

5. To make policy recommendations to the ICANN community and Board.

b. The SSAC's chair and members shall be appointed by the Board.SSAC membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC chair may provide recommendations to the Board regarding appointments to theSSAC. The SSAC chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC is considered for appointment or re-appointment each year. The Board shall also have to power to remove SSAC appointees as recommended by or in consultation with the SSAC. (Note: The first full term under this paragraph shall commence on 1 January 2011 and end on 31 December 2013. Prior to 1 January 2011, the SSAC shall be comprised as stated in the Bylaws as amended 25 June 2010, and the SSAC chair shall recommend the re-appointment of all current SSAC members to full or partial terms as appropriate to implement the provisions of this paragraph.)

c. The SSAC shall annually appoint a non-voting liaison to the ICANNBoard according to Section 9 of Article VI.

3. Root Server System Advisory Committee

a. The role of the Root Server System Advisory Committee("RSSAC") is to advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

   1. Communicate on matters relating to the operation of theRoot Servers and their multiple instances with the Internet technical community and the ICANN community. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNSservers.

   2. Communicate on matters relating to the administration of theRoot Zone with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone File.

   3. Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the current status of root servers and the root zone.

   4. Respond to requests for information or opinions from theICANN Board of Directors.

   5. Report periodically to the Board on its activities.

   6. Make policy recommendations to the ICANN community and Board.

b. The RSSAC shall be led by two co-chairs. The RSSAC's chairs and members shall be appointed by the Board.
   1. RSSAC membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC chairs shall provide recommendations to the Board regarding appointments to the RSSAC. If the board declines to appoint a person nominated by the RSSAC then it will provide the rationale for its decision. The RSSAC chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC is considered for appointment or re-appointment each year. The Board

shall also have to power to remove RSSAC appointees as recommended by or in consultation with the RSSAC. (Note: The first term under this paragraph shall commence on 1 July 2013 and end on 31 December 2015, and shall be considered a full term for all purposes. All other full terms under this paragraph shall begin on 1 January of the corresponding year. Prior to 1 July 2013, the RSSAC shall be comprised as stated in the Bylaws as amended 16 March 2012, and the RSSAC chairs shall recommend the re-appointment of all current RSSAC members to full or partial terms as appropriate to implement the provisions of this paragraph.)

    2. The RSSAC shall recommend the appointment of the chairs to the board following a nomination process that it devises and documents.

  c. The RSSAC shall annually appoint a non-voting liaison to theICANN Board according to Section 9 of Article VI.

4. At-Large Advisory Committee

  a. The At-Large Advisory Committee (ALAC) is the primary organizational home within ICANN for individual Internet users. The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created throughICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. TheALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users.

  b. The ALAC shall consist of (i) two members selected by each of the Regional At-Large Organizations ("RALOs") established according to paragraph 4(g) of this Section, and (ii) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according toSection 5 of Article VI.

c. Subject to the provisions of the Transition Article of these Bylaws, the regular terms of members of the ALAC shall be as follows:
    1. The term of one member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an even-numbered year.
    2. The term of the other member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an odd-numbered year.
    3. The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.
    4. The regular term of each member shall end at the conclusion of the second ICANN annual meeting after the term began.

d. The Chair of the ALAC shall be elected by the members of theALAC pursuant to procedures adopted by the Committee.

e. The ALAC shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region, as defined according toSection 5 of Article VI) to the Nominating Committee.

f. Subject to the provisions of the Transition Article of these Bylaws, the At-Large Advisory Committee may designate non-voting liaisons to each of the ccNSO Council and the GNSO Council.

g. There shall be one RALO for each Geographic Region established according to Section 5 of Article VI. Each RALO shall serve as the main forum and coordination point for public input to ICANN in its Geographic Region and shall be a non-profit organization certified by ICANN according to criteria and standards established by the

Board based on recommendations of the At-Large Advisory Committee. An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN addressing the respective roles and responsibilities of ICANN and the RALO regarding the process for selecting ALAC members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures.

h. Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN according to paragraph 4(i) of this Section. If so provided by its Memorandum of Understanding withICANN, a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

i. Membership in the At-Large Community
    1. The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC and shall be stated in the Memorandum of Understanding between ICANN and the RALO for each Geographic Region.

    2. The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region (as defined in Section 5 of Article VI) of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

    3. Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent

possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

4. To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.
5. Once the criteria and standards have been established as provided in this Clause i, the ALAC, with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.
6. Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC in its Rules of Procedure, save always that any changes made to the Rules of Procedure in respect of ALS applications shall be subject to review by the RALOs and by the ICANN Board.
7. Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.
8. On an ongoing basis, the ALAC may also give advice as to whether a prospective At-Large Structure meets the applicable criteria and standards.

j. The ALAC is also responsible, working in conjunction with the RALOs, for coordinating the following activities:
    1. Making a selection by the At-Large Community to fill Seat 15 on the Board. Notification of the At-Large Community's selection shall be given by the ALAC Chair in writing to theICANN Secretary, consistent with Article VI, Sections 8(4) and 12(1).
    2. Keeping the community of individual Internet users informed about the significant news from ICANN;

3. Distributing (through posting or otherwise) an updated agenda, news about ICANN, and information about items in the ICANN policy-development process;
4. Promoting outreach activities in the community of individual Internet users;
5. Developing and maintaining on-going information and education programs, regarding ICANN and its work;
6. Establishing an outreach strategy about ICANN issues in each RALO's Region;
7. Participating in the ICANN policy development processes and providing input and advice that accurately reflects the views of individual Internet users;
8. Making public, and analyzing, ICANN's proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;
9. Offering Internet-based mechanisms that enable discussions among members of At-Large structures; and
10. Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN decision-making, so interested individuals can share their views on pendingICANN issues.

Section 3. PROCEDURES

Each Advisory Committee shall determine its own rules of procedure and quorum requirements.

Section 4. TERM OF OFFICE

The chair and each member of a committee shall serve until his or her successor is appointed, or until such committee is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the committee.

Section 5. VACANCIES

Vacancies on any committee shall be filled in the same manner as provided in the case of original appointments.

Section 6. COMPENSATION

Committee members shall receive no compensation for their services as a member of a committee. The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by committee members, including Directors, performing their duties as committee members.

ARTICLE XI-A: OTHER ADVISORY MECHANISMS

Section 1. EXTERNAL EXPERT ADVICE

1. Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN. In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

2. Types of Expert Advisory Panels.
    a. On its own initiative or at the suggestion of any ICANN body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 1(3)(b) of this Article shall apply.

    b. In addition, in accordance with Section 1(3) of this Article, the Board may refer issues of public policy pertinent to matters within ICANN's mission to a multinational governmental or treaty organization.

3. Process for Seeking Advice-Public Policy Matters.

   a. The Governmental Advisory Committee may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

   b. In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

   c. The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee, with the suggestion that the request be transmitted by the Governmental Advisory Committee to the multinational governmental or treaty organization.

4. Process for Seeking and Advice-Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 1(2)(a) of this Article shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

5. Receipt of Expert Advice and its Effect. External advice pursuant to this Section shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities.

6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 2. TECHNICAL LIAISON GROUP

1. Purpose. The quality of ICANN's work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN's activities. ICANN's relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group (TLG) shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN's activities.

2. TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI), the International Telecommunications Union's Telecommunication Standardization Sector (ITU-T), the World Wide Web Consortium (W3C), and the Internet Architecture Board (IAB).

3. Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to otherICANN entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:
   a. In response to a request for information, to connect the Board or other ICANN body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

   b. As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN's mission. This component of the TLG role covers circumstances in which ICANN is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

4. TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.
5. Technical Work with the IETF. The TLG shall have no involvement with the ICANN's work for the Internet Engineering Task Force (IETF), Internet Research Task Force, or the Internet Architecture Board (IAB), as described in the IETF-ICANN Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000.
6. Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN's activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN when ICANN does not ask a specific TLG organization directly.

ARTICLE XII: BOARD AND TEMPORARY COMMITTEES

Section 1. BOARD COMMITTEES

The Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The

Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all members of the Board; provided, however, that any Director or Directors which are the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required two-thirds (2/3) vote; and, provided further, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all members of the Board.

Section 2. POWERS OF BOARD COMMITTEES

1. The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:
    a. The filling of vacancies on the Board or on any committee;
    b. The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
    c. The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;
    d. The appointment of committees of the Board or the members thereof;
    e. The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CNPBCL;
    f. The approval of the annual budget required by Article XVI; or
    g. The compensation of any officer described in Article XIII.
2. The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be

conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings shall be governed by the provisions of Article VI applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE XIII: OFFICERS

Section 1. OFFICERS

The officers of ICANN shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN.

Section 2. ELECTION OF OFFICERS

The officers of ICANN shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chairman of the ICANN Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio member of the Board, and shall have all the same rights and privileges of any Board member. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

Section 5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("CFO") shall be the chief financial officer ofICANN. If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN and shall keep or cause to be kept, in books belonging to ICANN, full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN. The CFO shall be responsible for ICANN's financial planning and forecasting and shall assist the President in the preparation of ICANN's annual budget. The CFO shall coordinate and oversee ICANN's funding, including any audits or other reviews of ICANN or its Supporting Organizations. The CFO shall be responsible for all other matters relating to the financial operation of ICANN.

Section 7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN.

ARTICLE XIV: INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

ICANN shall, to maximum extent permitted by the CNPBCL, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN, provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN's best interests and not criminal. For purposes of this Article, an "agent" of ICANN includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (including a member of any Supporting Organization, any Advisory Committee, the Nominating Committee, any other ICANN committee, or the Technical

Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN would have the power to indemnify the agent against that liability under the provisions of this Article.

ARTICLE XV: GENERAL PROVISIONS

Section 1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN or to render it liable for any debts or obligations.

Section 2. DEPOSITS

All funds of ICANN not otherwise employed shall be deposited from time to time to the credit of ICANN in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN shall be signed by such Officer or Officers, agent or agents, of ICANN and in such a manner as shall from time to time be determined by resolution of the Board.

Section 4. LOANS

No loans shall be made by or to ICANN and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN to its Directors or Officers.

ARTICLE XVI: FISCAL MATTERS

Section 1. ACCOUNTING

The fiscal year end of ICANN shall be determined by the Board.

Section 2. AUDIT

At the end of the fiscal year, the books of ICANN shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement and a description of any payments made by ICANN to Directors (including reimbursements of expenses).ICANN shall cause the annual report and the annual statement of certain transactions as required by the CNPBCL to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close ofICANN's fiscal year.

Section 4. ANNUAL BUDGET

At least forty-five (45) days prior to the commencement of each fiscal year, the President shall prepare and submit to the Board, a proposed annual budget of ICANN for the next fiscal year, which shall be posted on the Website. The proposed budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item. The Board shall adopt an annual budget and shall publish the adopted Budget on the Website.

Section 5. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN, with the goal of fully recovering the reasonable costs of the operation of ICANN and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN. Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

ARTICLE XVII: MEMBERS

ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.

ARTICLE XVIII: OFFICES AND SEAL

Section 1. OFFICES

The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE XIX: AMENDMENTS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

ARTICLE XX: TRANSITION ARTICLE

Section 1. PURPOSE

This Transition Article sets forth the provisions for the transition from the processes and structures defined by the ICANN Bylaws, as amended and restated on 29 October 1999 and amended through 12 February 2002 (the "Old Bylaws"), to the processes and structures defined by the Bylaws of which this Article is a part (the "New Bylaws"). [Explanatory Note (dated 10 December 2009): For Section 5(3) of this Article, reference to the Old Bylaws refers to the Bylaws as amended and restated through to 20 March 2009.]

Section 2. BOARD OF DIRECTORS

1. For the period beginning on the adoption of this Transition Article and ending on the Effective Date and Time of the New Board, as defined in paragraph 5 of this Section 2, the Board of Directors of the Corporation ("Transition Board") shall consist of the members of the Board who would have been Directors under the Old Bylaws immediately after the conclusion of the annual meeting in 2002, except that those At-Large members of the Board under the Old Bylaws who elect to do so by notifying the Secretary of the Board on 15 December 2002 or in writing or by e-mail no later than 23 December 2002 shall also serve as members of the Transition Board. Notwithstanding the provisions of Article VI, Section 12 of the New Bylaws, vacancies on the Transition Board shall not be filled. The Transition Board shall not have liaisons as provided byArticle VI, Section 9 of the New Bylaws. The Board Committees existing on the date of adoption of this Transition Article shall continue in existence, subject to any change in Board Committees or their membership that the Transition Board may adopt by resolution.

2. The Transition Board shall elect a Chair and Vice-Chair to serve until the Effective Date and Time of the New Board.

3. The "New Board" is that Board described in Article VI, Section 2(1) of the New Bylaws.

4. Promptly after the adoption of this Transition Article, a Nominating Committee shall be formed including, to the extent feasible, the delegates and liaisons described in Article VII, Section 2 of the New Bylaws, with terms to end at the conclusion of the ICANN annual meeting in 2003. The Nominating Committee shall proceed without delay to select Directors to fill Seats 1 through 8 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for those Seats in Article VI, Section 8(1)(a)-(c) of the New Bylaws, and shall give the ICANN Secretary written notice of that selection.

5. The Effective Date and Time of the New Board shall be a time, as designated by the Transition Board, during the first regular meeting of ICANN in 2003 that begins not less than seven calendar days after the ICANN Secretary has received written notice of the selection of Directors to fill at least ten of Seats 1 through 14 on the New Board. As of the Effective Date and Time of the New Board, it shall assume from the Transition Board all the rights, duties, and obligations of the ICANN Board of Directors. Subject to Section 4 of this Article, the Directors (Article VI, Section 2(1)(a)-(d)) and non-voting liaisons (Article VI, Section 9) as to which the ICANNSecretary has received notice of selection shall, along with the President (Article VI, Section 2(1)(e)), be seated upon the Effective Date and Time of the New Board, and thereafter any additional Directors and non-voting liaisons shall be seated upon the ICANNSecretary's receipt of notice of their selection.

6. The New Board shall elect a Chairman and Vice-Chairman as its first order of business. The terms of those Board offices shall expire at the end of the annual meeting in 2003.

7. Committees of the Board in existence as of the Effective Date and Time of the New Board shall continue in existence according to their existing charters, but the terms of all members of those committees shall conclude at the Effective Date and Time of the New Board. Temporary committees in existence as of the Effective Date and Time of the New Board shall continue in existence with their existing charters and membership, subject to any change the New Board may adopt by resolution.

8. In applying the term-limitation provision of Section 8(5) of Article VI, a Director's service on the Board before the Effective Date and Time of the New Board shall count as one term.

Section 3. ADDRESS SUPPORTING ORGANIZATION

The Address Supporting Organization shall continue in operation according to the provisions of the Memorandum of Understanding originally entered on 18 October 1999 between ICANN and a group of regional Internet registries (RIRs), and amended in October 2000, until a replacement Memorandum of Understanding becomes effective. Promptly after the adoption of this Transition Article, the Address Supporting Organization shall make selections, and give the ICANN Secretary written notice of those selections, of:

1. Directors to fill Seats 9 and 10 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for each of those Seats in Article VI, Section 8(1)(d) and (e) of the New Bylaws; and
2. the delegate to the Nominating Committee selected by the Council of the Address Supporting Organization, as called for in Article VII, Section 2(8)(f) of the New Bylaws.

With respect to the ICANN Directors that it is entitled to select, and taking into account the need for rapid selection to ensure that the New Board becomes effective as soon as possible, the Address Supporting Organization may select those Directors from among the persons it previously selected as ICANN Directors pursuant to the Old Bylaws. To the extent the Address Supporting Organization does not provide theICANN Secretary written notice, on or before 31 March 2003, of its selections for Seat 9 and Seat 10, the Address Supporting Organizationshall be deemed to have selected for Seat 9 the person it selected as anICANN Director pursuant to the Old Bylaws for a term beginning in 2001 and for Seat 10 the person it selected as an ICANN Director pursuant to the Old Bylaws for a term beginning in 2002.

Section 4. COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

1. Upon the enrollment of thirty ccTLD managers (with at least four within each Geographic Region) as members of the ccNSO, written notice shall be posted on the Website. As soon as feasible after that notice, the members of the initial ccNSO Council to be selected by the ccNSO members shall be selected according to the procedures stated in Article IX, Section 4(8) and (9). Upon the completion of that selection process, a written notice that theccNSO Council has been constituted shall be posted on the Website. Three ccNSO Council members shall be selected by theccNSO members within each Geographic Region, with one member to serve a term that ends upon the conclusion of the firstICANN annual meeting after the ccNSO Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN annual meeting after the ccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSOCouncil is constituted. (The definition of "ccTLD manager" stated inArticle IX, Section 4(1) and the definitions stated in Article IX, Section 4(4) shall apply within this Section 4 of Article XX.)

2. After the adoption of Article IX of these Bylaws, the Nominating Committee shall select the three members of the ccNSO Council described in Article IX, Section 3(1)(b). In selecting three individuals to serve on the ccNSO Council, the Nominating Committee shall designate one to serve a term that ends upon the conclusion of the first ICANN annual meeting after the ccNSOCouncil is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN annual meeting after theccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSO Council is constituted. The three members of theccNSO Council selected by the Nominating Committee shall not take their seats before the ccNSO Council is constituted.

3. Upon the ccNSO Council being constituted, the At-Large Advisory Committee and the Governmental Advisory Committee may designate one liaison each to the ccNSO Council, as provided

byArticle IX, Section 3(2)(a) and (b).

4. Upon the ccNSO Council being constituted, the Council may designate Regional Organizations as provided in Article IX, Section 5. Upon its designation, a Regional Organization may appoint a liaison to the ccNSO Council.

5. Until the ccNSO Council is constituted, Seats 11 and 12 on the New Board shall remain vacant. Promptly after the ccNSO Council is constituted, the ccNSO shall, through the ccNSO Council, make selections of Directors to fill Seats 11 and 12 on the New Board, with terms to conclude upon the commencement of the next regular term specified for each of those Seats in Article VI, Section 8(1)(d) and (f) of the New Bylaws, and shall give the ICANN Secretary written notice of its selections.

6. Until the ccNSO Council is constituted, the delegate to the Nominating Committee established by the New Bylaws designated to be selected by the ccNSO shall be appointed by the Transition Board or New Board, depending on which is in existence at the time any particular appointment is required, after due consultation with members of the ccTLD community. Upon the ccNSO Council being constituted, the delegate to the Nominating Committee appointed by the Transition Board or New Board according to this Section 4(9) then serving shall remain in office, except that theccNSO Council may replace that delegate with one of its choosing within three months after the conclusion of ICANN's annual meeting, or in the event of a vacancy. Subsequent appointments of the Nominating Committee delegate described in Article VII, Section 2(8)(c) shall be made by the ccNSO Council.

Section 5. GENERIC NAMES SUPPORTING ORGANIZATION

1. The Generic Names Supporting Organization ("GNSO"), upon the adoption of this Transition Article, shall continue its operations; however, it shall be restructured into four new Stakeholder Groups which shall represent, organizationally, the former Constituencies of the GNSO, subject to ICANN Board approval of each individual Stakeholder Group Charter:

   a. The gTLD Registries Constituency shall be assigned to the Registries Stakeholder Group;

   b. The Registrars Constituency shall be assigned to the Registrars Stakeholder Group;

   c. The Business Constituency shall be assigned to the Commercial Stakeholder Group;

   d. The Intellectual Property Constituency shall be assigned to the Commercial Stakeholder Group;

   e. The Internet Services Providers Constituency shall be assigned to the Commercial Stakeholder Group; and

   f. The Non-Commercial Users Constituency shall be assigned to the Non-Commercial Stakeholder Group.

2. Each GNSO Constituency described in paragraph 1 of this subsection shall continue operating substantially as before and no Constituency official, working group, or other activity shall be changed until further action of the Constituency, provided that eachGNSO Constituency described in paragraph 1 (c-f) shall submit to the ICANN Secretary a new or revised Charter inclusive of its operating procedures, adopted according to the Constituency's processes and consistent with these Bylaws Amendments, no later than the ICANN meeting in October 2009, or another date as the Board may designate by resolution.

3. Prior to the commencement of the ICANN meeting in October 2009, or another date the Board may designate by resolution, theGNSO Council shall consist of its current Constituency structure and officers as described in Article X, Section 3(1) of the Bylaws(as amended and restated on 29 October 1999 and amended through 20 March 2009 (the "Old Bylaws")). Thereafter, the composition of the GNSO Council shall be as provided in these Bylaws, as they may be amended from time to time. All committees, task forces, working groups, drafting committees, and similar groups established by the GNSO Council and in existence immediately before the adoption of this Transition Article shall continue in

existence with the same charters, membership, and activities, subject to any change by action of the GNSO Council orICANN Board.

4. Beginning with the commencement of the ICANN Meeting in October 2009, or another date the Board may designate by resolution (the "Effective Date of the Transition"), the GNSOCouncil seats shall be assigned as follows:
    a. The three seats currently assigned to the Registry Constituency shall be reassigned as three seats of the Registries Stakeholder Group;

    b. The three seats currently assigned to the Registrar Constituency shall be reassigned as three seats of the Registrars Stakeholder Group;

    c. The three seats currently assigned to each of the Business Constituency, the Intellectual Property Constituency, and the Internet Services Provider Constituency (nine total) shall be decreased to be six seats of the Commercial Stakeholder Group;

    d. The three seats currently assigned to the Non-Commercial Users Constituency shall be increased to be six seats of the Non-Commercial Stakeholder Group;

    e. The three seats currently selected by the Nominating Committee shall be assigned by the Nominating Committee as follows: one voting member to the Contracted Party House, one voting member to the Non-Contracted Party House, and one non-voting member assigned to the GNSOCouncil at large.

Representatives on the GNSO Council shall be appointed or elected consistent with the provisions in each applicable Stakeholder Group Charter, approved by the Board, and sufficiently in advance of the October 2009 ICANN Meeting that will permit those representatives to act in their official capacities at the start of said meeting.

5. The GNSO Council, as part of its Restructure Implementation Plan,

will document: (a) how vacancies, if any, will be handled during the transition period; (b) for each Stakeholder Group, how each assigned Council seat to take effect at the 2009 ICANN annual meeting will be filled, whether through a continuation of an existing term or a new election or appointment; (c) how it plans to address staggered terms such that the new GNSO Council preserves as much continuity as reasonably possible; and (d) the effect of Bylaws term limits on each Council member.

6. As soon as practical after the commencement of the ICANNmeeting in October 2009, or another date the Board may designate by resolution, the GNSO Council shall, in accordance with Article X, Section 3(7) and its GNSO Operating Procedures, elect officers and give the ICANN Secretary written notice of its selections.

Section 6. PROTOCOL SUPPORTING ORGANIZATION

The Protocol Supporting Organization referred to in the Old Bylaws is discontinued.

Section 7. ADVISORY COMMITTEES AND TECHNICAL LIAISON GROUP

1. Upon the adoption of the New Bylaws, the Governmental Advisory Committee shall continue in operation according to its existing operating principles and practices, until further action of the committee. The Governmental Advisory Committee may designate liaisons to serve with other ICANN bodies as contemplated by the New Bylaws by providing written notice to the ICANN Secretary. Promptly upon the adoption of this Transition Article, the Governmental Advisory Committee shall notify the ICANNSecretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2 of the New Bylaws.
2. The organizations designated as members of the Technical Liaison Group under Article XI-A, Section 2(2) of the New Bylaws shall each designate the two individual technical experts described inArticle XI-A, Section 2(6) of the New Bylaws, by providing written

notice to the ICANN Secretary. As soon as feasible, the delegate from the Technical Liaison Group to the Nominating Committee shall be selected according to Article XI-A, Section 2(7) of the New Bylaws.

3. Upon the adoption of the New Bylaws, the Security and StabilityAdvisory Committee shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Security and Stability Advisory Committee shall notify theICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2(4) of the New Bylaws.

4. Upon the adoption of the New Bylaws, the Root Server SystemAdvisory Committee shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Root Server Advisory Committee shall notify the ICANNSecretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2(3) of the New Bylaws.

5. At-Large Advisory Committee
   a. There shall exist an Interim At-Large Advisory Committeeuntil such time as ICANN recognizes, through the entry of a Memorandum of Understanding, all of the Regional At-Large Organizations (RALOs) identified in Article XI, Section 2(4) of the New Bylaws. The Interim At-Large Advisory Committee shall be composed of (i) ten individuals (two from each ICANN region) selected by the ICANN Board following nominations by the At-Large Organizing Committee and (ii) five additional individuals (one from each ICANN region) selected by the initial Nominating Committee as soon as feasible in accordance with the principles established inArticle VII, Section 5 of the New Bylaws. The initial Nominating Committee shall designate two of these individuals to serve terms until the

conclusion of the ICANNannual meeting in 2004 and three of these individuals to serve terms until the conclusion of the ICANN annual meeting in 2005.

b. Upon the entry of each RALO into such a Memorandum of Understanding, that entity shall be entitled to select two persons who are citizens and residents of that Region to be members of the At-Large Advisory Committee established by Article XI, Section 2(4) of the New Bylaws. Upon the entity's written notification to the ICANN Secretary of such selections, those persons shall immediately assume the seats held until that notification by the Interim At-LargeAdvisory Committee members previously selected by the Board from the RALO's region.

c. Upon the seating of persons selected by all five RALOs, the Interim At-Large Advisory Committee shall become the At-Large Advisory Committee, as established by Article XI, Section 2(4) of the New Bylaws. The five individuals selected to the Interim At-Large Advisory Committee by the Nominating Committee shall become members of the At-Large Advisory Committee for the remainder of the terms for which they were selected.

d. Promptly upon its creation, the Interim At-Large Advisory Committee shall notify the ICANN Secretary of the persons selected as its delegates to the Nominating Committee, as set forth in Article VII, Section 2(6) of the New Bylaws.

Section 8. OFFICERS

ICANN officers (as defined in Article XIII of the New Bylaws) shall be elected by the then-existing Board of ICANN at the annual meeting in 2002 to serve until the annual meeting in 2003.

Section 9. GROUPS APPOINTED BY THE PRESIDENT

Notwithstanding the adoption or effectiveness of the New Bylaws, task forces and other groups appointed by the ICANN President shall continue unchanged in membership, scope, and operation until changes are made by the President.

Section 10. CONTRACTS WITH ICANN

Notwithstanding the adoption or effectiveness of the New Bylaws, all agreements, including employment and consulting agreements, entered by ICANN shall continue in effect according to their terms.

Annex A: GNSO Policy Development Process

The following process shall govern the GNSO policy development process ("PDP") until such time as modifications are recommended to and approved by the ICANN Board of Directors ("Board"). The role of theGNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are not intended to result in a Consensus Policy, the Council may act through other processes.

Section 1. **Required Elements of a Policy Development Process**

The following elements are required at a minimum to form ConsensusPolicies as defined within ICANN contracts, and any other policies for which the GNSO Council requests application of this Annex A:

a. Final Issue Report requested by the Board, the GNSO Council ("Council") or Advisory Committee, which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party Is affected by the issue;

b. Formal initiation of the Policy Development Process by the Council;

c. Formation of a Working Group or other designated work method;

d. Initial Report produced by a Working Group or other designated work method;

e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;

f. Council approval of PDP Recommendations contained in the Final Report, by the required thresholds;

g. PDP Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council]; and

h. Board approval of PDP Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO shall maintain a Policy Development Process Manual (PDPManual) within the operating procedures of the GNSO maintained by theGNSO Council. The PDP Manual shall contain specific additional guidance on completion of all elements of a PDP, including those elements that are not otherwise defined in these Bylaws. The PDP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.6.

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by instructing theGNSO Council ("Council") to begin the process outlined the PDP Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee Request. An Advisory Committee may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSOCouncil.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO Council; or (iii) a properly supported motion from an Advisory Committee, the Staff Manager will create a report (a "Preliminary Issue Report"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

a. The proposed issue raised for consideration;

b. The identity of the party submitting the request for the Issue Report;

c. How that party is affected by the issue, if known;

d. Support for the issue to initiate the PDP, if known;

e. The opinion of the ICANN General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the ICANN's mission, policy process and more specifically the role of the GNSO as set forth in the Bylaws.

f. The opinion of ICANN Staff as to whether the Council should initiate the PDP on the issue

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the ICANN website for a public comment period that complies with the designated practice for public comment periods within ICANN.

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO Council for consideration for initiation of a PDP.

Section 5. **Initiation of the PDP**

The Council may initiate the PDP as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP Manual, shall initiate a PDP. No vote is required for such action.

GNSO Council or Advisory Committee Requests: The Council may only initiate the PDP by a vote of the Council. Initiation of a PDP requires a vote as set forth in Article X, Section 3, paragraph 9(b) and (c) in favor of initiating the PDP.

Section 6. **Reports**

An Initial Report should be delivered to the GNSO Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN, which time may be extended in accordance with the PDP Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. **Council Deliberation**

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP Manual.

The Council approval process is set forth in Article X, Section 3, paragraph 9(d) through (g), as supplemented by the PDP Manual.

Section 8. **Preparation of the Board Report**

If the PDP recommendations contained in the Final Report are approved by the GNSO Council, a Recommendations Report shall be approved by the GNSO Council for delivery to the ICANN Board.

Section 9. **Board Approval Processes**

The Board will meet to discuss the GNSO Council recommendation as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than aGNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSOSupermajority Vote or less than a GNSO Supermajority vote is not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN community or ICANN. For any Supplemental Recommendation approved by less than aGNSO Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANNcommunity or ICANN.

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN staff to work with theGNSO Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP, from policy suggestion to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each PDP issue. Such status page will outline the completed and upcoming steps in the PDP process, and contain links to key resources (e.g. Reports, Comments Fora, WG Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN on which notifications and comments regarding the PDP will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO Council.

"Staff Manager" means an ICANN staff person(s) who manages the PDP.

"GNSO Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP. If the Council determines that any ongoing PDP cannot be feasibly transitioned to these updated procedures, the PDP shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO Expedited Policy Development Process

The following process shall govern the specific instances where the GNSOCouncil invokes the GNSO Expedited Policy Development Process ("EPDP"). The GNSO Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP that was not initiated; (b) as part of a previous PDP that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the ICANN Board of Directors. Where a conflict arises in relation to an EPDP between the PDP Manual (see Annex 2 of the GNSO Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO is outlined in Article X of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus Policy; however, in all cases where the GNSO is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. **Required Elements of a GNSO Expedited Policy Development Process**

The following elements are required at a minimum to develop expeditedGNSO policy recommendations, including recommendations that could result in amendments to an existing Consensus Policy, as part of a GNSOExpedited Policy Development Process:

a. Formal initiation of the GNSO Expedited Policy Development Process by the GNSO Council, including an EPDP scoping document;

b. Formation of an EPDP Team or other designated work method;

c. Initial Report produced by an EPDP Team or other designated work method;

d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;

e. GNSO Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;

f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and

g. Board approval of EPDP Recommendation(s).

Section 2. **Expedited Policy Development Process Manual**

The GNSO shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO Policy Development Process Manual (PDP Manual), described in Annex 5 of the GNSO Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of an EPDP, including those elements that are not otherwise defined in these Bylaws. The EPDP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.4.

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG / C;
2. Origin of issue (e.g. previously completed PDP);
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of aGNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO policy issue that had been scoped previously as part of a PDP that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN General Counsel as to whether the issue proposed for consideration is properly within the scope of the ICANN's mission, policy process and more specifically the role of the GNSO;
6. Proposed EPDP mechanism (e.g. WG, DT, individual volunteers);
7. Method of operation, if different from GNSO Working Group

Guidelines;

8. Decision-making methodology for EPDP mechanism, if different from GNSO Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in in Article X, Section 3, paragraphs 9 n-o, as supplemented by the PDP Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO Council, a Recommendation(s) Report shall be approved by the GNSO Council for delivery to the ICANN Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any EPDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than aGNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN. For any Supplemental Recommendation approved by less than aGNSO Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANNcommunity or ICANN.

Section 7. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANNstaff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN staff to work with the GNSO Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board,ICANN will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO Guidance Process

The following process shall govern the GNSO guidance process ("GGP") until such time as modifications are recommended to and approved by theICANN Board of Directors ("Board"). The role of the GNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are intended to result in a Consensus Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. **Required Elements of a GNSO Guidance Process**

The following elements are required at a minimum to develop GNSOguidance:

1. Formal initiation of the GNSO Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO Guidance Recommendation(s) Report produced

by a GGP Team or other designated work method;

5. Final GNSO Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

Section 2. **GNSO Guidance Process Manual**

The GNSO shall maintain a GNSO Guidance Process (GGP Manual) within the operating procedures of the GNSO maintained by the GNSOCouncil. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.4.

Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN Board. Initiation of a GGP requires a vote as set forth in Article X, Section 3, paragraph 9.p in favor of initiating the GGP. In the case of a GGP requested by the ICANN Board, a GGP will automatically be initiated unless the GNSO Council votes against the initiation of a GGP as set forth in Article X, Section 3, paragraph 9 q[1].

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG / C
2. Origin of issue (e.g., board request)
3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. WG, DT, individual volunteers)
5. Method of operation, if different from GNSO Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. **Council Deliberation**

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Article X, Section 3, paragraph 9. r[2] as supplemented by the GGP Manual.

Section 5. **Preparation of the Board Report**

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO Council, a Recommendations Report shall be approved by the GNSO Council for delivery to the ICANN Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the GNSO Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any GGP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN community orICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO Guidance recommendation(s) adopted by a GNSO Supermajority Vote is not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN.

Section 7. **Implementation of Approved GNSO Guidance**

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN staff to implement the GNSO Guidance. If deemed necessary, the Board may direct ICANNStaff to work with the GNSO Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board,ICANN will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN staff person(s) who manages the GGP.

Annex B: ccNSO Policy-Development Process (ccPDP)

The following process shall govern the ccNSO policy-development process ("PDP").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

a. *Council.* The ccNSO Council (in this Annex B, the "Council") may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.

b. *Board.* The ICANN Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.

c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

d. *ICANN Supporting Organization or Advisory Committee.* An ICANNSupporting Organization or an ICANN Advisory Committee may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

e. *Members of the ccNSO.* The members of the ccNSO may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. Creation of the Issue Report and Initiation Threshold

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (in which case the costs of the Issue Manager shall be borne by ICANN) or such other person or persons selected by the Council (in which case the ccNSO shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

a. The proposed issue raised for consideration;

b. The identity of the party submitting the issue;

c. How that party is affected by the issue;

d. Support for the issue to initiate the PDP;

e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP for this issue (the "Manager Recommendation"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANNGeneral Counsel regarding whether the issue is properly within the scope of the ICANN policy process and within the scope of theccNSO. In coming to his or her opinion, the General Counsel shall examine whether:

    1. The issue is within the scope of ICANN's mission statement;

    2. Analysis of the relevant factors according to Article IX, Section 6(2) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO;

    In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

    3. Implicates or affects an existing ICANN policy;

    4. Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Annex C) shall be within the scope ofICANN and the ccNSO.

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Article IX, Section 6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO shall inform the Issue Manager accordingly. General Counsel and the ccNSO Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSOshall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP, a proposed time line for conducting each of the stages of PDP outlined herein (PDP Time Line).

g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the ICANNBoard. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty.Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP.

3. Initiation of PDP

The Council shall decide whether to initiate the PDP as follows:

a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP. Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.

b. A vote of ten or more Council members in favor of initiating thePDP shall be required to initiate the PDP provided that the Issue Report states that the issue is properly within the scope of theICANN mission statement and the ccNSO Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

a. In favor of convening a task force, it shall do so in accordance with Item 7 below.

b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP Time Lineset out in the Issue Report.

5. Composition and Selection of Task Forces

a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Article IX, Section 6) to appoint two individuals to participate in the task force (the "Representatives"). Additionally, the Council may appoint up to three advisors (the "Advisors") from outside the ccNSO and, following formal request for GAC participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.

b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.

c. The Council may also pursue other actions that it deems appropriate to assist in the PDP, including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP Time Line.

6. Public Notification of Initiation of the PDP and Comment Period

After initiation of the PDP, ICANN shall post a notification of such action to the Website and to the other ICANN Supporting Organizations andAdvisory Committees. A comment period (in accordance with the PDPTime Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD managers, otherSupporting Organizations, Advisory Committees, and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "Comment Report") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the

Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "Charter") within the time designated in the PDP Time Line. Such Charter shall include:
    1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP;
    2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and
    3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Article IX, Section 3(14) shall apply to Council actions under this Item 7(b).

c. *Appointment of Task Force Chair.* The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. *Collection of Information.*
    1. *Regional Organization Statements.* The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a

minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "Regional Statement") within the time designated in the PDP Time Line. Every Regional Statement shall include at least the following:

  i. If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;

  ii. If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;

  iii. A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

  iv. A statement of the position on the issue of anyccNSO members that are not members of the Regional Organization;

  v. An analysis of how the issue would affect the Region, including any financial impact on the Region; and

  vi. An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied

by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("Preliminary Task Force Report") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "Task Force Report") and post it on the Website and to the other ICANN Supporting Organizations andAdvisory Committees. Each Task Force Report must include:

   1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;

   2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;

   3. An analysis of how the issue would affect each Region, including any financial impact on the Region;

   4. An analysis of the period of time that would likely be necessary to implement the policy; and

   5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP Time Line.

b. The Council may, in its discretion, take other steps to assist in thePDP, including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in thePDP Time Line.

c. The Council shall formally request the Chair of the GAC to offer opinion or advice.

d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDPTime Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

a. A comment period (in accordance with the PDP Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD managers, other Supporting Organizations,Advisory Committees, and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.

b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "Final Report". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP Time Line.

10. Council Deliberation

a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC Chair an invitation to the GAC to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.

b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.

c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "Council Recommendation"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all viewpoints expressed by Council members during the PDP must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "Members Report"). The Members Report must contain at least the following:

a. A clear statement of the Council's recommendation;

b. The Final Report submitted to the Council; and

c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP Time Line, the ccNSO members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO members lodge votes within the voting period, the resulting vote will be be employed without further process. In the event that fewer than 50% of the ccNSO members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO members, will be employed if at least 50% of theccNSO members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the

Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSORecommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSORecommendation being made in accordance with Item 13 incorporate theccNSO Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

a. A clear statement of the ccNSO recommendation;

b. The Final Report submitted to the Council; and

c. the Members' Report.

15. Board Vote

a. The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b. The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.
    1. In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

    2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually

acceptable solution.

3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSOSupplemental Recommendation, it shall state its reasons for doing so in its final decision ("Supplemental Board Statement").

5. In the event the Board determines not to accept a ccNSOSupplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO Recommendation or ccNSOSupplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

a. Issue Report;

b. PDP Time Line;

c. Comment Report;

d. Regional Statement(s);

e. Preliminary Task Force Report;

f. Task Force Report;

g. Initial Report;

h. Final Report;

i. Members' Report;

j. Board Report;

k. Board Statement;

l. Supplemental Members' Report; and

m. Supplemental Board Statement.

In addition, ICANN shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO's policy-development role. As provided in Article IX, Section 6(2) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO's authority and responsibilities must recognize the complex relation between ICANN and ccTLD managers/registries with regard to policy issues. This annex shall assist the ccNSO, the ccNSOCouncil, and the ICANN Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO's policy role should be based on an analysis of the following functional model of the DNS:

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD name servers.

Within a TLD two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database (Data Entry Function) and
2. Maintaining and ensuring upkeep of name-servers for the TLD(Name Server Function).

These two core functions must be performed at the ccTLD registry level as well as at a higher level (IANA function and root servers) and at lower levels of the DNS hierarchy. This mechanism, as RFC 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

a. under which data will be collected and entered into a database or data changed (at the TLD level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.

b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF)

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority ofccTLD registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN and ccTLD managers to ensure the stable and proper functioning of the domain name system. ICANN and the ccTLDregistries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO cannot be established without reaching a common understanding of the allocation of authority between ICANN and ccTLD registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO with regard to developing policies. The scope is limited to the policy role of the ccNSO policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers
Policy role: IETF, RSSAC (ICANN)
Executive role: Root Server System Operators

Accountability role: RSSAC (ICANN), (US DoC-ICANN MoU)

Level 2: ccTLD Registry Name Servers in respect to interoperability
Policy role: ccNSO Policy Development Process (ICANN), for best practices a ccNSO process can be organized
Executive role: ccTLD Manager
Accountability role: part ICANN (IANA), part Local Internet Community, including local government

Level 3: User's Name Servers
Policy role: ccTLD Manager, IETF (RFC)
Executive role: Registrant
Accountability role: ccTLD Manager

Data Entry Function (as to ccTLDs)
Level 1: Root Level Registry
Policy role: ccNSO Policy Development Process (ICANN)
Executive role: ICANN (IANA)
Accountability role: ICANN community, ccTLD Managers, US DoC, (national authorities in some cases)

Level 2: ccTLD Registry
Policy role: Local Internet Community, including local government, and/orccTLD Manager according to local structure
Executive role: ccTLD Manager
Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels
Policy role: Registrant
Executive role: Registrant
Accountability role: Registrant, users of lower-level domain names

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[1] A GNSO Supermajority Vote will be required to not initiate a GGP following a formal request from the ICANN Board.

[2] Approval of GGP recommendations requires a GNSO Supermajority Vote.

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GNSO Operating Procedures

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Chapter 1.0: Introduction, Scope, and Definitions

1.1 Introduction

This document, the "Operating Procedures" of the GNSO, describes those supplementary elements of administration, governance, and other logistics/mechanics that are not already prescribed in the aforementioned ICANN Bylaws. Nothing in the contents of this document shall be in conflict with the ICANN Bylaws and, in the event of any discrepancy, apparent or otherwise, the ICANN Bylaws shall govern.

Taken together, the ICANN Bylaws and the GNSO Operating Procedures are intended to provide a complete set of rules, procedures, and practices for governing the operations of the GNSO.

1.2 Scope

The Generic Names Supporting Organization (GNSO), its description, purpose(s), structures (e.g. Council, Stakeholder Groups), and governance mandate are covered in ICANN Bylaws, Article X, Sections 1-6. Transition procedures to the new GNSO Council, to become effective in October 2009, are contained in Article XX, Section 5. The Policy Development Process (PDP) for the GNSO is described in ICANN Bylaws ANNEX A.

1.3 Definitions

1.3.1 An "appointing organization" is defined to be the Stakeholder Group or Constituency that elected or appointed a representative to the GNSO Council[1]. Note that, for the purposes of these procedures, the Nominating Committee is not considered an "appointing organization."

1.3.2 The terms "Council member," Council representative," and "Councilor" have the same meaning and are used synonymously throughout the text.

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[1] For the purposes of these GNSO Operating Procedures, the three Board Appointees to the GNSO Council are considered to have been elected or appointed by the Non-Commercial Stakeholder Group (NCSG).

Chapter 2.0: GNSO Council Supplementary Procedures

2.1 GNSO Council Member Term Limits

The ICANN Bylaws {Article X, Section 3(2)} specify term limits for GNSO Council Representatives except under a "Special Circumstance," which is defined within these procedures as follows:

2.1.1 Special Circumstance

A Special Circumstance may arise under the following conditions:

a. a Stakeholder Group, as appropriate, is unable to meet a geographic/diversity requirement specified in its Charter; and

b. after a reasonable search, including but not limited to publicizing the position among ICANN's other Supporting Organizations and Advisory Committees, no other qualified candidate is available to serve as its Council representative.

If both conditions above are present, the applicable Stakeholder Group may petition the Council to allow its designated representative to serve a third consecutive term. Approval requires greater than 60% affirmative vote in each House and does not require the abstention of the affected Council member.

2.1.2 If a Stakeholder Group wishes to have one of its Council members serve a third consecutive term under circumstances other than as provided in 2.1.1 above, it shall document the details and provide its rationale to the GNSO Secretariat who will disseminate to the Council for consideration. The Council may elect to apply a Special Circumstance, at its discretion, and such action will require greater than 75% affirmative vote in each House without requiring the abstention of any member.

2.1.3 In the event that a Council member is approved to and serves a third consecutive term, or any portion thereof, he/she must remain out of office for one full term before being eligible to serve a subsequent term as a Council member.

2.2 Officer Elections: Chair and Vice-Chairs

The GNSO Council shall select the GNSO Chair and two Vice-Chairs as follows:

a. The GNSO Chair shall be elected by a 60 percent vote of each house.

b. Each house will be allowed to nominate one candidate for GNSO Council Chair. Each house is responsible for determining how to nominate its candidate. A candidate for GNSO Council Chair does not need to be a member of a house, but must be a member of the GNSO Council. Should a Chair be elected from outside of the houses that Chair will be a non-voting Chair.

    i. All ballots will include the "none of the above" option. In the event that a 60 percent vote of each house selects the "none of the above" option, each house will commence a new nomination period of not longer than 15 days. An election for the new nominees will be scheduled for no sooner than 30 days after the unsuccessful vote.

ii. In the case of a tie for the most votes between the two candidates, or between a candidate and "none of above," a second election will be held no sooner than 30 days. The candidates shall remain the same for this second election. In the case this second election also results in a tie, each house will commence a new nomination period of not longer than 15 days. An election for the new nominees will be rescheduled for no sooner than 30 days after the unsuccessful vote.

iii. The leading candidate will be defined as the one with the highest score. The score is calculated by adding together the voting percentages attained from each house. The highest percentage attainable in each house is 100. Thus, the maximum score a candidate can achieve is 200 as a result of attaining 100 percent of the votes from the contracted party house and 100 percent from the non-contracted party house (100 percent + 100 percent = score of 200). In case neither candidate reaches the 60 percent of each house threshold, a second ballot will be held between the leading candidate and "none of the above."

iv. In case neither candidate reaches the 60 percent of each house threshold and the candidates do not tie, a second runoff ballot will be held between the leading candidate and "none of the above."

v. If the single candidate does not reach the 60 percent of each house threshold in the runoff ballot, then each house will commence a new nomination period of not longer than 15 days. An election for the new nominees will be rescheduled for no sooner than 30 days after the unsuccessful runoff ballot.

c. Each house shall select a Council Vice-Chair from within its respective house.

d. A Chair may not be a member of the same Stakeholder Group of either of the Vice-Chairs.

e. The Chair and Vice-Chairs shall retain their votes (if any) in their respective houses (if any).

f. In the event that the GNSO Council has not elected a GNSO Council Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO Co-Chairs until a successful election can be held.

g. The Council shall inform the Board and the Community appropriately and post the election results on the GNSO website within 2 business days following each election and runoff ballot, whether successful or unsuccessful.

2.3 Observers

The GNSO Council may agree with the Council of any other ICANN Supporting Organization or Advisory Committee to exchange observers. Such observers shall not be members of, or entitled to vote or make motions on, the GNSO Council, but otherwise shall be entitled to participate on equal footing with members of the GNSO Council. The appointing Council shall designate its observer (or revoke or change the designation of its observer) on the GNSO Council by providing written notice to the Chair of the GNSO Council and to the ICANN Secretary.

2.4 Board Seat Elections

2.4.1 The ICANN Bylaws, Article X, Section 3(6) specify that the Contracted Parties House shall select a representative to fill Board Seat 13 and that the Non-Contracted Parties House shall select a representative to fill Board Seat 14 according to procedures contained herein.

2.4.2 Timing

For the purposes of this section and Table 1 below, the date that either Board Seat 13 or 14 will become vacated shall be considered time period "T." The following activities shall take place according to the generalized schedule in the table below in order to meet the notification requirements provided in the Bylaws, Article VI, Section 8(4):

Table 1: Activities Timeline

Not Later Than:	**Activity Commences:**	**Maximum Duration:**
T – 5 Months	Call for Nominations	1 Month
T – 4 Months (or 16 Weeks)	Candidate Interviews	2 Weeks
T – 14 Weeks	First Round of Voting	2 Weeks
T – 12 Weeks	Second Round of Voting (if needed)	2 Weeks
T – 10 Weeks	Third Round of Voting (if needed)	2 Weeks
T – 8 Weeks	GNSO Secretariat Reports Election Results	3 Days
Next Council Meeting	Confirmation of Election	3 Days
T – 1 Month	GNSO Chair Notifies ICANN Secretary of Election as prescribed by Article VI, Sections 8(4) and 12(1) of the ICANN Bylaws.	3 Days

At the request of the House, the GNSO Secretariat will develop a specific schedule with actual dates in accordance with the above timeline.

2.4.3 Detailed Election Procedures

Each House is responsible for establishing its own internal procedures for nominations, interviews, voting, and candidate selection; however, those processes must be documented and forwarded to the GNSO Council for inclusion as ANNEXES to the GNSO Operating Procedures. If a House subsequently elects to alter its procedures, such amendments must be submitted to the GNSO Council before becoming effective so that the procedures accurately reflect the actual processes and activities performed by each House in selecting its candidate.

Chapter 3.0: GNSO Council Meetings

Except as provided elsewhere in these procedures, the GNSO Council shall act at meetings.

3.1 Meeting Facilities

Provided that all members participating in such a meeting can communicate with one another, members of the GNSO Council may participate in a meeting of the GNSO Council through use of (i) conference telephone or similar communications equipment; or (ii) electronic video screen communication or other communication equipment; provided that (a) all members are provided the means of fully participating in all matters before the GNSO Council, and (b) ICANN adopts and implements means of verifying that a person participating in such a meeting is a member of the GNSO Council or other person entitled to participate in the meeting and all actions of, or votes by, the GNSO Council are taken or cast only by the members of the GNSO Council and not persons who are not members.

3.2 Open vs. Closed Sessions

Except where determined by a majority vote of members of each house of the GNSO Council present that a closed session is appropriate, in-person meetings shall be open to physical or electronic attendance by all interested persons dependent upon space availability. Recordings of meetings will be made publicly available for any meetings not open to all interested parties. In cases where a closed session is deemed appropriate, the reason for such as closed session as well as the result of the vote will be published in the minutes. Votes in closed sessions shall be taken by a polling of the members.

3.3 Notice of Meetings

Advance notice of meetings shall be posted on the GNSO website, if reasonably practicable, at least 7 days in advance of the meeting for Administrative issues and 14 days in advance for Policy issues. Advance notice shall also be posted to other GNSO Council work spaces where practical.

Reports and motions should be submitted to the GNSO Council for inclusion on the agenda as soon as possible, but no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days before the GNSO Council meeting.

The time of the meetings may vary to accommodate the different geographic regions represented by GNSO Council members. By way of guidance, start times corresponding to local times for the GNSO Council members earlier than 0600 and later than 2300 should be avoided where possible.

3.4 Meeting Schedules

The GNSO Chair and GNSO Council will prepare a 12-month schedule of meetings within 30 days following the ICANN annual meeting. GNSO Council members may request changes to the schedule during the year, which may be agreed upon by the Chair in consultation with the Council, subject to the minimum period of notice below.

3.5 Procedure to Produce the Minutes

Within 8 working days of a GNSO Council meeting, the GNSO Secretariat will forward draft summary to the GNSO Chair and Vice-Chairs.

Within 10 days of the meeting, the Chair and Vice-Chairs will edit the draft and request the Secretariat to circulate the draft summary to GNSO Council members for comment and approval. All comments received will be accepted for inclusion into the draft minutes unless there are objections. If no objections are received within 10 days, the minutes will be deemed to have been approved for posting.

All comments received from GNSO Council members will be incorporated in the summary unless there are objections from other GNSO Council members.

Where there are objections, the Chair will attempt to resolve the issue (by reference to the audio transcript, if any) and secure agreement from the relevant GNSO Council members. If agreement is not achieved, the Chair will determine the final version of the minutes and will note areas in which agreement has not been achieved

Disputes: If any GNSO Council member disputes what he or she has said in the resulting draft minutes, the recording and/or transcript of the meeting should be reviewed before minutes are approved.

The Chair will ensure the above procedure is complete and an approved version of the summary is circulated and made public within 21 days of the relevant meeting.

All minutes of meetings of the GNSO (and any working groups thereof) shall be approved promptly by the originating body. No later than the business day after the date on which they are approved by the Council, the minutes shall be made publicly available on the Website.

3.6 Speaking at Meetings

Both at physical and telephone meetings the GNSO Chair will recognize three types of intervention in the following order of priority:

1. A point of order
2. A point of information
3. A normal substantive intervention

3.6.1 Points of Order

At a physical meeting, a GNSO Council member may raise a hand or, during a teleconference, a GNSO Council member may speak over the dialogue and say immediately "point of order." A point of order is raised when there is an infraction of the GNSO Operating Procedures or improper decorum in speaking. The point of order must be raised as soon as possible after the error occurs. The Chair will suspend discussion to hear the point.

3.6.2 Points of Information and Normal Substantive Interventions

At a physical meeting, a GNSO Council member may raise a hand and wait to be recognized by the Chair and, during a teleconference, a GNSO Council member may speak in an appropriate gap and say immediately "[state name] to speak". This will be noted by the Chair who will invite the intervention in due course. To ensure balance, the GNSO Council Chair has the discretion to delay an intervention by a frequent speaker to allow others to speak. By way of guidance for the Chair, a GNSO Council member is not expected to speak for more than three minutes at a time and the Chair should solicit the views of other GNSO Council members before returning to the same speaker on any one issue. This guidance should not be construed as limiting the Council from substantive discussion on any one issue. The GNSO Council Chair's discretion to delay an intervention should not be exercised for a "point of information". A "point of information" is for GNSO Council members seeking information from the Chair or other GNSO Council members about meaning or procedure - it is specifically not intended to provide information.

3.7 Seating and Visibility

As possible, during in-person meetings, the GNSO Council Chair and Vice-Chairs should be located so they can observe all GNSO Council members.

3.8 Absences and Vacancies

3.8.1 Absence

i. GNSO Councilors are expected to attend all regularly scheduled Council meetings and be present at the time such sessions are called to order. Absences may be **planned** (due to a conflicting personal or professional obligation that cannot be reasonably altered) or **unplanned** (e.g. sudden illness, accident, injury, or other unanticipated event). In either case (including being late) the Councilor is expected to notify the GNSO Secretariat by e-mail or telephone as soon as practicable before the meeting begins.

ii. Whenever possible, a Councilor is expected to vote on such motions as may come before the GNSO Council using the means provided in Section 4.4-Absentee Voting. If the vote is outside of the scope of 4.4.1 then the Council member may opt for Section 4.6-Proxy Voting.

3.8.2 Leave of Absence

a. Planned: If a GNSO Council member anticipates being unable to attend two or more regularly-scheduled GNSO Council meetings consecutively, the Councilor shall notify the appointing organization or, for a House NCA, the Nominating Committee and the GNSO Secretariat that a "Leave of Absence" is being requested at which time the remedy described in Paragraph 3.8.4 is available.

b. Unplanned: When a GNSO Council member fails to attend two regularly-scheduled GNSO Council meetings consecutively without prior notification to the GNSO Secretariat, the GNSO Secretariat will advise the appointing organization or, for a House NCA, the Nominating Committee that the Councilor has satisfied the conditions for an effective "Leave of Absence" at which time the remedy described in Paragraph 3.8.4 is available.

3.8.3 Vacancies

a. In the event of a GNSO Council member resignation or other permanent vacancy, the Bylaws call for replacement according Article X, Section 3(3).

b. During any transition period following the occurrence of the permanent vacancy, but before a new election or appointment and subsequent seating of the replacement Councilor, the remedy in Paragraph 3.8.4 is available.

3.8.4 Remedy: Temporary Alternate

a. For a Councilor who is not appointed by the Nominating Committee, the appointing organization may, at its discretion, name a Temporary Alternate to serve in the absent or vacant Councilor's seat.

b. For a voting NCA, the Council non-voting NCA is immediately activated to serve as a Temporary Alternate subject to provisions in Section 4.7-Temporary Alternate. The communication required pursuant to Section 4.8-Procedures, Paragraph b, if it cannot be submitted by the voting NCA, will be completed and forwarded by the non-Voting NCA.

c. A named Temporary Alternate pursuant to this section is subject to the applicable provisions in Section 4.7-Temporary Alternate and Section 4.8-Procedures, Paragraph b, except that the communication to the GNSO Secretariat should be amended as follows:

    i. the reason or condition leading to the remedy is either "Leave of Absence" or "Vacancy," as applicable; and

    ii. the measures/motions/votes upon which the Temporary Alternate may engage are not constrained, as in other remedies (see Section 4.5-Abstentions), and may be noted as "All Subjects Permitted."

d. A named Temporary Alternate pursuant to this section will be expected to participate in all matters that would otherwise have occupied the attention of the absent Councilor.

3.8.5 Any occurrence of absence or vacancy that is not declared in advance, as provided in this section, will be recorded as "Absent" and such action will not reduce the denominator in any vote tabulation for the affected House.

Chapter 4.0: Voting

4.1 Quorum

In order for the GNSO Council to initiate a vote, a quorum must be present. A quorum is a majority of voting members in each House, which must include at least one member of each Stakeholder Group.

4.2 Voting Thresholds

Unless otherwise specified in these procedures or in the ICANN Bylaws, to pass a motion or other action, greater than 50% of the eligible voters in each House must cast affirmative votes. For all votes taken, the number of eligible voters in each House shall be fixed to the number of seats allocated in the Bylaws (a.k.a. the denominator) and is not affected by the number of members present or absent at the meeting in which the motion or other action is initiated. For rules and procedures concerning abstentions and their impact on voting thresholds, refer to Section 4.5-Abstentions).

4.3 Motions and Votes

4.3.1 Eligibility: All actions of, or votes by, the GNSO Council are taken or cast only by the members of the GNSO Council. Except as otherwise provided in these procedures, persons who are not Council members may not vote. Acts by the GNSO Council members present at any meeting at which there is a quorum shall be acts of the GNSO Council unless otherwise provided herein.

4.3.2 For each motion or action of the GNSO Council requiring a vote, Councilors may enter either a "No", "Yes, or "Abstain." For a vote of "Abstain," a reason or explanation is required. For votes of "No" or "Yes", at the discretion of the Councilor, an explanation or reason may be provided which will be recorded in the meeting minutes.

4.3.3 Resubmission of a Motion: If a motion has been voted on by the GNSO Council and not adopted, that motion may be resubmitted to the Council for consideration at a subsequent meeting of the Council, subject to the following criteria:

1. Explanation: The Councilor submitting the motion must also submit an explanation for the resubmission of the motion. The explanation need not accompany the motion when it is resubmitted; however, the explanation must be submitted no later than the deadline for submitting the motion (i.e., no later than 23h59 Coordinated Universal Time (UTC) on the day 10 calendar days before the Council meeting at which the motion is to be reconsidered). The explanation does not need to meet any requirements other than being submitted in a timely manner.
2. Publication: The text and explanation of the resubmitted motion must be published (i.e., circulated to the Council mailing list) no later than the deadline for submitting the motion.
3. Second: Upon the second resubmission of a motion (i.e., the third time the same motion comes before the Council), the motion must be seconded by a Councilor

from each house as a prerequisite for placing the resubmitted motion on the consent agenda.

4.3.4 Limitations and Exceptions to Resubmission of a Motion: The above procedure on resubmission of a motion is subject to the following limitations and exceptions:

1. Same Meeting: A motion may not be resubmitted at the same meeting at which the motion was voted upon but not adopted.

2. Material Changes: If material changes have been made to the text of a motion, the revised motion will not be considered a resubmitted motion. The revised motion will instead be considered a new motion. Whether or not a change in the text of a motion is material will be determined at the discretion of the GNSO Council Chair.

3. Timing: A motion will no longer be considered a resubmitted motion once two Council meetings have passed after the meeting at which the motion was voted upon but not adopted. The motion will thereafter be considered a new motion. For example, if a motion has been voted upon but not adopted at a meeting in January, it would be considered a resubmitted motion if submitted for a meeting in February or March, but would be considered a new motion if submitted for a meeting in April.

4. Motions Not Voted Upon: A motion that has been submitted to the Council but not voted upon (e.g., because the motion was tabled or withdrawn) will not be considered a resubmitted motion if it is submitted again to the Council. Instead, such a motion will still be considered a new motion.

5. ICANN Meetings: For purposes of this procedure, all Council sessions at an ICANN Meeting will be considered to be part of a single meeting.

4.4 Absentee Voting

4.4.1 Applicability

Absentee voting is permitted for the following limited number of Council motions or measures.

- a. Initiate a Policy Development Process (PDP);
- b. Approve a PDP recommendation;
- c. Recommend amendments to the GNSO Operating Procedures (GOP) or ICANN Bylaws;
- d. Fill a Council position open for election.

4.4.2 Absentee ballots, when permitted, must be submitted within the announced time limit, which shall be 72 hours from the meeting's adjournment. In exceptional circumstances, announced at the time of the vote, the Chair may reduce this time to 24 hours or extend the time to 7 calendar days, provided such amendment is verbally confirmed by all Vice-Chairs present.

4.4.3 The GNSO Secretariat will administer, record, and tabulate absentee votes according to these procedures and will provide reasonable means for transmitting and authenticating absentee ballots, which could include voting by telephone, e- mail, web-based interface, or other technologies as may become available.

4.4.4 Absentee balloting does not affect quorum requirements.

4.5 Abstentions

4.5.1 Duty of Councilors, Constituencies, and Stakeholder Groups

The GNSO Council is, by design, a small number of members organized into two voting Houses comprised of 7 and 13 members respectively, representing Stakeholder Groups as prescribed in the ICANN Bylaws (see http://www.icann.org/en/general/bylaws.htm#X). If approved within a particular Stakeholder Group Charter, a GNSO Council member may be a representative of a Constituency within that Stakeholder Group. Given the Council's size and the voting thresholds that have been defined, it is important that each Stakeholder Group (or Constituency, where applicable) vote decisively, through its appointed or elected Councilors, on every matter that is before the Council for action.

When exercising his/her voting responsibilities on Council matters, a GNSO Councilor is expected to comply with any obligations prescribed within the applicable Stakeholder Group or Constituency Charter governing Councilor's appointment to the Council. If such Charter procedures are silent with respect to voting guidance, directions, or restrictions, the Councilor may use his/her best-informed judgment, unless specifically directed as described in Paragraph 4.5.3 below.

When circumstances regarding a potential voting abstention occur that would otherwise prevent a Councilor from discharging his/her responsibilities (see Paragraph 4.5.2), the Councilor's appointing organization is provided a remedy (see Paragraph 4.5.3) designed to enable its vote to be exercised. For a Nominating Committee Appointee (NCA) assigned to a House (hereinafter House NCA), certain remedies are available and prescribed based upon a set of specific criteria, conditions, and implementation rules without requiring formal action by the Nominating Committee.

Specific Councilor obligations include:

a. Active participation: a Councilor is expected to actively participate in the regular affairs of the GNSO Council including, *inter alia*, attending its scheduled meetings, staying abreast of the technical and administrative agenda, engaging in relevant email and live discussions, reading minutes, evaluating reports, listening to meeting recordings (in the event of absence), asking questions that foster learning, voting responsibly on all matters before the Council, and periodically reviewing the performance of the Chair and Vice-Chairs.

b. Reasonable inquiry: Councilors should request and receive sufficient information, including support from their Constituencies or Stakeholder Groups, as appropriate, so Councilors may carry out their responsibilities. When a problem manifests itself or some issue does not make sense, a Councilor has a duty to inquire into the surrounding facts and circumstances and seek guidance.

4.5.2 Abstention Categories

Circumstances leading to a potential voting abstention can arise when a Council member perceives a set of conditions, relative to some action or motion before the Council that warrants his/her recusal from participating and/or voting. For purposes of the Council's operating procedures, abstentions will be grouped into two categories varying by severity and recommended action: "volitional" abstentions and "obligational" abstentions.

a. Volitional Abstentions

Circumstances may occur when a Council member elects to refrain from participating and voting for reasons that may include, but are not limited to:

- Perception of being inadequately informed
- Has not participated in relevant discussions or studied available materials
- Lacks sufficient understanding, expertise, or technical knowledge

The above list itemizes several potential reasons for a volitional abstention; however, as described in Paragraph 4.5.1 above, it is the duty of Council members to remain informed, to exercise their responsibilities to vote, and to take whatever reasonable measures are available so that this category of abstentions is minimized to the greatest extent possible. Appointing organizations are encouraged to provide sufficient guidance, assistance, education, and direction, where applicable, to avoid circumstances that might otherwise result in a volitional abstention.

b. Obligational Abstentions

This category of abstentions results from conditions in which a Councilor may find that he/she is unable to vote on a measure due to a competing personal (e.g. religious), professional, or political interest that interferes with his/her ability to participate in the matter or where participation raises ethical questions.

Disclaimer concerning the term "Conflict of Interest": There are certain financial interests and, possibly, incentives associated with GNSO actions that affect Internet domain name policies. As they pertain to GNSO Council voting actions, such interests are expected to be documented in a Councilor's required Statement of Interest (see Chapter 5.0) and do not require that the Councilor abstain from participating and voting. GNSO Councilors do not have a fiduciary responsibility to act in the best interests of ICANN in discharging their responsibilities on the Council. While the deliberations and decisions of ICANN are made in the interests of the global Internet community as a whole, GNSO Councilors are understood, in some cases, to represent the views of organizations and interest groups that would materially benefit from policies recommended by the GNSO. It is understood that Councilors are often employed by or represent those affected parties and such relationships could engender subsequent benefit to Councilors as individuals. As a result of these special circumstances and to avoid confusion with ICANN's Conflict of Interest Policy, which does not pertain to GNSO Council matters, the term "Conflict of Interest" will not pertain when a GNSO Councilor argues for and votes "Yes" or "No" on a matter which, by virtue of that action, directly or indirectly benefits that individual financially or *economically; however, that interpretation does not imply that circumstances cannot occur in which a Councilor may perceive his/her situation as obligating a formal abstention.*

A Councilor who believes that proceeding to vote on a motion or action before the Council not only warrants, but requires, his/her abstention and, thereby, recusal from deliberations, is considered to be facing an obligational abstention. Although it is not possible to draft a set of exhaustive conditions under which obligational abstentions can arise, two examples are provided by way of illustration:

> Case 1: a Councilor (attorney by profession) is representing a client in legal action relating to a matter before the Council and, and as required by his/her professional code, must abstain and, furthermore, such abstention should not be counted as a negative vote. *[Note: this type of situation requires the remedy specified in Paragraph 4.5.3 below].*
>
> Case 2: a Councilor is a paid consultant for a national political body that has a vested interest in a particular motion before the Council. The Councilor is concerned that his/her future income potential and ability to retain a consulting engagement with the national body may be affected if he/she votes on the measure. In such a case, the Councilor believes that the ethical course of action is to abstain.

In the two examples above, personal or professional obligations interfere with the Council member's ability to participate ethically; thus, requiring recusal from deliberations on the matter and abstention from voting.

4.5.3 Remedy To Avoid Abstaining on a Vote

According to existing rules, any abstention would not contribute to the passing of a motion; therefore, by default, an abstention functions as a "No" vote. The purpose of the remedial procedures in this section is to minimize this effect.

Voting Direction[2]

The preferred remedy, if applicable for the appointing organization, is to request a "Yes" or "No" voting instruction from the Council member's appointing organization (if applicable). The Council member is obligated to follow the instruction.

If a Voting Direction is not obtained then the Council member may opt for Section 4.6 (Proxy Voting).

4.6 Proxy Voting

An abstaining or absent Council member as defined above (the Proxy Giver) may transfer his or her vote to any other Council member (the Proxy Holder).

The Proxy Holder must vote in order of precedence according to one of three types:

1. An instruction from the Proxy Giver's appointing organization (if applicable), or if none;
2. An instruction from the Proxy Giver, or in the absence of either;
3. The Proxy Holder's own conscience.

a. Multiple Proxies

A GNSO Council member is not permitted to be a Proxy Holder for more than one Proxy Giver.

b. Quorum

An absent Council member does not count toward quorum even if a proxy has been established. A Temporary Alternate (see Section 4.7-Temporary Alternate below) if present, would count toward quorum.

c. Proxy Notification

A proxy notification must be sent to the GNSO Secretariat and should indicate which type it is. The notification should, where applicable, be sent by the Proxy Giver's appointing organization. Ordinarily a proxy notification must be received by the GNSO Secretariat before the start of the relevant meeting.

Exceptionally, a proxy notification may be given during a meeting by a Council member who is present but needs to leave before a vote. In all cases the most recent notification takes precedence.

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[2] The term "appointing organization" (see Section 1.3.1) does not comprise the Nominating Committee; therefore, the Voting Direction remedy does not apply to House NCAs.

4.7 Temporary Alternate

Another remedy that may be exercised in avoiding the consequences of an abstention is the naming by the appointing organization of a Temporary Alternate who is empowered to "stand in" for the abstaining Councilor according to the provisions below. For a House NCA, the Temporary Alternate remedy is defined only for certain conditions of absence and vacancy as provided in Section 3.8 (Absences and Vacancies).

In selecting a Temporary Alternate, the appointing organization shall choose, from within its membership ranks, a responsible individual who is not a current voting GNSO Council member, but is otherwise knowledgeable on the matter at issue and qualified to represent the appointing organization's interests. The Temporary Alternate must meet all criteria (e.g. Term Limits) for GNSO Council membership.

i. The GNSO Secretariat will arrange for the named Temporary Alternate to participate in GNSO Council meetings, teleconferences, email list discussions, as appropriate, and will cause such arrangements to be deactivated upon conclusion of the Temporary Alternate's tenure.

ii. The Temporary Alternate is entitled to participate in Council deliberations and voting only upon the specific matter(s) outlined in the communication submitted to the GNSO Secretariat (see Section 4.8 (Procedures)). In all other matters, the regular Councilor is expected to function in Councilor's normal capacity. A Temporary Alternate may not be selected to register a proxy vote, as described in Section 4.6 (Proxy Voting).

iii. The presence of a duly recognized Temporary Alternate at a Council meeting is counted in quorum calculations; however, the regular Councilor, if present, and any Temporary Alternate only contribute a count of one to the meeting quorum.

iv. Only one Temporary Alternate may be named to act for a GNSO Councilor at a time.

v. If the Temporary Alternate is named for a Council member who is an elected officer of the GNSO Council, the Temporary Alternate does not assume those officer duties and responsibilities; the Council's leadership succession shall take effect as provided elsewhere in these procedures.

The above remedies are available for the purposes of ensuring that, to the maximum extent possible, each and every GNSO Council vote can be exercised and that conditions otherwise resulting in an abstention can be mitigated. The GNSO Council has not established any provision that would permit the voting thresholds and calculations to be altered, for example, by reducing the denominator due to an abstention.

4.8 Procedures

This paragraph outlines the notification and communication steps required when an abstention condition is identified as well as the procedures that must be followed in remedying the abstention.

For the purposes of these procedures, the term "written" or "in writing" shall mean via postal mail or electronic mail (e-mail).

In order for an abstention remedy to be implemented, all required procedures must be completed prior to the start of the GNSO Council meeting in which the vote will be taken; otherwise, the abstention will not be remedied and the provisions of Section 4.8, Paragraph c will apply.

a. Notification by Councilor

A Councilor who believes that he/she should abstain from participation/voting on a measure before the Council is required to provide, at the earliest opportunity, a brief written notification documenting the circumstances to the appointing organization with a copy forwarded to the GNSO Secretariat. For a House NCA, the notification should be sent to the GNSO Secretariat with a copy to the Council NCA who is required to acknowledge receipt to both parties that an automatic proxy is confirmed. If the situation is perceived to be confidential in nature and cannot be disclosed in the notification, a statement to that effect should be included by the Councilor.

b. Communication by Appointing Organization or NCA

To effectuate a remedy described in Paragraph 4.5.3 the appointing organization or, when applicable, the House or Council NCA must provide a written statement to the GNSO Secretariat, as early as possible prior to any discussion/voting on the matter at issue, containing the following information:

- Name of the abstaining Councilor.
- Remedy selected (from Paragraph 4.5.3).
- Reason(s) for or condition(s) leading to the remedy.
- Specific subject(s)/measure(s)/motion(s)/action(s) of the Council for which the remedy is being exercised.
- Date upon which the remedy will expire or terminate. No remedy may initially or subsequently extend beyond three (3) months at a time. If the period needs to be extended, a written notice can be provided to the GNSO Secretariat indicating the reason for extension (e.g. Council vote postponed) and a new expiration date. While there is no limit to the number of extensions; "standing" remedies are not allowed under any circumstances.
- For the specific remedies of Voting Direction and Proxy Voting, the communication must include an affirmation that the appointing organization has established a voting position, subject to provisions contained in its Charter or Bylaws, on the matter at issue. For Voting Direction, a statement from the appointing organization shall indicate that the affected Councilor has been instructed how to vote on the matter. Exclusion: these statements are not applicable or required in a remedy applied for a House NCA.
- For Proxy Voting, identification of the GNSO Councilor who will register the vote for the abstaining Councilor.
- For a Temporary Alternate, identification of the individual who will serve as a substitute for the abstaining Councilor. If not already published and available, a short bio and Statement of Interest should be prepared by the Temporary Alternate and delivered to the GNSO Secretariat in advance of any discussion or voting scheduled to take place.

c. Effect and Recording of an Abstention Not Otherwise Remedied

If an abstention cannot be avoided after pursuing the remedy provided in Paragraph 4.5.3, then the Councilor may abstain from voting and an "Abstention" will be entered into the record along with a reason. If the reason for the abstention warrants such action (e.g. obligational abstention), the Councilor shall be recused and not participate in discussions on the affected topic(s) or otherwise attempt to influence other Council members nor shall he/she vote on any action attendant to the matter for which the abstention conditions are present. An abstention shall not affect quorum requirements or calculations nor will it reduce the denominator in any vote tabulations for the affected House.

4.9 Consent Agenda

When preparing the meeting agenda, the Council Chair in consultation with the Council Vice-Chairs determines whether an item belongs on the consent agenda. All items that are subject to a different voting threshold than a simple majority vote (see ICANN Bylaws, Article X, section 3-9) or are subject to absentee voting (see section 4.4 – Absentee Voting) are not eligible for inclusion in the consent agenda. A numbered list of consent items is included as part of the meeting agenda. The list and supporting documents are included in the Council agenda in sufficient time to be read by all Council members prior to the meeting in accordance with section 3.3 – Notice of Meetings of these Operating Procedures.

At the beginning of the meeting, the Chair asks members what items they wish to have removed from the consent agenda and discussed individually. If any Council member requests that an item be removed from the consent agenda, it must be removed. Council members may request that an item be removed for any reason. They may wish, for example, to discuss the item, to query the item, or to register a vote against the item. If an item is removed from the consent agenda, it is added to the meeting agenda for that meeting, unless the Council Chair in consultation with the Council Vice-Chairs determines differently.

When there are no more items to be removed, the Chair reads out the number of the remaining consent items. Then the Chair calls for a vote.

When preparing the minutes, the full text of (or links to) the resolutions, reports or recommendations that were adopted as part of the consent agenda are included. In addition the minutes should include a statement regarding the composition/threshold that approved the consent agenda.

Chapter 5.0: Statements of Interest

5.1 Definitions

Generic Names Supporting Organization (GNSO) Group:

a. the GNSO Council, or

b. a work team, working group, committee or other such policy development body formed by and under the supervision of the GNSO Council.

Relevant Party: An individual who participates as a member of a GNSO Group.

Statement of Interest: A written statement made by a Relevant Party that provides a declaration of interests that may affect the Relevant Party's judgment, on any matters to be considered by the GNSO Group.

Material Interest: A material interest is an important interest and is generally, but not always, financial in nature. However, in the legal sense, the interest needs to be substantial or of consequence.

5.2 Policy

5.2.1 Purpose

The purpose of this policy is to set forth responsibilities and procedures pertaining to the content, creation, timely update, accuracy, completeness, and compliance of Statements of Interest as defined in Section 5.1.

5.2.2 Compliance

Each Relevant Party is responsible for ensuring that he or she complies with this policy. Failure to comply with these procedures is covered in Section 5.5.

This policy is administered by ICANN Staff. Administration includes informing new members of groups of the policies, posting all Statements of Interest, and following up on any requests from the Chairs of GNSO Groups pertaining to this procedure.

5.2.3 Exemptions

Full time ICANN Staff members are exempt from the individual responsibility of completing a Statement of Interest by virtue of ICANN posting a global Statement of Interest confirming that all employees and individuals who have an exclusive contract with ICANN are representing the interests of ICANN, and no others, at all times. The exemption does not extend to Staff who do not have an exclusive contract with ICANN.

5.3 Statement of Interest Procedures

5.3.1 Timeliness

Relevant Parties are required to provide to the GNSO Secretariat a Statement of Interest, updated not less frequently than once a year or whenever there is a material change, setting forth those specified interests, relationships, arrangements, and affiliations that may affect the judgments of Relevant Parties in the conduct of their participation within the GNSO. A completed Statement of Interest, updated at least annually, is a precondition for Relevant Parties to participate in a GNSO Group.

At the beginning of each meeting the Chair of the GNSO Group shall ask all Relevant Parties whether they have updates to their Statements of Interest.

5.3.2 Electronic Form and Publication

To ensure consistency, ICANN Staff shall develop, maintain, and provide to Relevant Parties an electronic Statement of Interest form including procedures and instructions pertaining to its completion online. ICANN Staff shall make available an alternative arrangement (e.g., email) in the event that a Relevant Party does not have the necessary Internet access or capability to complete the form online. ICANN Staff shall post the completed Statements of Interest in the relevant section of the GNSO web site prior to Relevant Parties undertaking any activity.

5.3.3 Content

Relevant Parties shall complete all six sections of the Statement of Interest form as specified below:

1. Please identify your current employer(s) and position(s).
2. Please identify your declared country of primary residence (which may be the country to which you pay taxes).
3. Please identify the type(s) of work performed at #1 above.
4. Please list any financial relationship beyond *de minimus* stock ownership you may have with any company that to your knowledge has a financial relationship or contract with ICANN.
5. Do you believe you are participating in the GNSO policy process as a representative of any individual or entity, whether paid or unpaid? Please answer “yes” or “no.” If the answer is “yes,” please provide the name of the represented individual or entity. If professional ethical obligations prevent you from disclosing this information, please so state.
6. Please identify any other relevant arrangements, interests, or benefits as requested in the following two questions:
    i. Do you have any type of material interest in ICANN GNSO policy development processes and outcomes? Please answer “yes” or “no.” If the answer is “yes,” please describe the material interest in ICANN GNSO policy development processes and outcomes.
    ii. Are there any arrangements/agreements between you and any other group, constituency or person(s) regarding your participation as a work team member? Please answer “yes” or “no.” If the answer is “yes,” please describe the arrangements/agreements and the name of the group, constituency, or person(s).

5.3.4 Timing of Updates and Recordation

A Relevant Party shall provide any changes/and or updates to his or her Statement of Interest within ten business days of any material change in any information appearing in the statement of interest form. Such changes shall also be recorded in the minutes of the meeting at which the Relevant Party advises of such change and should be posted as soon as possible.

5.4 Completeness and Accuracy

5.4.1 Completeness

ICANN Staff shall review each Relevant Party's Statement of Interest to ensure completeness. If ICANN Staff has reason to believe that a Relevant Party's documentation is not complete, ICANN Staff shall notify the Relevant Party and request that the omitted or missing information be provided or, if there are extenuating circumstances, explanation as to why the document is incomplete. If the matter cannot be satisfactorily resolved with the Relevant Party after a reasonable period, Staff shall raise the matter with the applicable Chair pursuant to Paragraph 5.4.3.

5.4.2 Accuracy

Concerns raised by ICANN Staff or a member of the ICANN community about the accuracy of a Relevant Party's Statement of Interest, including whether an interest that may affect the Relevant Party's judgment with respect to a pending matter has been disclosed, shall be brought to the attention of the applicable Chair and handled pursuant to Paragraph 5.4.3.

5.4.3 Appeal Process

If concerns about the completeness and/or accuracy of a Statement of Interest persist after reasonable attempts are made to resolve them with the Relevant Party, the matter shall be brought to the attention of the applicable Chair and handled according to decision-making methodology and appeal process as prescribed in the GNSO Working Group Guidelines (ANNEX 1, Sections 3.6 and 3.7). At each step of the appeal process, every effort should be made to resolve the completeness and/or accuracy concerns by working cooperatively with the Relevant Party.

5.5 Failure to Comply

5.5.1 Requirement to Participate

A Statement of Interest form must be submitted by each Relevant Party in accordance with these procedures. If a Relevant Party fails to provide a Statement of Interest once a year or whenever there is a material change, the Chair may temporarily suspend that Relevant Party's participation until the Statement of Interest is provided. Participation shall not be suspended if a Statement of Interest is subject to the Appeals process of Paragraph 5.4.3 until a final determination is made under that process.

5.5.2 Suspension

Pursuant to the appeal provisions referenced in Paragraph 5.4.3, if it is determined that a Relevant Party has not complied with these procedures, the GNSO Council Chair, in consultation with the Vice-Chairs, may suspend that Relevant Party's participation in a GNSO group until the failure to comply has been remedied. The ICANN General Counsel and GNSO Council will be notified when such actions are taken as a matter of protocol and the decision to take this step will be recorded in the GNSO Council minutes. If the failure to comply pertains to a Chair, the applicable Vice-Chairs shall act pending completion of the appeal process. If the failure to comply pertains to the GNSO Council Chair, the Vice-Chairs shall act after consulting with the ICANN Vice President - Policy Development.

Chapter 6.0: Stakeholder Groups and Constituencies: Operating Principles and Participation Guidelines

6.1 Participation Rules and Operating Procedures

The following sections address the BGC WG's recommendation that Groups shall establish and abide by a set of participation rules and operating procedures.

6.1.1 Participation Principles

All Stakeholder Groups/Constituencies (here-in-after called Groups) should adopt the rules below for participation. Such rules and procedures should be part of their Charters.[3]

a. All Groups should adopt these rules for participation to encourage openness, transparency and accountability. These rules and any other rules governing participation should be objective, standardized and clearly stated.[4] For the avoidance of doubt, while commonality is encouraged in the interest of simplification, Groups are not required to have identical rules and variation between Groups is acceptable, as appropriate.

b. Groups should have their participation rules based on common principles developed by the GNSO. Groups should avail themselves of ICANN staff services to make these rules available in English and the five United Nations languages – Chinese, Russian, Arabic, Spanish, and French – so that ICANN's global audience can understand them.[5]

c. All Groups should strive to improve inclusiveness and representativeness. Groups should have either a differential fee structure based on the ability to pay, in order to encourage increased representation from those living in less developed economies, or hardship provisions that entitle any potential member to apply for relief from the normal fee scale.[6]

d. All Groups should strive to remove information barriers and put in place well-structured outreach programs so that many potential stakeholders come to know of their existence and also of the benefits in being part of the ICANN policy process, thereby becoming more aware of the value of joining the GROUP.[7]

6.1.2 Membership[8]

a. All Groups should make and publish rules and procedures for admission requirements of interested parties as Members in clear and simple terms. Such rules and procedures should be part of their Charters.

b. All Groups should abide by rules governing membership, which are based on common principles. All Group members should have rights, duties and

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[3] See Board Governance Committee (BGC) GNSO Review Working Group Report on GNSO Improvements, page 45, last paragraph.

[4] Ibid, page 43, paragraph 1.

[5] Ibid, page 42, paragraph 5.

[6] Ibid, page 41, last paragraph.

[7] Ibid, page 42, paragraph 4.

[8] Ibid, page 43, paragraph 2.

responsibilities and in particular, rights to vote as applicable as per Group membership rules.

c. All Groups must offer membership to natural persons or individuals (if applicable) as well as to entities with legal personality such as corporations. However, any person or organization applying for membership should meet the membership criteria laid down by the Group with ICANN's approval.

d. All Groups should stipulate the rights, duties, and responsibilities of its members in clear and simple terms and publish the same.

e. A simple application form should be devised for membership and it should be publicly available on the Group's website.
    i. Admission criteria should be predictable and objective and not arbitrary or discretionary. Where eligibility depends on participation in a certain sector of business, then applicants should be entitled to submit evidence of their participation in that sector.
    ii. The general membership should be entitled to object to an application for membership provided that such objection is based on predictable and objective membership criteria. Such an objection should be published to the Group members.
    iii. In applying for membership an applicant thereby agrees to abide by the written rules and regulations, including charters and bylaws, of the Group and terms and conditions laid down by it.

f. Status of a new application and admission decision, as far as possible, should be publicly available at the option of the applicant and an applicant should be advised of any objection to the application, be given the opportunity to ask clarifying questions about the objection, and be given the opportunity to reply with clarification or to reply in general.

g. In case of unfair treatment resulting in the rejection of an application or a dispute, the applicant may lodge a complaint with the ICANN Ombudsman or a mutually agreed upon non-biased neutral third party. The process for lodging a complaint with the Ombudsman is set forth in Article V of the ICANN Bylaws and in the Ombudsman Framework.[9]

h. Every member should remain in good standing until the Group has decided otherwise as per its Charter provisions. The reasons that such status can be imperiled should be certain and predictable and objective and not arbitrary or discretionary. In such an event, the member should be given an opportunity to be heard. Appropriate procedures should be made for such an eventuality. The affected party should have right of appeal to a neutral third party.

i. List of members and their contact details should be publicly available on the Group website. Individual members should have the right to have publication of address and other contact details withheld to protect their privacy. All members, unless otherwise stated should be eligible to participate in the business of the Group and have voting rights as applicable.

j. No legal or natural person should be a voting member of more than one Group.

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[9] See <http://www.icann.org/ombudsman/documents/ombudsman-framework-26mar09-en.pdf>.

6.1.3 Policy and Consensus

a. All Group members should be eligible to participate in the Policy work of the Group and to join Committees formed to deal with policy issues and other Group issues, including eligibility of membership in the Group's committees.

b. Groups should refer to the GNSO Working Group model and guidelines for the purpose of reaching consensus and to improve accessibility, transparency, and accountability all Groups should establish and publish a consensus-building model or process that is publicly available to their membership and the community. Whatever consensus-building model or process a Group uses, the Group must describe the process and ensure that is publicly available to their membership and the community so it is visible and transparent.

6.2 Operating Principles

The following sections address the BGC WG's recommendations for clear operating principles for each Group to ensure that all Groups function in a representative, open, transparent and democratic manner.

Groups should adhere to the following common operating principles: representativeness, process integrity, flexibility, transparency, participation, openness, and other norms common to the GNSO.

6.2.1 Term Limits

a. No person should serve in the same Group Officer position for more than four consecutive years. A member who has served four consecutive years must remain out of office for one full term prior to serving any subsequent term in the same Group Officer position. Any exception to this policy would require approval by the Group membership.

6.2.2 Executive Committees

a. All Executive Committees must promptly publish action points, decisions, and any resolutions to Group members. It is recommended that prompt publication means within a reasonable period and a guideline is between 72 hours and 1 week of the relevant meeting.

b. All Executive Committees must publish to Group members their rules and procedures, decision making process and criteria.

6.2.3 Committees

a. Groups should adopt a standard set of rules and procedures to govern Group Committee constitution and operations. Whatever model is adopted, it should be published to the entire Group membership and maintained.

b. The formation of all Committees should be made known to the entire Group membership and eligibility to participate should be open to all members.

c. The fact a Committee has been established and its membership should be made available to the entire Group membership and should be published on the Group website.

d. Action points, decisions and any resolutions and final work products should be made available to the entire Group membership within a reasonable period of any given meeting.

e. Going forward, Groups should publish to the Group membership a list of all active and inactive Committees and their final decisions, resolutions and final work products.

6.2.4 Communications

a. Group mailing lists should be open to the entire Group membership and, at the election of the Group in any given case, to the public. The Group may have reserved lists if needed.

b. The outcome of all Group policy decisions should be open and publicly archived with posting rights limited to members at the election of the Group.

c. Group business, work products, finance and accounts, and submissions to Staff and other ICANN entities should be made available to the entire Group membership unless there are valid grounds for restricting distribution.

d. All Groups should have a published Privacy Policy providing for the protection of the private data of members.

6.2.5 Elections

Groups should publish and maintain a list of all Office holders, past and present, to inform Group members and to provide transparency for term limits.

6.2.6 Voting

a. All Group Charters should clearly delineate the voting rights of all of their members.

b. All Groups should permit all voting members in good standing to vote in elections as delineated in their Charters.

c. Members may be entitled to appoint proxies.

d. No legal or natural person should be a voting member of more than one Group.

6.2.7 Charter Amendments

The procedure for amending Group Charters should be stipulated therein.

6.2.8 Meetings

Groups should adopt simple and accessible basic meeting procedures. Groups also may refer to the GNSO Bylaws, Operating Procedures, and the GNSO Council Working Group Guidelines.

Minutes should be taken at meetings of the general Group membership and action points, decisions and any resolutions or minutes be published to the entire Group membership within a reasonable period.

6.2.9 Policy

a. Eligibility to participate on Policy Committees should be open to all members in good standing.

b. Any Member of a Group should be able to propose the Policy Committee consider a Policy issue in accordance with the Group Charter.

c. Policy Committee meetings should be open for attendance by all Group members.

6.2.10 GNSO Working Group (WG)

a. Any individual participant of a Group should be entitled to join any GNSO WG in an individual capacity and Groups should publish and advise all members of the call for WG participants.

b. Groups should adopt and publish to the Group membership their rules and procedures for selecting and appointing Group representatives to GNSO WGs. It is recommended that these appointments be open to the entire membership to increase opportunities for participation.

c. Group Members may participate in an individual or representative capacity, but Group representatives must advise the entire Group membership of the WG activity from time to time.

Version Control

Version	Date	Description
1.0	24 Sep 2009	New GNSO Operating Procedures adopted by Council
1.1	23 Nov 2009	Council approved text changes that were inadvertently omitted in v1.0 (Seoul)
1.2	28 Jan 2010	Council approved Annex 1 - Board Seat Elections Transition for Seat #13 and directed that a Public Comment Forum be initiated (28 Jan 2010 to 18 Feb 2010).
2.0	5 Aug 2010	Added Table of Contents; placeholder Chapters (6, 8, 9) for anticipated future content; Version Control; and Section 1.3-Definitions to Chapter 1.0. Added new content approved by GNSO Council: 2.1-Term Limits; 2.4-Board Seat Elections; 3.8-Absences and Vacancies; Chapter 4.0-Voting; Chapter 5.0-Statements and Disclosures of Interest; and Chapter 7.0-Stakeholder Groups and Constituencies: Operating Principles and Participation Guidelines.
2.1	7 April 2011	Added APPENDIX 1: GNSO Council Voting Results Table; Removed placeholder Chapter 6.0 (GNSO Work Prioritization) and renumbered Chapter 7.0 to become Chapter 6.0; Removed placeholder Chapters 8.0 (WG Guidelines) and 9.0 (PDP Procedures); Added ANNEX 1 for Council approved Working Group Guidelines; and Added bookmarks and reference links throughout the document.
2.2	8 April 2011	Replaced entire Chapter 5.0-Statements of Interest with language approved by the OSC (4 Feb 2011) and GNSO Council (7 April 2011), which removed references to "Disclosures of Interest" among other amendments; Inserted bookmarks including a link to WG Guidelines (new ANNEX 1); and Deleted all other GOP references to "Disclosures of Interest" consistent with this revision, including the WG Guidelines (ANNEX 1) added in v2.1.
2.3	22 September 2011	Revised text in Chapter 3.0-GNSO Council Meetings: 3.8.1 Absences; 3.8.4 Remedy: Temporary Alternate; and in Chapter 4.0-Voting: 4.5.3 Remedy To Avoid Abstaining on a Vote. The purpose of the revisions was to simplify and clarify the procedures and avoid contradicting the internal procedures of some constituencies. The revisions required renumbering of sections in Chapter 4 and subsequent revisions to references in Chapter 3.0 and Chapter 4.0 to those sections.
2.4	16 December 2011	On 08 December 2011 the ICANN Board of Directors approved a revised Annex A, GNSO Policy Development Process (PDP). See http://www.icann.org/en/minutes/resolutions-08dec11-en htm#2.5. The new PDP is included as the new ANNEX 2 in this revision.
2.5	13 September 2012	Following recommendations of the Standing Committee on Improvements Implementation, added new section on consent agenda (4.9) and updated Appendix A to incorporate changes resulting from adoption of the revised GNSO PDP.
2.6	16 May 2013	Following recommendations of the Standing Committee on Improvements Implementation, revised section 15 of the Policy Development Process (PDP) Manual, Annex 2 of the GNSO Council Operating Procedures, on Termination or Suspension of PDP prior to Final Report.

Version	Date	Description
2.7	13 June 2013	On 13 June 2013 the GNSO Council approved a motion instructing staff to update any sections in the GNSO Operating Procedures that are related to the submission of reports and / or motions to ensure that these are consistent with the new provision that reports and motions should be submitted to the GNSO Council for inclusion on the agenda as soon as possible, but no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days before the GNSO Council meeting.

APPENDIX 1: GNSO Council Voting Results Table

Motion or Action	Reference	Threshold	CPH[10]: (3.3.1)	Conj.	NCPH[11]: (6.6.1)
Create Issue Report	Bylaws: Art X, §3(9)a	> ¼ Both (or) > ½ One	2	AND	4
			4	OR	7
Initiate PDP Within Scope	Bylaws: Art X, §3(9)b	> ⅓ Both (or) > ⅔ One	3	AND	5
			5	OR	9
Initiate PDP Not Within Scope	Bylaws: Art X, §3(9)c	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Approve PDP Team Charter for PDP Within Scope	Bylaws: Art X, §3(9)d	> ⅓ Both (or) > ⅔ One	3	AND	5
			5	OR	9
Approve PDP Team Charter for PDP Not Within Scope	Bylaws: Art X, §3(9)e	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Amendment to an Approved PDP Team Charter	Bylaws: Art X, §3(9)f	>½ Both	4	AND	7
Terminate a PDP (only for a significant cause)	Bylaws: Art X, §3(9)g	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Approve PDP Recommendation Without GNSO Super Majority	Bylaws: Art X, §3(9)h	> ½ Both[12] See footnote	4	AND	7

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[10] CPH = Contracted Parties House

[11] NCPH = Non-Contracted Parties House

[12] Also requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

Approve PDP Recommendation With GNSO Super Majority	Bylaws: Art X, §3(9)i	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Approve PDP Recommendation Imposing New Obligations on Certain Contracting Parties (where a 2/3 vote of the council demonstrates the presence of a consensus)	Bylaws: Art X, §3(9)l	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Modify or Amend an Approved PDP Recommendation (only prior to Board approval)	Bylaws: Art X, §3(9)k	>= ⅔ Both OR >= ¾ One AND > ½ One	5	AND	9
			6	AND	7
			4	AND	10
Elect GNSO Chair	GOP: §2.2a	> 60% Both	5	AND	8
Elect Vice-Chair Each House	GOP: §2.2c	> 50% One	4	OR	7
Elect Board Seat 13	Bylaws: Art X, §3(6)a	> 60% One	5	▨	▨
Elect Board Seat 14	Bylaws: Art X, §3(6)b	> 60% One	▨	▨	8
Remove NCA Each House	Bylaws: Art X, §3(3)	> 75% One	6	OR	10
Remove NCA	Bylaws: Art X, §3(3)	> 75% Both	6	AND	10
Extend Term Limit: Geog/Diversity Circumstance	GOP: §2.1.1	> 60% Both	5	AND	8
Extend Term Limit: New Circumstance	GOP: §2.1.2	> 75% Both	6	AND	10
All Other (Default)	Bylaws: Art X, §3(9)	> ½ Both	4	AND	7

Instructions:

Set forth above are all possible vote counts necessary to effectuate GNSO Council decisions that result from the consensus voting thresholds published in the ICANN Bylaws and GNSO Council Operating Procedures.

Where the threshold action notes a "both" designation, the vote in that column cell that corresponds with the appropriate voting house composition must be combined with the vote total in a second column cell. Where a result indicates "one" the action can be triggered by only the vote count in the column cell that corresponds with the appropriate voting house composition. For example, to create an Issues Report would require (2 votes in the Contracted Parties House combined with 4 votes in the Non-Contracted Parties House) OR (4 votes from the Contracted Parties House or 7 votes in the Non-Contracted Parties House).

Unless otherwise specified, a motion or action affecting a Council Member (e.g., Extend Term Limit) does not require that Councilor to abstain.

The Secretariat shall announce the motion and then call the roll, varying the sequence randomly for each new vote.

Results shall be published by Councilor by House indicating number of votes by category: Yes, No, Abstain (with Reason).

Legend:

CPH = Contracted Parties House
NCPH = Non-Contracted Parties House
GOP = GNSO Operating Procedures
(3.3.1) = Three CPH Members; Three NCPH Members; 1 Voting NCA
(6.6.1) = Six CPH Members; Six NCPH Members; 1 Voting NCA

ANNEX 1: GNSO Working Group Guidelines

Section 1.0: General

1.1 Purpose

The objective of this document is to assist Working Groups to optimize productivity and effectiveness by providing a set of guidelines, checklists, templates, and other 'best practice' materials that they may consider and/or utilize, as appropriate, in the process of establishing the WG and throughout its life cycle.

1.2 Intended Audience

This document is intended to inform the (potential) members of Working Groups that have been created or are in the process of being created by the GNSO or another Chartering Organization[1] to achieve or accomplish one or more objectives or outcomes. It should be noted that the manner in which the output of a WG defined by these guidelines is used is not determined by these guidelines, but rather is determined by the charter of the WG and, if applicable, the relevant ICANN Bylaw definitions such as the Policy Development Process.

While the document is the outcome of an effort started in response to the GNSO reorganization, the guidelines are meant to be applicable to other chartering organizations; hence, reference is made to Chartering Organization or CO as opposed to GNSO Council throughout this document.

1.3 Revisions

As further experience is developed in the management, operation and practice of Working Groups, it is intended that this document will be updated when appropriate. Any proposals for updates or changes should be submitted to the GNSO Council for consideration (please contact the GNSO Secretariat for further information).

The GNSO Council should commit to the annual review of these documents to ensure that documents stay up-to-date.

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[1] These guidelines can also be used when several organizations want to charter a joint working group, such as has been done in the Cross-Community Working Groups (CWG).

Section 2.0: Roles and Responsibilities

2.1 Introductions and Working Group Formation

2.1.1 Announcement of a Working Group

After a decision has been taken to form a Working Group, it is important to circulate a 'Call For Volunteers' as widely as possible in order to ensure broad representation and participation in the Working Group. Depending upon the scope of the Working Group and its intended subject matter, the following avenues could be explored:

- Publication of announcement on relevant ICANN web sites, including by not limited to the GNSO and other Supporting Organization and Advisory Committee web pages.
- Distribution of announcement to GNSO Stakeholder Groups, Constituencies, and/or other ICANN Supporting Organizations and Advisory Committees.
- Circulation of announcement to organizations that are considered to have expertise/knowledge/interest in relation to the subject matter of the Working Group.
- One-to-one outreach from either the GNSO Chair or the Interim WG Chair to the Chair of other ICANN Supporting Organizations and Advisory Committees either known to have an interest in the subject, or those where it is felt that their input into the discussions will be valuable. Individuals known to be knowledgeable or interested could be similarly approached.

Ideally, the 'Call For Volunteers' announcement should include the following types of information about the Working Group: its objective(s), expectations concerning activities and timeframes, links to relevant background information including its charter, details on how to sign up as a participant, and the requirement to submit a Statement of Interest (SOI). In addition, a Chartering Organization (CO) might want to include some statement as to the importance of the activity, that is, why the effort is being undertaken, its criticality, context, and perceived usefulness to the GNSO. While a WG may not "need to know" these elements in order to complete their tasks, it could help in recruitment and sense of purpose. In addition, the announcement should include a link to these Working Group Guidelines as well as any other instructions or information that might be applicable to that particular Working Group.

2.1.2 Membership Applications

The Chartering Organization Secretariat or their representative, herein after referred as the Secretariat, will be tasked to gather expressions of interest to participate in a WG. Following the submission of an expression of interest, the Secretariat will verify that the submission has been received from a 'real person.' If the expression of interest has been made on behalf of a company or organization, a primary point of contact and alternate will be required in order to be eligible for WG membership.

Upon completion of the 'real person' verification, the Secretariat will send a confirmation of receipt together with a request for a Statement of Interest (SOI), according to GNSO Operating Procedures, Chapter 5.0, and a link to these Working Group Guidelines.

Appeals Process

If concerns about the completeness and/or accuracy of a Statement of Interest persist after reasonable attempts are made to resolve them with the Relevant Party, the matter shall be brought to the attention of the applicable Chair and handled according to decision-making methodology and appeal process as prescribed in Sections 3.6 and 3.7.

2.1.3 Planning the First Meeting

The responsible ICANN Staff member will coordinate with the Chair, Interim Chair or Chartering Organization (as appropriate) on the timing and proposed agenda for the first meeting of the WG. In addition, the ICANN Staff member is expected to provide the members of the WG with the relevant background information, including any relevant historical data, and recommended materials for review prior to the first meeting, including, but not limited to, a link to these Working Group Guidelines.

Once a date and time has been identified, the Secretariat will send out the call-in details to all the members of the WG.

2.1.4 First Meeting of the Working Group

2.1.4.1 Introductions

For team-building purposes, to understand its resources and capabilities and, potentially, to help with prospective assignments, members of the Working Group should be provided with the opportunity, at the start of the first meeting, to share information regarding interests, background, skills, experience, especially as related to any requirements in the Charter.

Members of the Working Group should be informed that all Working Groups are normally expected to operate under the principles of transparency and openness, which means, *inter alia*, that mailing lists are publicly archived, meetings are normally recorded and/or transcribed, and SOIs are required from Working Group participants which will be publicly posted.

2.1.4.2 Election of the WG Leaders

Unless a Chair has already been named by the Chartering Organization, normally a Chair will be selected at the first meeting of the WG. Until that time, the Chartering Organization's liaison may fulfill the role of interim Chair. A Working Group may elect to have Co-Chairs and Vice-Chairs. Under extraordinary circumstances, ICANN staff may be requested to perform administrative co-ordination of the WG until such time a Chair can be appointed. Once selected, a Working Group Chair will need to be confirmed by the Chartering Organization (CO). The newly elected Chair will act on a provisional basis until the Chartering Organization has confirmed the appointment. If there are any objections to the selected Chair, the CO will conduct a vote to establish whether there is sufficient support for the selected Chair according to the voting procedures of the CO. If not, the Working Group will be requested to reconsider their choice for Chair and return to the CO with a new proposal.

In the unlikely event that the selected Chair is rejected by the CO, the CO must articulate its reason for the rejection and the WG must be able to ask for reconsideration of the decision.

2.1.4.3 Items for Review

At the first meeting of the WG or as soon thereafter as practicable, the following documents should be reviewed in order to ensure all members have a common understanding of the WG's mission, goals, objectives, deliverables, decision-making process and timeframes: Charter, Working Group Guidelines and any other documents relevant for the WGs discussion (e.g., Policy Development Process Guidebook, Issues Paper). These documents are normally transmitted to the WG prior to the first meeting. It is required that WGs develop a work plan that outlines the necessary steps and expected timing in order to achieve the milestones set out in the WG Charter. If a WG does not develop a work plan, it will need to provide a justification to the Chartering Organization.

If the Chartering Organization has specified that it would like the WG to complete a formal Self-Assessment, it may be helpful to participants to review the questionnaire (see Section 7.0) in advance so that, as plans unfold and deliberations proceed, members have an understanding of the information that will be asked at the conclusion of the team's work.

The WG Chair may use the following checklist ~~(see Addendum)~~ for ~~further details assistance.~~

Checklist	**Yes/No**
Have all WG members submitted Statements of Interest?	
Introduction of WG members	
Inform members that WG will operate under the principles of transparency and openness (i.e., mailing lists are publicly archived, meetings are recorded / transcribed)	
Review of WG's mission, goals, objectives, deliverables, decision-making process, timeframes and any other documents relevant for the WG‟s discussion	
Review WG Self-Assessment Questionnaire (see Section 7.0)	
Development of a work plan	
Schedule for future meetings of the WG	

If the Chartering Organization has specified that it would like the WG to complete a formal Self-Assessment, it may be helpful to participants to review the questionnaire (see Section 7.0) in advance so that, as plans unfold and deliberations proceed, members have an understanding of the information that will be asked at the conclusion of the team's work.

2.2 Working Group Member Roles and Responsibilities

The following is a description of standard WG roles. Typically, the Charter will outline the desired qualities and skills a WG Chair should possess, the role and name of the official liaison to the Chartering Organization, and any key Staff or other experts assigned to the WG. Any additional roles that are not included here should be listed in the WG Charter, including a description and minimal set of functions/duties to the extent that the chartering organization might wish to specify them.

A suggested procedure to conduct elections may be:

- Nominations or self-nominations;
- Statements of qualifications from candidates, which sets forth the qualifications, qualities and experience that they possess that will serve the particular WG;
- Vote by simple majority;
- Notification of and subsequent confirmation by the Chartering Organization of results of actions.

2.2.1 Chair

The purpose of a Chair is to call meetings, preside over working group deliberations, manage the process so that all participants have the opportunity to contribute, and report the results of the Working Group to the Chartering Organization. The Chair should underscore the importance of achieving overall representational balance on any sub-teams that are formed. The Chair should make it clear that participation on sub-teams is open to all and he/she should encourage representational balance to the degree possible. However, it should be understood that there will not always be volunteers from every interest group and that it is often acceptable to have a small sub-team that is not totally representational perform an initial role that will later be reviewed by a broader more representational group. In those cases where initially there is insufficient balance, the Chair should make a special outreach effort to those groups not represented. In all cases where the Chair believes that one set of interests or expertise is missing from a group, special efforts must be made to bring that interest or expertise into the group via invitation or other method and the situation must be documented in the final report, including a discussion of the efforts made to redress the balance. Additionally, the Chair should ensure that particular outreach efforts are made when community reviews are done of the group's output, to include reviews from the interests or expertise that were not adequately represented. The Chair should always encourage and, where necessary, enforce the ICANN Standards of Behavior (see 3.0 Norms).

2.2.2 Co-Chairs or Vice-Chairs

Appointing a co-chair(s) or vice-chair(s) may facilitate the work of the Chair by ensuring continuity in case of absence, sharing of workload, and allowing the Chair to become engaged in a particular debate.

2.2.3 Secretary

Note taker and recorder of the WG’s activities (Note: this role could also be fulfilled by ICANN Staff).

2.2.4 Liaison

A Member of the Chartering Organization (CO) may be appointed to serve as a Liaison to the Working Group. The role of the Liaison consists of reporting to the CO on a regular basis on the progress of the Working Group; assisting the Chair as required with his/her knowledge of WG processes and practices; taking back to the CO any questions or queries the WG might have in relation to its charter and mission; and, assisting or intervening when the WG faces challenges or problems. The liaison is expected to fulfill the liaison role in neutral manner, monitor the discussions of the Working Group and assist and inform the Chair and the WG as required.

2.2.5 Members

WG members as a whole are expected to participate, contribute and drive the work of the group. It is the responsibility of the WG members to make sure that any initial drafts represent as much of the diversity of views as possible. This may be done by either asking multiple WG members to contribute text that may be assembled with the help of staff, or for a drafting subgroup to be established to produce such an initial draft. While staff may be asked to help in assembling initial drafts, the WG is responsible for driving the work. Examples of member responsibilities include:

- Develop and draft working-group documents;
- Contribute ideas and knowledge to working group discussions;
- Act as liaisons between the Working Group and their respective stakeholder groups or constituencies;
- Ensure that stakeholder group or constituency statements are developed in an informed and timely way; and
- Actively and constructively participate in the consensus decision making process.

2.2.6 Staff

ICANN Staff performs the following two basic functions for any WG, namely secretariat (fundamentally a support function covering logistics) and policy liaison (a support function providing WG assistance in a neutral manner, including drafting, if required, which should reflect faithfully the deliberations of the Working Group). In addition, workload permitting, ICANN Staff may perform the following distinct roles for a WG as requested and appropriate:

- Expertise (technical, legal, economic, etc.);
- Operational/Implementation (facilitation with the framework of existing policies and rules);
- Scoping (for policy matters, internal role of the General Counsel, but possibly distinct, guaranteeing respect of the procedures and competencies of the different structures); or
- Liaison with other Staff or experts.

2.3 Use of Sub-Teams

The WG may decide to employ sub-teams as an efficient means of delegating topics or assignments to be completed. Sub-team members need to have a clear understanding of issues they work on as well as the results to be achieved. The members of sub-teams report their results to whole working group for review and approval. The WG should indicate whether or not it would like to have meetings of the sub-team recorded and/or transcribed.

Any member of the WG may serve on any sub-team; however, depending upon the specific tasks to be accomplished, the Chair should ensure that the sub-team is properly balanced with the appropriate skills and resources to ensure successful completion. It is recommended that the sub-team appoints a coordinator who heads up the sub-team and is responsible for providing regular progress updates to the Working Group. There is no need for formal confirmation by the CO or WG of such a coordinator.

The lifespan of a sub-team should not extend beyond that of the Working Group.

Decisions made by sub-teams should always be shared with the larger working group and a call for consensus must be made by the entire WG.

Section 3.0: Norms

3.1 Participation

Members of a WG are expected to be active participants, either on the WG mailing lists and/or in the WG meetings, although some might opt to take an observer approach (monitor mailing lists and/or meetings). The WG Chair is expected to make an assessment at the start of every meeting whether a sufficient number of WG members are present to proceed with the meeting and discussions. A sufficient number has not been defined in exact numbers in this context, but should be understood as having a representative number of WG members present. For example, the Chair may decide that there is not a sufficient number of WG present to make decisions, but that there is a sufficient number of WG members to have initial discussions on a certain issue and following those initial discussions encourage members on the mailing list to share their views before a decision is made at a subsequent meeting. An attendance record will be kept of every WG meeting.

If there is lack of participation resulting in meetings being cancelled and/or decisions being postponed, the Chair is expected to explore the reasons (e.g. issues with the schedule of meetings, conflict with other activities or priorities) and attempt to address them (e.g. review meeting schedule). If there is no obvious way to address the situation, the Chair should approach the Chartering Organization, Stakeholder Groups, or Constituencies for assistance (e.g. request for additional volunteers to the WG) on whether there is sufficient interest from the community to continue or whether the work should be delayed.

3.2 Representativeness

Ideally, a Working Group should mirror the diversity and representativeness of the community by having representatives from most, if not all, CO Stakeholder Groups and/or Constituencies. It should be noted that certain issues might be more of interest to one part of the community than others. The Chair, in cooperation with the Secretariat and ICANN Staff, is continually expected to assess whether the WG has sufficiently broad representation, and if not, which groups should be approached to encourage participation. Similarly, if the Chair is of the opinion that there is over-representation to the point of capture, he/she should inform the Chartering Organization.

3.3 Process Integrity

WGs are encouraged to focus and tailor their work efforts to achieve the identified goals of the Charter. While minimum attendance and participation requirements are not explicitly recommended, a Chair is expected, as outlined above, to take the necessary measures to ensure that all WG members have an opportunity to provide their input on issues and decisions. WG members should be mindful that, once input/comment periods have been closed, discussions or decisions should not be resurrected unless there is group consensus that the issue should be revisited in light of new information that has been introduced. If the reopening is perceived as abusive or dilatory, a WG member may appeal to the Chair (see Section 3.7).

Members are expected to participate faithfully in the WG's process (e.g., attending meetings, providing input OR monitoring discussions) and should formally withdraw if they find that they can no longer meet this expectation. Working group members may request a review by the Chair if a member disrupts the work or decision-making of the group as a result of inconsistent participation. It should be noted that there are no rules or requirements as to what constitutes sufficient or adequate 'participation;' this is an assessment that each WG member should make individually.

Public comments received as a result of a public comment forum held in relation to the activities of the WG should be carefully considered and analyzed. In addition, the WG is encouraged to explain their rationale for agreeing or disagreeing with the different comments received and, if appropriate, how these will be addressed in the report of the WG.

3.4 Individual/Group Behavior and Norms

ICANN's Expected Standards of Behavior are outlined in the ICANN Accountability and Transparency Framework, see http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf for further details. [2]

If a WG member feels that these standards are being abused, the affected party should appeal first to the Chair and Liaison and, if unsatisfactorily resolved, to the Chair of the Chartering Organization or their designated representative. It is important to emphasize that expressed disagreement is not, by itself, grounds for abusive behavior. It should also be taken into account that as a result of cultural differences and language barriers, statements may appear disrespectful or inappropriate to some but are not necessarily intended as such. However, it is expected that WG members make every effort to respect the principles outlined in ICANN's Expected Standards of Behavior as referenced above.

3.5 Rules of Engagement

This section contains procedures for handling any member that is perceived to be persistently and continually obstructing the Working Group's efforts.

The Chair, in consultation with the Chartering Organization liaison(s), is empowered to restrict the participation of someone who seriously disrupts the Working Group. Any such restriction will be reviewed by the Chartering Organization. Generally, the participant should first be warned privately, and then warned publicly before such a restriction is put into place. In extreme circumstances, this requirement may be bypassed. This restriction is subject to the right of appeal as outlined in Section 3.7.

3.6 Standard Methodology for Making Decisions

The Chair will be responsible for designating each position as having one of the following designations:

- **Full consensus** - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as **Unanimous Consensus.**
- **Consensus** - a position where only a small minority disagrees, but most agree[3].

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[2] Other best practices that can be considered include the 'Statement on Respectful Online Communication', see http://www.odr.info/comments.php?id=A1767_0_1_0_C.

[3] For those that are unfamiliar with ICANN usage, you may associate the definition of 'Consensus' with other definitions and terms of art such as rough consensus or near consensus. It should be noted, however, that in the case of a GNSO PDP originated Working Group, all reports, especially Final Reports, must restrict themselves to the term 'Consensus' as this may have legal implications.

- **Strong support but significant opposition** - a position where, while most of the group supports a recommendation, there are a significant number of those who do not support it.
- **Divergence** (also referred to as **No Consensus**) - a position where there isn't strong support for any particular position, but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it is due to the fact that no one has a particularly strong or convincing viewpoint, but the members of the group agree that it is worth listing the issue in the report nonetheless.
- **Minority View** - refers to a proposal where a small number of people support the recommendation. This can happen in response to a **Consensus**, **Strong support but significant opposition**, and **No Consensus;** or, it can happen in cases where there is neither support nor opposition to a suggestion made by a small number of individuals.

In cases of **Consensus**, **Strong support but significant opposition**, and **No Consensus**, an effort should be made to document that variance in viewpoint and to present any **Minority View** recommendations that may have been made. Documentation of **Minority View** recommendations normally depends on text offered by the proponent(s). In all cases of **Divergence,** the WG Chair should encourage the submission of minority viewpoint(s).

The recommended method for discovering the consensus level designation on recommendations should work as follows:

i. After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair, or Co-Chairs, make an evaluation of the designation and publish it for the group to review.

ii. After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation.

iii. Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group.

iv. In rare case, a Chair may decide that the use of polls is reasonable. Some of the reasons for this might be:

    - A decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.
    - It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between **Consensus** and **Strong support but Significant Opposition** or between **Strong support but Significant Opposition** and **Divergence.**

Care should be taken in using polls that they do not become votes. A liability with the use of polls is that, in situations where there is **Divergence** or **Strong Opposition**, there are often disagreements about the meanings of the poll questions or of the poll results.

Based upon the WG's needs, the Chair may direct that WG participants do not have to have their name explicitly associated with any Full Consensus or Consensus view/position. However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls where taken.

If a Chartering Organization wishes to deviate from the standard methodology for making decisions or empower the WG to decide its own decision-making methodology it should be affirmatively stated in the WG Charter.

Consensus calls should always involve the entire Working Group and, for this reason, should take place on the designated mailing list to ensure that all Working Group members have the opportunity to fully participate in the consensus process. It is the role of the Chair to designate which level of consensus is reached and announce this designation to the Working Group. Member(s) of the Working Group should be able to challenge the designation of the Chair as part of the Working Group discussion. However, if disagreement persists, members of the WG may use the process set forth below to challenge the designation.

If several participants[4] in a WG disagree with the designation given to a position by the Chair or any other consensus call, they may follow these steps sequentially:

1. Send email to the Chair, copying the WG explaining why the decision is believed to be in error.
2. If the Chair still disagrees with the complainants, the Chair will forward the appeal to the CO liaison(s). The Chair must explain his or her reasoning in the response to the complainants and in the submission to the liaison. If the liaison(s) supports the Chair's position, the liaison(s) will provide their response to the complainants. The liaison(s) must explain their reasoning in the response. If the CO liaison disagrees with the Chair, the liaison will forward the appeal to the CO. Should the complainants disagree with the liaison support of the Chair's determination, the complainants may appeal to the Chair of the CO or their designated representative. If the CO agrees with the complainants' position, the CO should recommend remedial action to the Chair.
3. In the event of any appeal, the CO will attach a statement of the appeal to the WG and/or Board report. This statement should include all of the documentation from all steps in the appeals process and should include a statement from the CO.[5]

3.7 Appeal Process

Any WG member that believes that his/her contributions are being systematically ignored or discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG Chair. In the event that the matter cannot be resolved satisfactorily, the WG member should request an

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[4] Any Working Group member may raise an issue for reconsideration; however, a formal appeal will require that that a single member demonstrates a sufficient amount of support for initiating an appeal before the formal process outlined in Section 3.7 can be invoked. In those cases where a single Working Group member is seeking reconsideration, the member will advise the Chair and/or Liaison of their issue and the Chair and/or Liaison will work with the dissenting member to investigate the issue and to determine if there is sufficient support for the reconsideration to initial the appeal process set forth in Section 3.7.

[5] It should be noted that ICANN also has other conflict resolution mechanisms available that could be considered in case any of the parties are dissatisfied with the outcome of this process.

opportunity to discuss the situation with the Chair of the Chartering Organization or their designated representative.

In addition, if any member of the WG is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2 of this document, the same appeals process may be invoked.

Section 4.0: Logistics and Requirements

4.1 Session Planning – General Meeting Logistics

The Chair will normally work with ICANN Staff and/or the Secretariat to coordinate the logistics for the WG meetings. Online tools are available that may be used to find a day and time convenient for most WG participants. It should be noted, however, that scheduling tools should follow the preference of the majority and accommodate those that are in different time zones. Alternating meeting times should be considered as an option if the same members of the WG are always 'inconvenienced' by a standing meeting time. WGs should decide how often they would like to meet (e.g., weekly, every two weeks) and for how long (e.g., 1 hour, 1.5 hours).

The Secretariat is responsible for communicating the timing and dial-in details for meetings that take place by conference call. Universal Standard Time (UTC) is used as a standard reference (local times can be found using www.timeanddate.com). Dial out support and/or toll free numbers, when available, will be provided to WG members to facilitate participation. Additionally, to facilitate remote participation and sharing of documents, WGs may make use of various online connect services. As described above, meetings are normally recorded and transcribed.

There is a presumption of full transparency in all WGs. In the extraordinary event that the WG should require confidentiality, it is up to that WG to propose a set of rules and procedures in collaboration with the CO.

WGs may opt to organize face-to-face meetings during ICANN meetings to take advantage of those members attending and to open its session to the broader ICANN community. It should be noted that not all WG members may attend an ICANN meeting, a factor that should be weighed in deciding whether to arrange a face-to-face session. Best efforts should be made to provide remote participation facilities for those not attending an ICANN meeting in person.

Apart from face-to-face sessions during ICANN meetings, WGs might decide that it is vital for its deliberations and/or reaching consensus to meet in person for a certain amount of time (e.g., day, two days). If funding is required to organize such a meeting (e.g., travel expenses), a request should be made to the Chartering Organization for approval with as much advance notice as possible[6].

A WG may request additional tools or applications if considered necessary to achieve the objectives set out in its Charter.

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[6] Please note that the ICANN Budget is finalized and approved in advance of each fiscal year so if general funds are not available for a need like this, it may be difficult to obtain funding.

The Chair, with support of ICANN Staff, if required, is expected to circulate the draft agenda to the WG ideally at least 24 hours in advance. At the start of a meeting, the Chair should review the agenda and any proposed changes to that agenda.

Following the meeting, an MP3 recording and/or transcript will be made available for those who were not able to attend and/or other interested parties. In addition, a WG may consider using action items and/or notes from the meeting to record the main decisions or follow-up items from a meeting. The action items or meeting notes should be circulated in a timely manner in order to allow for sufficient preparation or response ahead of the next meeting.

4.2 Communication/Collaboration Tools

Each Working Group will have a dedicated mailing list. Working Group mailing lists are publicly archived (e.g., on the GNSO web site (http://gnso.icann.org). In addition, WGs may make use of collaborative workspaces such as Wikis (see https://community.icann.org). WGs are free to make use of different document formats, but it might be helpful to come to an agreement, in advance, to ensure that all members are able to work with them.

4.3 Translation

ICANN uses the following translation principles:

ICANN will provide timely and accurate translations, and move from an organization that provides translation of texts to one that is capable of communicating comfortably with a range of different languages. The translation framework comprises a four-layer system:

- The bottom layer contains those specific documents and publications that address the organization's overall strategic thinking. They will be translated into an agreed block of languages.
- The next layer contains a class of documents that ICANN undertakes to provide in different languages to allow interaction within ICANN processes by non-English speakers.
- The third layer comprises documents suggested by ICANN staff as being helpful or necessary in ongoing processes; and documents requested by the Internet community for the same reasons. These documents will be run through a translation approval system.
- The top layer is where the community is encouraged to use online collaborative tools to provide understandable versions of ICANN materials as well as material dynamically generated by the community itself. ICANN will provide the technology for community editing and rating, and a clear and predictable online location for this interaction to occur. It will also seek input from the community to review the tools.

English will remain the operating language of ICANN for business consultation and legal purposes.

Every effort will be made to ensure equity between comments made in languages other than English and those made in English. If it is not possible to arrange the release of particular documents in the agreed languages at the same time, then each language will be provided with the same time period in which to make comments.

ICANN will adopt the International Organisation for Standardisation's 639-2 naming system for identifying and labeling particular languages.

4.4 Briefings and Subject Matter Experts

If the WG determines that it needs additional educational briefings occurring upfront or as issues emerge during deliberations, it should identify its specific requests to the CO including subject matter(s), type(s) of expertise, objectives, and costs. If additional costs are involved, prior approval must be obtained from the CO.

Additionally, a WG may, at any stage throughout its deliberations, decide to seek input from self-formed groups and/or individuals with the aim of further informing WG members about matters that fall within the remit of the WG and which are of interest to the ICANN community.

Section 5.0: Products and Outputs

The products and outputs of a Working Group may be prescribed by the Charter such as a report, recommendations, guidelines, self-assessment or defined by the process under which the WG operates (e.g., Policy Development Process). In addition, the Working Group might decide that additional products or outputs are required in order to carry out its Charter in an efficient and productive manner such as a statement of work or a project plan. Working Groups should be encouraged to review products and outputs from other WGs and/or consult with ICANN Staff to decide what additional products or outputs would be advisable to develop. Links to some examples of products and outputs produced by other GNSO Working Groups can be found hereunder:

- Initial Report – IRTP Part A WG Initial Report
- Final Report – GNSO Final Report on Domain Tasting
- Public Comment Review Sheet – Fast Flux Public Comments Review
- Recommendations/Guidelines – New gTLDs Principles, Recommendations & Implementation Guidelines
- Stakeholder Group/Constituency Statement Template – IRTP Part B Constituency Statement Template
- Public Comment Announcement Text – Post-Expiration Domain Name Recovery Public Comment Announcement
- WG Self Assessment Template (~~TBD~~ See Section 7.0.))

Section 6.0: Charter Guidelines

This section of the document is intended to assist any Chartering Organization in its effective implementation of Working Groups by providing a set of guidelines, checklists, templates, and other 'best practice' materials that it should consider and/or utilize, as appropriate, in creating, chartering, staffing, and guiding a Working Group (WG) to accomplish some desired outcome. The term “Chartering Organization” (CO), in this context, can be any formal entity or informal grouping of individuals that wishes to generate a WG Charter document.

These Guidelines are organized into three major sections as follows:

Section 6.1: Contains suggestions and recommendations related to the implementation of Working Groups.

Section 6.2: Is organized and structured to be a template containing specific elements that are recommended to be considered by any CO intending to produce a specific Working Group Charter document.

Section 6.3: Contains background information informing the effort to create this document.

6.1 General Working Group Implementation Guidelines

Introduction: This Section contains suggestions and recommendations related to the general implementation of Working Groups. For those engaged in drafting a specific Working Group Charter, please see Section 6.2 below for further details.

6.1.1 Announcement of a Working Group

After a decision has been taken to form a Working Group, it is important to circulate a ‘Call For Volunteers’ as widely as possible in order to ensure broad representation and participation in the Working Group. Depending upon the scope of the Working Group and its intended subject matter, the following avenues are required to be utilized as the default rule, subject to exceptions only in extraordinary circumstances:

- Publication of announcement on the relevant ICANN web sites.
- Distribution of announcement to appropriate Stakeholder Groups, Constituencies, and/or other ICANN Supporting Organizations and Advisory Committees.

Nothing in the foregoing is intended to limit the wider distribution of the call for volunteers. For example, the WG could consider:

- Circulation of announcement to organizations that are considered to have expertise/knowledge/interest in relation to the subject matter of the Working Group.

Ideally, the ‘Call For Volunteers’ announcement should include the following types of information about the Working Group: its objective(s), expectations concerning activities and timeframes, links to relevant background information including its charter, details on how to sign up as a participant, and the requirement to submit a Statement of Interest (SOI). In addition, a CO might want to include some statement as to the purpose of the activity, that is, why the effort is being undertaken, its criticality, context, and perceived usefulness to the Chartering Organization. While a WG may not "need to know" these elements in order to complete their tasks, it could help in recruitment and sense of purpose.

6.1.2 Transparency and Openness

All Working Groups are expected to operate under the principles of transparency and openness, which means, *inter alia*, that mailing lists are publicly archived, meetings are normally recorded and/or transcribed, and SOIs are required from Working Group participants and will be publicly available. It is important that prospective Working Group members are made aware of these principles.

6.1.3 Purpose, Importance, and Expectations of the Chair

While open Working Groups may offer many benefits in terms of broad participation and support, it is equally important that inclusiveness does not compromise effectiveness. An experienced Chair with strong leadership and facilitation skills will be a key ingredient of a successful outcome. He or she should be able to distinguish between participants who offer genuine reasons for dissent and those who raise issues in an effort to block progress. The Chair should have the authority to enforce agreed upon rules applicable to anyone trying to disrupt discussions and be able to exclude individuals in certain cases, provided an avenue of appeal is available. In addition, the Chair should be able to ensure that anyone joining a Working Group after it has begun has reviewed all documents and mailing list postings and agrees not to reopen previously decided questions. However, if there is support from the Chair to reopen an issue in light of new information that is provided either by a new member or an existing member of the Working Group, this should be possible.

The Chair is expected to assume a neutral role, refrain from promoting a specific agenda, and ensure fair treatment of all opinions and objectivity in identifying areas of agreement. This does not mean that a Chair experienced in the subject manner cannot express an opinion, but he or she should be explicit about the fact that a personal opinion or view is being stated, instead of a 'ruling of the chair.' However, a Chair should not become an advocate for any specific position. The appointment of co-chairs could be considered and is encouraged as a way to share the burden, provide continuity in case of absence of the Chair as well as allowing group leaders to rotate their participation in the discussion. In addition, in certain circumstances the CO may decide that it must appoint a completely neutral and independent Chair who would not participate in the substance of the discussions. In such circumstances, the Chair would be appointed by the CO.

Ideally, a Chair should have sufficient and substantive process expertise, possess leadership skills and be skilled in consensus building.

The Chartering Organization, working with the Staff, might consider the use of a professional facilitator, in certain circumstances, to help a Chair ensure neutrality and promote consensus or to provide other capabilities and expertise.

6.1.4 Other Important Roles

There are a number of other roles that a Chartering Organization should consider including:

- **Chartering Organization Liaisons** – A Member of the Chartering Organization (CO) is appointed to serve as a Liaison to the Working Group. The role of the Liaison consists of reporting to the CO on a regular basis on the progress of the Working Group; assisting the Chair as required with his/her knowledge of WG processes and practices; taking back to the CO any questions or queries the WG might have in relation to its charter and mission; and, assisting or intervening when the WG faces challenges or problems. The Liaison is expected to play a neutral role, monitor the discussions of the Working Group and assist and inform the Chair and the WG as required. The CO is therefore strongly encouraged to appoint an individual to the role of liaison who is expected to remain neutral and fulfill the role as described above.
- **Expert Advisors/Consultants** – If deemed necessary to fulfill the charter obligations, a CO may consider inviting one or more expert advisors or consultants to participate in the WG. If there are budget implications related to the participation of such external resources, funding should be confirmed in advance with the appropriate ICANN Staff organization.
- **ICANN Staff** – the following distinct Staff roles may be assigned to a WG:
    - Expertise (technical, legal, economic, etc.)
    - Secretariat (fundamentally a support function covering both logistics and drafting assistance in a neutral manner reflecting faithfully the deliberations of the Working Group)
    - Operational/Implementation (facilitation with the framework of existing policies and rules)
    - Scoping (for policy matters, internal role of the General Counsel, but possibly distinct, guaranteeing respect of the procedures and competencies of the different structures)

6.2 Working Group Charter Template[7]

Introduction: This Section of the Guidelines is organized and structured to be a template containing specific elements that are recommended to be considered by any group intending to produce a specific Working Group Charter document.

Disclaimer: The reader is cautioned that, while this template was designed to be comprehensive in terms of topics that might be applicable to a wide range of circumstances, not all Working Group Charters need to contain each and every section outlined below. Charter drafters are encouraged to consider all of the elements contained herein, but should feel unconstrained in skipping any section(s) that are not relevant to a particular purpose or adding additional sections that are specific to the particular WG effort. However, the following sections are required like 6.2.1, 6.2.2, 6.2.3 and all associated sub-sections.

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[7] The Chartering Organization will be responsible for drafting the charter and may follow its own internal procedures for completing and/or assigning this task.

6.2.1 Working Group Identification

This section of the Charter should identify the name/identity of the Working Group and any sponsoring motion (as well as links/pointers) that establishes the Charter, if applicable. Drafters are also encouraged to identify which version of these Guidelines was referenced in preparing the Charter document. Specific elements that might be included in this section are:

- *Name of WG*
- *Name of Appointed Liaison(s)*
- *Names of Advisers to the WG, if any*
- *Name of WG Chair, if appointed in advance [Note: the Liaison may serve as Interim Chair until a Chair selected by the WG and confirmed by the CO]*
- *URL of any WG Workspace(s) and WG mailing list archives, if available*
- *Links to other ICANN documents or initiatives, including past documents or initiatives, that might have a bearing on the WGs discussions and deliberations*

Links to documents and/or decisions that have led to the creation of the WG

6.2.2 Mission, Purpose, and Deliverables

6.2.2.1 Mission and Scope

A well-written mission statement is characterized by its specificity, breadth and measurability.

The Scope of a WG should outline the boundaries within which the WG is expected to operate, e.g., in the context of a GNSO policy development process, the scope of a WG is limited to consideration of issues related to gTLDs and within ICANN's mission.

6.2.2.2 Objectives and Goals

The objectives/goals should clearly set out the issues that the WG is supposed to address. This could, for example, be in the form of a number of questions that the WG is expected to answer. In addition, objectives/goals could also include specific activities such as the organization of a workshop or production of certain documents. In general, well-defined objectives will structure and facilitate the deliberations of the WG and should be written clearly and concisely to minimize questions and confusion.

A provision should be considered that encourages the WG to request clarity from the CO if it feels it cannot carry out its tasks and responsibilities due to perceived uncertainties or limitations within the Charter. Furthermore, a WG has the possibility to renegotiate potential changes to the Charter if deemed necessary in order to achieve the objectives and goals set out.

6.2.2.3 Deliverables and Timeframes

A Charter is expected to include some, if not all, of the following elements: potential outcomes and/or expected deliverables, key milestones, and a target timeline - all of which can, if necessary, be further refined by the WG at its onset in conjunction with the CO. Although the identification of specific work tasks, outcomes, and deadlines might be perceived as constraining the WG in its activities, it is also intended to provide guidance to the WG and prevent unintentional scope creep. It should be emphasized that the WG can always ask the CO to reconsider any of the deliverables or renegotiate deadlines identified by providing its rationale.

In certain WGs, such as a Policy Development Process, the milestones and timeline might be prescribed by the ICANN Bylaws. In other situations, sufficient thought should be given to key milestones, realistic timelines, and ways to inform and consult the ICANN Community (such as public comment periods). It should be noted that any changes to milestone dates incorporated in the charter will need to be cleared with the CO.

6.2.3 Formation, Staffing, and Organization

6.2.3.1 Membership Criteria

This section of the charter should contain the chartering organization's guidance to the Working Group in terms of membership/staffing and may specify certain types of knowledge/expertise needed or desired, balance in skills/background/interest, openness to the ICANN community and its modus operandi, sizing elements/factors, and any limitations or restrictions to individuals previously banned from participating in a WG for cause.

6.2.3.2 Group Formation, Dependencies, and Dissolution

This section should outline information about the proper formation and instantiation of the Working Group (e.g., date, place, logistics). It would also indicate any dependencies or relationships with other groups, if applicable. Further information might be included addressing under what conditions the WG is dissolved.

6.2.3.3 Working Group Roles, Functions, and Duties

This section is intended to describe the WG roles that exist (e.g., Chair, Vice-Chair, Secretary, Liaison, Expert Advisor, Staff). A description of standard WG roles [provide list of standard roles] can be found in the WG Guidelines [include reference]. A reference to this section should be included in the Charter. Any additional roles that are not included in the WG Guidelines should be listed here including a description and minimal set of functions/duties to the extent that the chartering organization might wish to specify them.

6.2.3.4 Statements of Interest (SOI)

This section will contain guidelines relating to the elements and content of SOIs that each member of the WG is required to supply to the team. [See GNSO Operating Procedures, Chapter 5.0, for provisions related to Statements of Interest]
Further guidance is provided in Section 2.1.2 of this document on how to deal with any participant that does not provide an SOI despite multiple requests and reminders.

6.2.4 Rules of Engagement

The intention of this section is to provide a place in the Charter for those situations where a sponsor or chartering organization wishes to emphasize the rules of engagement or impose specific overarching 'rules of engagement' that will apply to the WGs deliberations and activities. The standard rules of engagement, including behavior and norms, are explained in further detail in Section 3.0 of this document.

6.2.4.1 Decision Making Methodologies

The standard methodology for making decisions is incorporated in Section 3.6 of this document and should be reproduced/referenced in the WG's charter. If a chartering organization wishes to deviate from the standard methodology for making decisions or empower the WG to decide its own decision-making methodology it should be affirmatively stated in this section.

6.2.4.2 Status Reporting

This section of the Charter should stipulate the types of status reports requested (e.g., Chair or Liaison update), frequency of reporting, and any guidance to the WG in terms of expected substance/content, e.g. status of deliberations, significant agreements/disagreements, how often are meetings held, how many active participants are there, role assignments, etc. It should also specify if there is a requirement for status updates at set times, e.g., two weeks prior to an ICANN meeting[8]*. If the CO has a standard for reporting, it can be included here by reference.*

6.2.4.3 Problem/Issue Escalation and Resolution Processes

The standard methodology for problem/issue escalation and resolution is incorporated in Section 3.4, 3.5 and 3.7 of this document and should be reproduced in the WG's charter. If a chartering organization wishes to deviate from the standard methodology for problem/issue escalation and resolution, and empower the WG to decide its problem/issue escalation and resolution methodology it should be affirmatively stated in this section.

6.2.4.4 Closure and Working Group Self-Assessment

This section of the Charter should describe any instructions for WG final closure including any feedback and/or self-assessment that is requested by the Chartering organization. This section might also indicate if there is any specific format, template, or prescribed manner in which the feedback is to be provided.

Charter Document History

This section should record key changes to the WG Charter, that take place after the adoption of the Charter by the CO.

6.3 Revisions

The original drafters of this document intended that its contents be continually revised and improved as individuals and groups gain experience with Working Groups and utilize these guidelines in writing charter documents. Comments about this document, including suggestions for revision may be directed to: policy-staff@icann.org. When offering suggestions for update, please cite the section, chapter, page number, and specific text along with recommendations for amendment. This document and its prior versions will be available on the GNSO Website (http://gnso.icann.org).

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[8] It should be noted that the Board has adopted a 'Document Publication Operational Policy' (see http://www.icann.org/en/committees/participation/document-publication-operational-policy-30oct09-en.pdf) which requires the publication of documents 15 working days in advance of an ICANN public meeting.

6.4 Applicability

The GNSO Council or any of its sub-groups may decide to utilize a WG anytime they think that community wide participation is advisable for resolving issues. It should be emphasized that WGs are not intended to apply to policy development processes solely.

Addendum: Chair Checklist

~~Checklist~~	~~Yes/No~~
~~Have all WG members submitted Statements of Interest?~~	
~~Introduction of WG members~~	
~~Inform members that WG will operate under the principles of transparency and openness (i.e., mailing lists are publicly archived, meetings are recorded / transcribed)~~	
~~Review of WG's mission, goals, objectives, deliverables, decision-making process, timeframes and any other documents relevant for the WG's discussion~~	
~~Development of a work plan~~	
~~Schedule for future meetings of the WG~~	

7.0: Working Group Self-Assessment

A WG Self-Assessment instrument has been developed as a means for Chartering Organizations to formally request feedback from a WG as part of its closure process. WG members are asked a series of questions about the team's inputs, processes (e.g., norms, decision-making, logistics), and outputs as well as other relevant dimensions and participant experiences. Screenshots of the questionnaire have been assembled into a PDF (see link below) so that WG participants can review, in advance, how it is designed and what specific information will be solicited.

During the WG's closure process, coordinating with the Chair, Staff will provide a unique link (URL) to the online questionnaire along with open and close dates and any specific instructions. Staff will then perform the following actions:

- Monitor the online process providing status updates to the WG Chair;
- Provide technical assistance to WG members if requested;
- Notify the Chair when all team members have completed the questionnaire; and, following the close date,
- Summarize the feedback in a written report to the Chartering Organization.

Link to WG Self-Assessment Questionnaire: *INSERT LINK ONCE POSTED.*

END OF ANNEX 1

ANNEX 2: Policy Development Process Manual

1. PDP Manual - Introduction

These guidelines and processes supplement the requirements for PDPs described in Annex A of the ICANN Bylaws http://www.icann.org/en/general/bylaws.htm#AnnexA.

2. Requesting an Issue Report

As outlined in Annex A of the ICANN Bylaws, a request for an Issue Report may be initiated upon Board, Council or Advisory Committee request.

Requests for an Issue Report by the Board or by an Advisory Committee do not require any GNSO Council action, but are to be reviewed by Staff and prepared in accordance with Section 5.4 below.

3. Planning for Initiation of a PDP

Consistent with ICANN's commitment to fact-based policy development, the GNSO and Staff are encouraged to provide advice in advance of a vote on the request for an Issue Report specifying any additional research, discussion, or outreach that should be conducted as part of the development of the Issue Report, in order to ensure a balanced and informed Issue Report.

The GNSO is encouraged to consider scheduling workshops on substantive issues prior to the initiation of a PDP. Such workshops could, amongst others; facilitate community understanding of the issue; assist in scoping and defining the issue; gather support for the request of an Issue Report, and/or; serve as a means to gather additional data and/or information before a request is submitted. Where appropriate, the GNSO Council should consider requiring such a workshop during the planning and initiation phase for a specific issue. To the extent such workshops are utilized by the GNSO, the invitations and/or announcements for workshops should be communicated as broadly as possible.

The GNSO Council should take into full account the resources available, both volunteers and staff, when making its decision on whether or not to initiate a PDP.

4. Recommended Format of Issue Report Requests

The recommended format of requests for Issue Reports under paragraphs (b) and (c) of Section 2 is described below:

Request for Issue Report	
Name of Requestor:	
Name of Stakeholder Group/Constituency/Advisory Committee (if applicable) in support of request:	
Please provide rationale for policy development:	
Brief explanation of how issue affects your SG / Constituency / Advisory Committee:	
Suggestions on specific items to be addressed in the Issue Report (if any):	
Please provide a concise definition of the issue presented and the problems raised by the issue, including quantification to the extent feasible:	
What is the economic impact or effect on competition, consumer trust, privacy and other rights:	
Please provide supporting evidence (if any):	
How does this issue relate to the provisions of the ICANN Bylaws, the Affirmation of Commitments and/or ICANN's Articles of Incorporation:	
Date Submitted:	
Expected Completion Date:	

Any request for an Issue Report, either by completing the template or in another form, must include at a minimum: the name of the requestor and the definition of the issue. The submission of any additional information, such as the identification and quantification of problems, and other as outlined for example in the template, is strongly encouraged.

5. Creation of the Preliminary Issue Report

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO Council; or (iii) a properly supported motion from an Advisory Committee, the Staff Manager will create a report (a "Preliminary Issue Report"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report, which request should be discussed with the Requestor.

In the event that the Issue Report was initially requested by the Board or an Advisory Committee, the requestor shall be informed of any extension of time for completion of the Issue Report. Any request for extension of time should include consideration of the complexity of the issue, the extent of research and outreach recommended, and the ICANN Staff workload.

The following elements should be considered in the Issue Report:

a) The proposed issue raised for consideration;
b) The identity of the party submitting the request for the Issue Report;
c) How that party is affected by the issue, if known;

d) Support for the issue to initiate the PDP, if known;
e) The opinion of the ICANN General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the ICANN's mission, policy process and more specifically the role of the GNSO. In determining whether the issue is properly within the scope of the ICANN policy process, General Counsel's opinion should examine whether the issue:
    a. is within the scope of ICANN's mission statement, and more specifically the role of the GNSO;
    b. is broadly applicable;
    c. is likely to have lasting value or applicability, albeit with the need for occasional updates;
    d. is likely to enable ICANN to carry out its commitments under the Affirmation of Commitments;
    e. will establish a guide or framework for future decision-making;
    f. will implicate or affect an existing ICANN policy.
f) The opinion of ICANN Staff as to whether the Council should initiate the PDP on the issue

6. Public Comment on the Preliminary Issue Report

Upon completion of the preliminary Issue Report, the preliminary Issue Report shall be posted on the ICANN website for a public comment period of no less than 30 days. When posted for Public Comment, Staff is encouraged to translate the executive summary of Preliminary Issue Reports into the six UN languages to the extent permissible under the ICANN translation policy and the ICANN budget, though the posting of any version in English shall not be delayed while translations are being completed.

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO Council for consideration for initiation of a PDP.

The summary and analysis and the Final Issue Report are expected to be delivered to the Chair of the GNSO Council within 30 days of the closing of the public comment forum, though the Staff Manager may request an extension of that 30-day time for delivery.

7. Initiation of the PDP

The Council may initiate the PDP as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the paragraph below, shall note for the record the confirmation of receipt of the Issue Report and the formal initiation of the PDP. No vote is required for such action.

GNSO Council or Advisory Committee Requests: The Council may only initiate the PDP by a vote of the Council. Initiation of a PDP requires a vote as set forth in Article X, Section 3, paragraph 9(b) and (c) in favor of initiating the PDP.

Timing of vote on Initiation of the PDP. The Council should endeavour to vote on whether to initiate the policy development process at the next scheduled Council meeting following the receipt of a Final Issue

Report; provided that the Final Issue Report is received no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days prior to the GNSO Council meeting. If the Final Issue Report is forwarded to the GNSO Council Chair no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days immediately preceding the next GNSO Council meeting, the Council should endeavour to vote on the initiation of the PDP at the subsequent GNSO Council meeting. At the request of any Council member, for any reason, consideration of the Final Issue Report may be postponed by not more than one (1) meeting, provided that the Council member details the rationale for such a postponement. Consideration of the Final Issue Report may only be postponed for a total of one (1) meeting, even if multiple Council members request postponement.

Upon consideration of the Final Issue Report the GNSO Council may, when necessary, vote to suspend further consideration of the Final Issue Report. Any motion to suspend further consideration of the Final Issue Report shall fail if the votes in favor of continuing consideration of the Final Issue Report is sufficient to initiate a PDP under Article X Section 9.b or 9.c of the Bylaws, as appropriate. The basis for suspension could include prioritization reasons such as insufficient Staff or community support available due to other ongoing PDP work, requests for additional data and requests for additional discussion. The GNSO Council is expected to use this procedure sparingly, and should generally endeavour to vote on the initiation of a PDP within 90 calendar days of the receipt of the Final Issue Report. Any decision to suspend consideration of the Final Issue Report is to be accompanied by a proposed timeline for further consideration, including a timeline for a vote on the initiation of the PDP.

In the event that the GNSO Council does not approve the initiation of the PDP, not including the possible suspension of further consideration of the Final Issue Report as described above, any Councillor may appeal the denial, and request that the GNSO Council hold a renewed vote on the initiation of the PDP at the next subsequent GNSO Council meeting.

In the event that the GNSO Council does not approve the initiation of the PDP following a Final Issue Report requested by an Advisory Committee (AC), the AC or its representatives should have the opportunity to meet with representatives of the GNSO, and in particular, those voting against the initiation of the PDP, to discuss the rationale for the rejection and why the AC feels that reconsideration is appropriate. Following this meeting, the AC may submit a statement to the GNSO Council requesting a re-vote and giving its rationale for such a re-vote. This process may be followed just once for any given Issue Report.

As part of its decision on the initiation of the PDP, the GNSO Council may include consideration of how ICANN’s budget and planning can best accommodate the PDP and/or its possible outcomes, and, if applicable, how the proposed PDP is aligned with ICANN’s Strategic Plan.

8. Development and Approval of the Charter for the PDP

Upon initiation of the PDP, a group formed at the direction of Council should be convened to draft the charter for the PDP Team. The Council should indicate the timeframe within which a draft PDP Charter is expected to be presented to the Chair of the GNSO Council. Such a timeframe should be realistic, but at the same time ensure that this task is completed as soon as possible and does not unnecessarily delay the formation of a Working Group. The elements of the Charter should include, at a minimum, the following elements as specified in the GNSO Working Group Guidelines: Working Group Identification; Mission, Purpose and Deliverables; Formation, Staffing and Organization, and; Rules of Engagement.

The Council should consider whether to approve the proposed PDP Charter at the Council meeting following the Chair's receipt of the proposed PDP Charter; provided that the proposed PDP Charter is received no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days prior to the GNSO Council meeting. If the proposed PDP Charter is forwarded to the GNSO Council Chair no later than 23h59 Coordinated Universal Time (UTC) on the day, 10 calendar days immediately preceding the next GNSO Council meeting, the Council should endeavour to consider the proposed PDP Charter at the meeting after the next GNSO Council meeting.

The same voting thresholds that apply to the initiation of the PDP also apply to the approval of the proposed PDP Charter. Specifically, the proposed PDP Charter is to be approved with an affirmative vote of vote of more than one-third (1/3) of the Council members of each House or more than two-thirds (2/3) vote of one House in favour of approval of a Charter for a PDP within scope; unless the Staff Recommendation stated that the issue is not properly within the scope of the ICANN policy process or the GNSO, in which case a GNSO Supermajority Vote as set forth in Article X, Section 3, paragraph 9(c) in favour of approving the PDP Team Charter is specified to approve the PDP Charter.

Once approved, modification of any PDP Charter is discouraged, absent special circumstances. Approved charters may be modified or amended by a simple majority vote of each House.

In exigent circumstances, upon approval of the initiation of the PDP, the GNSO Council may direct certain work to be performed prior to the approval of the PDP Charter.

9. PDP Outcomes and Processes

Upon approval of the PDP Charter, the GNSO Council may form a working group, task force, committee of the whole or drafting team (the "PDP Team"), to perform the PDP activities. The preferred model for the PDP Team is the Working Group model due to the availability of specific Working Group rules and procedures that are included in the GNSO Operating Rules and Procedures. The GNSO Council should not select another model for conducting PDPs unless the GNSO Council first identifies the specific rules and procedures to guide the PDP Team's deliberations which should at a minimum include those set forth in the ICANN Bylaws and PDP Manual. The PDP Team is required to review and become familiar with the GNSO Working Group Guidelines, which also apply to PDP Working Groups (see http://gnso.icann.org/council/annex-1-gnso-wg-guidelines-07apr11-en.pdf), which includes further information and guidance on the functioning of GNSO Working Groups.

Once formed, the PDP Team is responsible for engaging in the collection of information. If deemed appropriate or helpful by the PDP Team, the PDP Team may solicit the opinions of outside advisors, experts, or other members of the public. The PDP Team should carefully consider the budgetary impacts, implementability, and/or feasibility of its proposed information requests and/or subsequent recommendations.

The PDP Team should formally solicit statements from each Stakeholder Group and Constituency in the early stages of the PDP. Stakeholder Groups and Constituencies should at a minimum have 35 days to complete such a statement from the moment that the statement is formally requested by the PDP Team. If appropriate, such statements may be solicited more than once by the PDP Team throughout the PDP process. The PDP Team is also encouraged to formally seek the opinion of other ICANN Advisory

Committees and Supporting Organizations, as appropriate that may have expertise, experience, or an interest in the PDP issue. Solicitation of opinions should be done during the early stages of the PDP.

In addition, the PDP Team should seek input from other SOs and ACs. Such input should be treated with the same due diligence as other comments and input processes. In addition, comments from ACs and SOs should receive a response from the PDP Team. This may include, for example, direct reference in the applicable Report or embedded in other responsive documentation or a direct response. The PDP Team is expected to detail in its report how input was sought from other SOs and ACs.

The PDP Team is encouraged to establish communication in the early stages of the PDP with other departments, outside the policy department, within ICANN that may have an interest, expertise, or information regarding the implementability of the issue. The Staff Manager is responsible for serving as the intermediary between the PDP Team and the various ICANN departments (finance, legal, compliance, etc.). The PDP Team Chair may escalate to the Vice President of Policy if the PDP Team is of the opinion that such communications have been hindered through the involvement of ICANN policy Staff. ICANN Staff may perform additional distinct roles for a PDP Team as requested and appropriate (see GNSO Working Group Guidelines for further details).

This Section illustrates the types of outcomes that are permissible from a PDP. PDP Teams may make recommendations to the GNSO Council regarding:

i. Consensus policies
ii. Other policies
iii. Best Practices
iv. Implementation Guidelines
v.Agreement terms and conditions
vi. Technical Specifications
vii. Research or Surveys to be Conducted
viii. Advice to ICANN or to the Board
ix. Advice to other Supporting Organizations or Advisory Committee
x.Budget issues
xi. Requests for Proposals
xii. Recommendations on future policy development activities

At the same time, a PDP Team may also conclude that no recommendation is necessary.

The Staff Manager is responsible for coordinating with the Chair(s) of the PDP Team to supervise and to carry out the PDP activities as necessary or appropriate, including, without limitation, making available the standard technical resources for the PDP Team, scheduling and attending PDP Team meetings, drafting and publishing PDP reports for public comment, and providing expertise where needed.

10. Publication of the Initial Report

After collection and review of information, the PDP Team and Staff are responsible for producing an Initial Report. The Initial Report should include the following elements:

- Compilation of Stakeholder Group and Constituency Statements

- Compilation of any statements received from any ICANN Supporting Organization or Advisory Committee
- Recommendations for policies, guidelines, best practices or other proposals to address the issue
- Statement of level of consensus for the recommendations presented in the Initial Report
- Information regarding the members of the PDP Team, such as the attendance records, Statements of Interest, etc.
- A statement on the WG discussion concerning impact of the proposed recommendations, which could consider areas such as economic, competition, operations, privacy and other rights, scalability and feasibility.

These elements may be included as content within the Initial Report or by reference to information posted on an ICANN website (such as through a hyperlink).

The Initial Report should be delivered to the GNSO Council and posted for a public comment period of not less than 30 days. If such a public comment period would coincide with an ICANN Public Meeting, the PDP Team is strongly encouraged to extend the public comment period a minimum of seven (7) days. Any public comment period on items other than the Issue Report and Initial Report shall be for a minimum of 21 days. The PDP Team is encouraged to explore other means to solicit input than the traditional public comment forum such as, for example, the use of a survey which might allow for asking more targeted questions.

11. Preparation of the Final Report

At the end of the public comment period, the Staff Manager will prepare a summary and analysis of the public comments received for the Working Group. Such a summary and analysis of the public comments should be provided at the latest 30 days after the closing of the public comment period, absent exigent circumstances. The Working Group shall review and take into consideration the public comments received. Following this review, the Staff Manager, in close coordination with the PDP Team, shall add those comments deemed appropriate for inclusion to the Initial Report. In addition, the Staff Manager and the PDP Team may update the Initial Report if there are any recommendations within the Initial Report that require modification to address comments received through public comment. Such a revised Report shall be put forward for consideration by the PDP Team. The Staff Manager and the PDP Team are not obligated to include all comments made during the comment period, including each comment made by any one individual or organization.

The PDP Team is expected to deliberate as appropriate to properly evaluate and address comments raised during the public comment period. This should include the careful consideration and analysis of the public comments; explaining the rationale for agreeing and disagreeing with the different comments received, and, if appropriate, how these will be addressed in the report of the PDP Team. Following the review of the comments received and, if required, additional deliberations, the PDP Team is expected to produce a Final Report for transmission to the Council. The analysis of the comments by the PDP Team is expected to be included or referenced as part of the Final Report.

While the Final Report is not required to be posted for public comment, in preparing the Final Report, the PDP Team should consider whether the Final Report should be posted for public comment as a [Draft]

Final Report, with the goal of maximizing accountability and transparency with regards the PDP, especially when substantial changes have been made compared to the contents of the Initial Report. When posted for Public Comment, Staff should consider translating the executive summaries of the Initial Reports and Draft Final Reports into the six UN languages, to the extent permissible under the ICANN translation policy and the ICANN budget, though the posting of any version in English is not to be delayed while translations are being completed. Upon completion of the Public Comment period, if any, and incorporation of any additional comments identified therein, or if no further comment period is necessary, the Final Report is to be forwarded to the GNSO Council Chair to begin the GNSO Council deliberation process.

In addition to any required public comment periods, the PDP Team may seek public comment on any item that the PDP Team notes it will benefit from further public input. The PDP Team does not have to seek approval from the GNSO Council to seek public comment on interim items. The minimum duration of a public comment period that does not concern the Initial Report is twenty (21) days.

Each recommendation in the Final Report should be accompanied by the appropriate consensus level designation (see section 3.6 – Standard Methodology for Making Decisions in the **GNSO Working Group Guidelines**).

12. Council Deliberation

The GNSO Council is strongly encouraged to allow sufficient time for Stakeholder Group, Constituency and Councillor review of the Final Report prior to a motion being made to formally adopt the Final Report. However, the GNSO Council is also encouraged to take formal action on a Final Report in a timely manner, and preferably no later than the second GNSO Council meeting after the report is presented. At the request of any Council member, for any reason, consideration of the Final Report may be postponed for no more than one (1) meeting, provided that such Council member details the rationale for such a postponement. Consideration of the Final Report may only be postponed for a total of one (1) meeting, even if multiple Council members request postponement. The GNSO Council may, if deemed appropriate, schedule a separate session with the PDP Team to discuss the Final Report and ask any clarifying questions that might arise.

The GNSO Council is expected to vote on the recommendations contained in the Final Report. Approval of the PDP recommendations contained in the Final Report requires an affirmative vote meeting the thresholds set forth at Article X, Section 3(9) d – f.

In the event that the Final Report includes recommendations that did not achieve the consensus within the PDP Team, the GNSO Council should deliberate on whether to adopt them or remand the recommendations for further analysis and work. Although the GNSO Council may adopt all or any portion of the recommendations contained in the Final Report, it is recommended that the GNSO Council take into account whether the PDP Team has indicated that any recommendations contained in the Final Report are interdependent. The GNSO Council is strongly discouraged from itemizing recommendations that the PDP Team has identified interdependent or modifying recommendations wherever possible. In the event the GNSO Council expresses concerns or proposes changes to the PDP recommendations, it may be more appropriate to pass these concerns or recommendations for changes back to the respective PDP Team for input and follow-up.

13. Preparation of the Board Report

If the PDP Recommendations contained in the Final Report are approved by the GNSO Council, the GNSO Council may designate a person or group responsible for drafting a Recommendations Report to the Board. If feasible, the Recommendations Report to the Board should be submitted to the Board in time for consideration at the next GNSO Council meeting following adoption of the Final Report. Staff should inform the GNSO Council from time to time of the format requested by the Board. These GNSO Council Reports supplement any Staff Reports that may highlight any legal, implementability, financial, and other operational concerns related to the PDP recommendations contained in the Final Report. In order to enhance ICANN's accountability and transparency, Staff is encouraged to publish its Staff Reports with minimal redactions wherever possible, without jeopardizing information that may be protected under attorney/client or other legal privileges.

14. GNSO Council Role in Implementation

Upon a final decision of the Board adopting the GNSO PDP policy, the Board may, as appropriate, give authorization or direction to ICANN staff to work with the GNSO Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy in as timely a fashion as possible. The GNSO Council may, but is not required to, direct the creation of an Implementation Review Team to assist Staff in developing the implementation details for the policy. In its Final Report, the PDP Team should provide recommendations to the GNSO Council on whether an Implementation Review Team should be established and any other recommendations deemed appropriate in relation to such an Implementation Review Team (e.g. composition).

ICANN Staff should inform the GNSO of its proposed implementation of a new GNSO recommended policy. If the proposed implementation is considered inconsistent with the GNSO Council's recommendations, the GNSO Council may notify the Board and request that the Board review the proposed implementation. Until the Board has considered the GNSO Council request, ICANN Staff should refrain from implementing the policy, although it may continue developing the details of the proposed implementation while the Board considers the GNSO Council request.

15. Termination or Suspension of PDP Prior to Final Report

The GNSO Council may terminate or suspend[9] a PDP prior to the publication of a Final Report only for significant cause, upon a motion that passes with a Supermajority Vote in favour of termination **or** suspension. The following are illustrative examples of possible reasons for a premature termination **or** suspension of a PDP:

1. **Deadlock**. The PDP Team is hopelessly deadlocked and unable to identify recommendations or statements that have either the strong support or a consensus of its members despite significant time and resources being dedicated to the PDP;
2. **Changing Circumstances**. Events have occurred since the initiation of the PDP that have rendered the PDP moot, no longer necessary; or warranting a suspension; or

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[9] Suspension is a stated time interval during which there is a temporary cessation of the PDP, i.e. all activities are temporarily halted upon a decision of the GNSO Council. A mere change in milestones or schedule of the PDP is not considered a suspension.

3. **Lack of Community Volunteers.** Despite several calls for participation, the work of the PDP Team is significantly impaired and unable to effectively conclude its deliberations due to lack of volunteer participation.

In the case of a proposed termination of a PDP prior to the issuance of a Final Report or suspension of a PDP upon the recommendation of the PDP Team, the GNSO liaison to the PDP Team shall promptly submit to the Council a written Termination Summary or Suspension Summary specifying the reasons for the recommended action to be taken and, if applicable, the points of view represented in the PDP Team and the consensus status (as defined by the GNSO Working Group Guidelines) at the time such action is recommended. In the event that no PDP Team has been formed or there is no recommendation from the PDP Team for a proposed termination or suspension by the GNSO Council, any GNSO Council member may propose termination or suspension of a PDP. In the case of such a proposal, the GNSO Council will publicly specify the reasons for the recommended action and will conduct a public comment forum on the proposed termination or suspension prior to conducting the vote.

Upon the request of any Council Member, Advisory Committee or the ICANN Board, the GNSO Council will prepare a formal report on the proposed termination or suspension of a PDP outlining the reasons for the proposed action, current status of the PDP and expected next steps, if any.

16. Amendments or Modifications of Approved Policies

Approved GNSO Council policies may be modified or amended by the GNSO Council at any time prior to the final approval by the ICANN Board as follows:

1. The PDP Team is reconvened or, if disbanded, reformed, and should be consulted with regards to the proposed amendments or modifications;
2. The proposed amendments or modifications are posted for public comment for not less than thirty (30) days;
3. The GNSO Council approves of such amendments or modifications with a Supermajority Vote of both Houses in favour.

Approved GNSO Council policies that have been adopted by the ICANN Board and have been implemented by ICANN Staff may only be amended by the initiation of a new PDP on the issue.

17. Periodic Assessments of Approved Policies

Periodic assessment of PDP recommendations and policies is an important tool to guard against unexpected results or inefficient processes arising from GNSO policies. PDP Teams are encouraged to include proposed timing, assessment tools, and metrics for review as part of their Final Report. In addition, the GNSO Council may at any time initiate reviews of past policy recommendations.

18. Miscellaneous

This Manual may be updated by the GNSO Council from time to time following the same procedures as applicable to amendments to the GNSO Operating Rules and Procedures.

In the event of any inconsistencies between the ICANN Bylaws or this Manual, the terms of the ICANN Bylaws shall supersede.

END OF ANNEX 2

Forrest-008

Forrest-008

Acronym helper: Search

ccNSO Country Code Names Supporting Organisation ICANN

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▸ Working Groups

Cross-Community Working Group on Use of Country/Territory Names as TLDs

Working Group Members

ccNSO

- Sebastien Pensis, .eu
- Lucila Abate, .ar
- Monica Capparelli, .ar
- Neil El Himam, .id
- Lise Fuhr, .dk
- Laura Hutchison, .uk
- Jordi Iparraguirre, ccNSO Council NomCom appointee
- Erick Iriarte Ahon, pe
- Daniel Kalchev, .bg
- Annebeth Lange, .no (Co-Chair)
- Young-Eum Lee, .kr
- Han Liyun, .cn
- Carlos Marco Liuzzi
- Jacqueline Morris, .tt
- Sanna Sahlman, .fi,
- Grigori Saghyan, .am
- Ron Sherwood, .vi
- Paul Szyndler, .au (Co-Chair)
- Mirjana Tasic, .rs
- Mary Uduma, .ng

GNSO

- Philip Adar, BC
- Benjamin Akinmoyeje, NCUC
- Maxim Alzoba, NTAG
- Griffin Barnett, IPC
- Chris Chaplow, BC
- Ching Chiao, RySG (Co-Chair)
- Mason Cole, RySG
- Sonigitu Ekpe, NCUC
- Heather Forrest, IPC (Co-Chair)
- Robin Gross, NCSG
- Carlos Raul Gutierrez, Nomcom Appointee to the GNSO
- Scott Harlan, IPC
- Hector Manoff, IPC
- Ghislain Nyamfit Ngamba, individual
- Colin O'Brien, IPC
- Susan Payne, IPC
- Ganeswar Sahoo, NCUC
- Cintra Sooknanan, NPOC
- Gabriela Szlak, GNSO Council liaison
- Marc Trachtenberg, IPC
- Liz Williams, NTAG
- Brian Winterfeldt, IPC

ALAC

- Inam Ali, ALAC
- Fouad Bajwa, APRALO
- Cheryl Langdon-Orr, ALAC

GAC

- Olga Cavalli
- Edmund Katiti

Other

- Jaap Akkerhuis, Expert

Objective and Scope

The objective of the Working group is to draw upon the collective expertise of the participating SOs and ACs and others, and based on the initial analysis of the ccNSO Study Group on the uSe of names for Countries and territories as TLDs, further review the current status of representations of country and territory names, as they exist under current ICANN policies, guidelines and procedures. Secondly, provide advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable across the respective SO's and AC's; and should such a framework be deemed feasible, provide detailed advice as to the content of he framework. The scope of the WG is limited to:

- Representations of names of Countries, Territories and their subdivisions listed on or eligible to be listed on the Alpha-2 code International Standard for country codes and codes for their subdivisions (ISO 3166-1), (Names of Country and Territory). Other geographical indicators, such as regions, are excluded;
- The use of Country and Territory names as Top Level Domains. The use of Country and Territory names as second or other level is excluded.

Working Group Charter

Documents

UCTN Progress Report 23 September 2014

Background Material

ccNSO Study Group on Use of Country and Territory Names Compare and Evolution Final Report

ccNSO Study Group on the Use of Names for Countries and Territories Final Report

Transcripts

UCTN Working Group Transcript 21 September 2015

UCTN Working Group Transcript 24 August 2015

UCTN Working Group Transcript 27 July 2015

UCTN Working Group Transcript 8 June 2015

UCTN Working Group Transcript 18 May 2015

UCTN Working Group Transcript 4 May 2015

UCTN Working Group Transcript 20 April 2015

UCTN Working Group Transcript 30 March 2015

UCTN Working Group Transcript 16 March 2015

UCTN Working Group Transcript 2 March 2015

UCTN Working Group Transcript Singapore 9 February 2015

UCTN Working Group Transcript 14 January 2015

UCTN Working Group Transcript Los Angeles 16 October 2014

UCTN Working Group Transcript 23 September 2014

UCTN Working Group Transcript 26 August 2014

UCTN Working Group Transcript London 22 June 2014

UCTN Transcript Buenos Aires 22 June 2015

UCTN Transcript 15 July 2014

UCTN Working Group Transcript 10 June 2014

UCTN Working Group Transcript Singapore 27 March 2014

Relevant Links

UCTN Working Group Wiki Work Space

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ccNSO Study Group on the use of Country and Territory Names

Final Report

September 2013

Table of Contents

1. Executive Summary

The Study Group on the use of Country and Territory Names ("the Study Group") was established by a resolution of the ccNSO Council on 8 December 2010. The Study Group was tasked with developing an overview of:

- the way in which the names of countries and territories are currently used within ICANN, be it in the form of policies, guidelines and/or procedures;
- the types of strings, relating to the names of countries and territories that currently used, or proposed to be used, as TLDs; and
- the issues that arise (or may arise) when current policies, guidelines and procedures are applied to these representations of country and territory names.

The Study Group is comprised of representatives from across the ICANN stakeholder community and conducted its work between May 2011 and June 2013.

Comments and Observations

In summary, the Study Group developed the following comments and observations.

- Throughout its deliberations, the Study Group observed an incredible level of complexity associated with any attempt to definitively categorize country or territory names, especially when such an effort includes multiple languages or scripts.

- A consistent observation was the inability of individual "lists" or resources to provide comprehensive, consistent or universal guidance regarding the various representations of country and territory names, in particular as a result of geo-political changes, the creation of new countries and the dissolution of others.

- ICANN's current policies and procedures (as they may relate to ccTLDs, IDNs or current and potential new gTLDs) do not afford consistent treatment of country and territory names. This may give rise to stakeholder and end-user confusion and uncertainty.

- ICANN's current policy framework (the Applicant Guidebook) for the introduction of new gTLDs affords an unprecedented level of protection for country and territory names, though notes that such protections are only confirmed for the first and current round of new gTLD applications.

- The current Fast Track and IDN ccTLD policy are restricted. The major restrictions are the requirements that:
    1. the IDN ccTLD string is a meaningful representation in a designated language of the territory, and
    2. only one string per designated language

  If adopted the IDN ccTLD policy should be reviewed in five years, which includes a review of these restrictions.

Recommendations

A. It is recommended that the ccNSO Council establish a cross community working group to:

- Further review the current status of representations of country and territory names, as they exist under current ICANN policies, guidelines and procedures;
- Provide advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable across the respective SO's and AC's; and
- Should such a framework be deemed feasible, provide detailed advice as to the content of the framework.

The GNSO, ALAC and GAC should be invited to participate in such a WG.

B. In light of the need for further work on the treatment of country and territory names, the complexity of the issue at hand and the aforementioned inconsistencies between various ICANN policies, it is also recommended that the ccNSO Council request that the ICANN Board extend the current rule in the new gTLD Applicant Guidebook regarding the exclusion of all country and territory names in all languages, for consecutive rounds of new gTLD applications.

2. Introduction

Context

The treatment of country and territory names as Top Level Domains is a topic that has been discussed by the ccNSO, GAC, GNSO, ALAC and the ICANN Board for a number of years.

Issues regarding the treatment of representations of country and territory names have arisen in a wide range of ICANN policy processes, including the IDN fast track, IDN ccPDP, and the development of the new gTLD Applicant guidebook.

References to country and territory names and their use are also present in guidelines such as the GAC's "Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains" and "Principles regarding new gTLDs", foundation documents such as RFC1591 and administrative procedures such as those followed by IANA, in accordance with ISO3166-1, in the delegation and redelegation of ccTLDs.

However, there has never been an overarching, cross-constituency study undertaken on how country and territory names are used across the ICANN community. There is no analysis of how the various rules and procedures relating to how country and territory names are used, whether there are inconsistencies between each, whether current frameworks are appropriate, and consideration of whether a more unified policy approach is required, or desirable.

It is in recognising the absence of such a study, and the importance of country and territory names to a wide range of stakeholders, that the ccNSO Council convened the Study Group on the use of Country and Territory Names.

Background

On 21 November 2009, the Chair of the ccNSO, wrote to the Chair of the ICANN Board to express the ccNSO's belief that it would be inappropriate and unwise to, at that time, introduce new gTLDs that constitute meaningful representations of the names of countries and/or territories on the ISO 3166-1 list.

In his letter, the ccNSO Chair cited the potential, significant issues that had been identified by both the ccNSO and the GAC in relation to country/territory gTLDs, the extent to which these issues had not been addressed in a meaningful way to date, and the existence of an ongoing policy development process in which they could be considered.

In his letter, dated 21 June 2010, the Chair of the ICANN Board stated that, in response GAC's interpretation of paragraph 2.2 of the GAC principles on new gTLDs, the ICANN Board had reconsideration of the treatment of country and territory names in the new gTLD process.

This had resulted in a change of approach as reflected in draft version 4 of the Applicant Guidebook: namely, that country and territory names would not be available for delegation in the first round of the new gTLD application process.

The letter also acknowledged that the ccNSO was undertaking ongoing policy discussions. In particular, defining the distinction between country code and generic names may warrant a broader cross-SO/AC policy discussion and once policy is developed, it will be appropriate for the Board to reconsider its positions on the use of country and territory names.

On 8 December 2010, the Chair of the IDN ccPDP WG 1 informed the ccNSO Council that the use of Country and Territory names as TLD strings in general is considered outside the scope of the IDN ccPDP and will therefore not be addressed.

In response to this advice, the ccNSO Council resolved to establish a Study Group to examine these issues. The Members, experts and support staff are listed in **Annex A: Study Group Membership**.

Study group purpose and scope

The Study Group was established to provide the ccNSO Council, ccTLD community, and other interested stakeholders, including the GAC and GNSO Council:

1. An overview of current and proposed policies, guidelines and procedures for allocation and delegation of strings currently used or proposed to be used as TLDs that are either associated with Countries and Territories (i.e., by inclusion on the ISO 3166-1 list) and/or are otherwise considered representations of the names of Countries and Territories.

2. A comprehensive overview of the types and categories of strings currently used or proposed to be used as TLDs that are either associated with Countries and Territories (i.e., by inclusion on the ISO 3166-1 list) and/or are otherwise considered representations of Country and Territory names.

3. A comprehensive overview of issues arising (or likely to arise) in connection with applying the current and proposed policies, guidelines and procedures for allocation to types and categories of strings currently used or proposed to be used as TLDs that are either associated with

Countries and Territories (i.e., by inclusion on the ISO 3166-1 list) and/or are otherwise considered representations of Country and Territory names.

If considered appropriate, the Study Group was also empowered to advise on a course of further action, if any, to resolve the issues identified in the course of their work.

In particular, the Study Group was directed to:

a. Develop a work plan to conduct its study, including a high level schedule. The schedule is reflected in **Annex B: Timeline**;

b. Summarise existing and proposed policies, guidelines and implementation rules regarding the use of representations of Country and Territory names as TLDs;

c. Provide a comprehensive overview of the issues associated with the use of representations of Country and Territory names as TLDs as identified by the ccNSO, GAC and GNSO;

d. Liaise with the ccNSO, GAC and GNSO as needed to seek further clarification and input regarding b. and c.;

e. Liaise with the IDN ccPDP working group 1 as necessary and appropriate to seek further clarification and input, and provide input and feedback to that working group.

f. Liaise with ICANN's new gTLD project team as necessary and appropriate to seek further clarification and input and provide input and feed-back, for example to better understand the proposed future scope of excluded Country and Territory names and objection mechanisms;

g. Liaise with (IDN) ccTLDs and individual GAC-members as necessary and appropriate to solicit their views and perspectives on the use of representations of their Country or Territory names;

h. Prepare sessions to be conducted at ICANN meetings to inform and report to the ccTLD community, and other interested Supporting Organisations and Advisory Committees on the findings and intermediate results of the Study Group;

i. Provide a Final Report of its findings to the ccNSO Council.

A table outlining the Study Group's activities against each aforementioned task is at **Annex C: Checklist - Study Group tasks**.

The Study Group was also empowered to undertake any other activities that members deemed appropriate to fulfil the Group's purpose and scope.

Throughout the early stages of the Study Group's working schedule, group members also identified, and shared with other ICANN stakeholders, issues which were outside of the group's scope. These included:

- Developing a formal definition of what is and isn't a ccTLD
- Intervening in first round of the new gTLDs process
- Passing judgement on the effectiveness or appropriateness of previous policy approaches
- Making recommendations for additional protections for country and territory names
- Developing a definitive recommendation for how country and territory names should be treated in future policy processes.

It should be noted that the Study Group also determined that, in order to ensure its deliberations were expansive and comprehensive, it would address a very wide range of possible representations of country or territory names. As a guiding principle, the group attempted to capture and assess the many possible representations of the names of sovereign States that *may* be chosen, and how this would impact, and be dealt with, by existing policy structures within ICANN.

However, the group stressed throughout its outreach to community members that this thorough approach was not, at any stage, an attempt to expand the definition of "country and territory names" in the ICANN policy context, nor an endorsement for the expansion of current protections.

Making these clarifications was an important part of the Study Group's preliminary work, as it helped set a clear focus and work plan for the group, prevented internal misunderstandings and also allayed some of the community's concerns and possible misunderstandings about the intended outcomes of the Study Group.

Process to date

Over time the Study Group met through telephone conferences and at ICANN meetings. It provided regular updates to the communities, including the ccNSO, GAC and GNSO Council[1]. A comprehensive list of the activities of the Study Group is included in Annex B, Timeline.

The draft Final Report of the working group was published for public comment on 2 July 2013. The public forum closed on 30 August 2013. The summary and analysis of the comments is included (Annex D). After careful analysis of the comments received, the members of the Study group have not modified the observations and recommendations. However, if the ccNSO Council adopts the recommendations, the chair of the Study Group will advise the ccNSO Council that based on the comments received the proposed cross-community working group should take into account specific suggestions.

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[1] The transcripts of the face-to-face meetings and telephone calls, and presentations are available at: http://ccnso.icann.org/workinggroups/unctwg.htm

3. Deliverable 1: Overview of current policies and procedures

The Study Group's first priority was the development an overview, or stocktake, of the ways in which country and territory names are currently used, or are proposed to be used, as TLD strings within ICANN policies, guidelines and procedures.

It was intended that commencing the Study Group's work with this priority would provide Study Group members with a factual, objective baseline understanding of the way in which country and territory names have been treated within ICANN in the past and will be in future. This would also provide an evidentiary basis for subsequent analysis of possible policy gaps or inconsistencies.

With respect to the (future) policies and methodologies included in the overview, the Study Group observed different terminology to refer to country and territories. The Study Group did not attempt to consolidate the terminology, but instead provided the terminology as used in the methodology and current and proposed policies.

This starting point is also important to illustrate to Study Group members – and the broader ICANN community – the key points of difference between ICANN's various policies and procedures, as they relate to country and territory names. That is, which policy or procedure is applied to a country or territory name as TLD, determines the applicable governance framework, the structure of relationships between the relevant stakeholders (including end-users) and their respective roles and responsibilities. This is not just relevant for the selection or delegation stage, but also for subsequent stages, once a country or territory name Top Level Domain is operational.

Current policies and methods for use of country and territory names as a TLD

Policy for two-letter codes as ccTLDs (ASCII ccTLDs)

Eligibility: The name of country or territory must be listed on International Standard ISO 3166-1, Codes for the representation of names of countries and their subdivisions – Part 1: Country Codes'

TLD String: two letter code as listed on the ISO 3166-1 standard and associated with a territory.

Reference Documents: RFC 1591, ICP-1, GAC principles on delegation and re-delegation of ccTLDs

Basic Rule from RFC 1591[2]: The IANA is not in the business to define what is and what is not a country. The selection of the ISO 3166 list as a basis for country code top-level domain names was made with the knowledge that ISO has a procedure for determining which entities should be and should not be on that list.

Rules Fast Track Process for IDN ccTLD's

Eligibility: The name of country or territory or must be listed on International Standard ISO 3166-1, Codes for the representation of names of countries and their subdivisions – Part 1: Country Codes'

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[2] http://www.ietf.org/rfc/rfc1591.txt, section 4.2

TLD String: Meaningful representation of the name of a country or territory listed on ISO 3166-1 in an official language of that country or territory.

Meaningfulness Requirement
For purposes of the Fast Track the string used must be meaningful in the Official Language. A string is meaningful if it is in the Official Language and:
a) is the name of the Territory; or
b) a part of the name of the Territory that denotes the Territory in the language (for example "Lanka" representing Sri Lanka in Sinhalese) ; or
c) a short-form designation for the name of the Territory, recognizably denoting it in the indicated language (for example **РФ,** RF in Cyrillic)

Official language criteria
For the purpose of the Fast Track, an 'official' language is one that has a legal status in the Territory or that serves as a language of administration.

In the event that there is more than one Official Language in the Territory, it may be possible for the Territory to use the Fast Track for the delegation of one IDN ccTLD in each of those languages.

Only one (1) IDN ccTLD string per Official Language.
In the event that there is more than one Designated Language in the Territory, one (1) unique IDN ccTLD for each Official Language may be selected, provided the meaningful representation in one Designated Language cannot be confused with an existing IDN ccTLD string for that Territory.

Requirements relating to the script
For purposes of the Fast Track the term "non-Latin script" is used to designate any script that does not contain the twenty-six letters listed in the US-ASCII character set (a-z), either in their basic forms or with combining marks.

Procedural requirements:
Where the selected string is listed as the long form or short form name of the relevant Territory in of the United Nations Group of Experts on Geographical Names Manual[3] then the string should be considered to be meaningful. If the string is not so listed then meaningfulness will need to be documented by the selected delegate of the IDN ccTLD. The selected string is considered to meet the criteria if:
1. The identified language is an Official language/script of the Territory in accordance with the definition in Stage 1, section 1 above and
2. The selected string is the long or short form name of the relevant Territory in the identified language in the UNGEGN Manual, Part Three column 3 or 4
In all other cases additional documentation should be provided by the selected delegate.

The delegation, re-delegation and retirement of IDN ccTLD is similar and in accordance with the processes for the delegation, re-delegation and retirement of ccTLD's

Reference documents:

- IDNC WG Final Board Report (http://ccnso.icann.org/workinggroups/idnc-wg-board-proposal-25jun08.pdf)
- Final Implementation Plan (http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf)

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[3] http://unstats.un.org/unsd/geoinfo/ungegn/docs/pubs/UNGEGN%20tech%20ref%20manual_m87_combined.pdf

Treatment of Country Names under the new gTLD process

New gTLD policy and process first round of applications

According to the Applicant Guidebook, version 2012-06-04[4], Module 2 Part III – Policy Requirements for Generic Top Level Domains
These requirements apply to all prospective Top Level Domain strings applied for as gTLDs.

3.1 Applied-for gTLD strings in ASCII must be composed of three or more visually distinct characters. Two character ASCII strings are not permitted, to avoid conflicting with current and future country codes based on the ISO 3166-1 standard.

3.2 Applied-for gTLD strings in IDN scripts must be composed of two or more visually distinct characters in the script, as appropriate. Note, however, that a two-character IDN string will not be approved if:

3.2.1 It is visually similar to any one-character label (in any script); or

3.2.2 It is visually similar to any possible two character ASCII combination.

According to the Applicant Guidebook, version 2012- 06-04, section 2.2.1.4.1:
Applications for strings that are country or territory names will not be approved, as they are not available under the new gTLD Program in the first application round. This based on advice from the Governmental Advisory Committee in recent communiqués providing interpretation of Principle 2.2 of the GAC Principles regarding New gTLDs to indicate that strings which are a meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccPDP, and other geographic strings could be allowed in the gTLD space if in agreement with the relevant government or public authority[5]. A string shall be considered to be a country or territory name if:

i. It is an alpha-3 code listed in the ISO 3166-1 standard.
ii. It is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.
iii. It is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.
iv. It is the short- or long-form name association with a code that has been designated as "exceptionally reserved" by the ISO 3166 Maintenance Agency.

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[4] http://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf

[5] This rule in the Applicant Guidebook is the result of a long and extensive correspondence between the GAC and ICANN Board of Directors on the interpretation of the GAC new gTLD Principles section 2.2. See for background on this decision:
Letter from the Board to the GAC: http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf
Letter from the GAC to the Board: http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf
GAC Communiqué Nairobi: https://gacweb.icann.org/display/gacweb/GAC37+Meeting+Nairobi%2C+Kenya
GAC principles new gTLD's: Section 2.1 and 2.2
https://gacweb.icann.org/download/attachments/28278837/gTLD_principles_0.pdf?version=1&modificationDate=1312358178000&api=v2

v. It is a separable component of a country name designated on the “Separable Country Names List,” or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module (not included).
vi. It is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or removal of grammatical articles like “the.” A transposition is considered a change in the sequence of the long or short–form name, for example, “RepublicCzech” or “IslandsCayman.”
vii. It is 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.

Policies under development

IDN ccTLD overall policy[6]

Eligibility

Eligibility only if name of territory listed on ISO 3166.
To be eligible for a ccTLD string a country, dependency or other area of particular geopolitical interest must be listed on the ‘International Standard ISO 3166, Codes for the representation of names of countries and their subdivisions – Part 1: Country Codes’, or, in some exceptional cases already assigned as a ccTLD and listed as an exceptionally reserved ISO 3166-1 code element

Requirements Country or Territory name as TLD String

An IDN country code Top Level Domain must contain at least one non-ASCII character.
For example, *españa* would qualify under this criteria and *italia* would not. *españa* contains at least one character other than [-, a-z, 0-9], while still being a valid domain name.
A different way of expressing this is that the IDN ccTLD must be a valid U-Label that can also be expressed as an A-label. It cannot be a NR-LDH Label.

For more formal definitions of these terms, see RFC 5890.

The IDN ccTLD string must be a meaningful Representation of the name of a Territory
The principle underlying the representation of Territories in two letter (ASCII) code elements is the visual association between the names of Territories (in English or French, or sometimes in another language) and their corresponding code elements[7].
A visual association between the IDN country code string and the name of a Territory should be maintained. An IDN ccTLD string has to be a meaningful representation of the name of the Territory. A country code string is considered meaningful if it is:
a) The name of the Territory; or
b) Part of the name of the Territory that denotes the Territory; or
c) A short-form designation for the name of the Territory, recognizably denoting the name.

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[6] The current status (September 2013) is that the proposals have been adopted by the ccNSO Council and Membership. The ccNSO Recommendation will be submitted to the ICANN Board of Directors in October 2013. The Governmental Advisory Committee has the opportunity to provide advise or an opinion.
[7] See ISO 3166-1: 2006 Section 5.1

The meaningful Representation of the name of the Territory must be in a Designated Language of the Territory
The ccTLD string should be a meaningful representation of the name of the Territory in a "designated" language of that Territory. For this purpose a "designated" language is defined as a language that has a legal status in the Territory or that serves as a language of administration (hereafter: Designated Language)[8].

Only one (1) IDN ccTLD string per Designated Language.
In the event that there is more than one Designated Language in the Territory, one (1) unique IDN ccTLD for each Designated Language may be selected, provided the meaningful representation in one Designated Language cannot be confused with an existing IDN ccTLD string for that Territory.
Reference: IDN ccPDP Final Report

Contention rules relating to the use of country or territory names as TLDs

The following sets of contention rules have been identified:

- Fast Track Process rules
- New gTLD process: String Similarity Check (Module 2 Applicant Guidebook)
- New gTLD process: Objection Procedures (Module 3 Applicant Guidebook)
- IDN ccTLD overall Policy rules

Fast Track Process[9]

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[10].

String confusion issues can involve two or more strings that are identical or are so confusingly similar that they cannot coexist in the DNS, such as:

Requested IDN ccTLD strings against existing TLDs and reserved names;

Requested IDN ccTLD strings against other requested IDN ccTLD strings; and

Requested IDN ccTLD strings against applied-for gTLD strings.

Contention situations between Fast Track requests and new gTLD applications are considered unlikely to occur. Assessments of whether strings are considered in conflict with existing or applied-for new gTLD strings are made in the DNS Stability String Evaluation for Fast Track requests and in the Initial Evaluation step for new gTLD applications. The following supplemental rules provide the thresholds for solving any identified contention issues:

A. A gTLD application that is approved by the ICANN Board will be considered an existing TLD in inter-process contention unless it is withdrawn. Therefore, any other later application for the same string will

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[8] The limitation to Designated Language is recommended as criteria for reasons of stability of the DNS. According to some statistics currently 6909 living languages are identified. See for example: http://www.ethnologue.com/ethno_docs/distribution.asp?by=area. If one IDN ccTLD would be allowed per territory for every language this would potentially amount to 252*6909 or approximately 1.7 million IDN ccTLDs.

[9] http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf

[10] Note the standard for string similarity is similar to the standard under the new gTLD process.

be denied.

B. A validated request for an IDN ccTLD will be considered an existing TLD in inter-process contention unless it is withdrawn. Therefore, any other later application for the same string will be denied.

For the purpose of the above contention rules, an IDN ccTLD string request is regarded as validated once it is confirmed that the string is a meaningful representation of the country or territory and that the string has passed the DNS String confusion with existing TLD strings (ccTLD, and gTLD, and any of the elements in the alpha-2 codes that is used by ISO 3166/MA (section 5.2 of ISO 3166-1:2006)

Result of the Evaluation[11]

If any issues with the selected string are discovered in this review the DNS Stability Panel can request clarification from the requester through ICANN.

If clarifications are insufficient or cannot be provided, the Termination Process will be initiated.

If the DNS Stability Panel review reveals no technical issues the requester is notified that the DNS Stability String Evaluation is successfully completed and that the requested string(s) will be queued for public posting.

New gTLD process: String similarity check[12]

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names;
- Applied-for gTLD strings against other applied-for gTLD strings;
- Applied-for gTLD strings against strings requested as IDN ccTLDs; and
- Applied-for 2-character IDN gTLD strings against:
    - Every other single character.
    - Any other 2-character ASCII string (to protect possible future ccTLD delegations)

Similarity to Existing TLDs or Reserved Names

This review involves cross-checking between each applied-for string and the lists of existing TLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion.

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

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[11] Implementation Plan Section 5.6.3

[12] See Applicant Guidebook, version 2012-06-04, section 2.4.1.

Testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. For example, protocols treat equivalent labels as alternative forms of the same label, just as "foo" and "Foo" are treated as alternative forms of the same label (RFC 3490). All TLDs currently in the root zone can be found at http://iana.org/domains/root/db/. IDN tables that have been submitted to ICANN are available at http://www.iana.org/domains/idn-tables/.

Similarity to TLD strings requested as IDN ccTLDs (Section 2.2.1.1.1)

Applied for gTLD strings will also be reviewed for similarity to TLD strings requested in the IDN ccTLD Fast Track process (see http://www.icann.org/en/topics/idn/fast-track/). Should a conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take the following approach to resolving the conflict.

If one of the applications has completed its respective process before the other is lodged, that TLD will be delegated. A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request. Similarly, an IDN ccTLD request that has completed evaluation (i.e., is "validated") will be considered complete and therefore would not be disqualified by a newly-filed gTLD application.

In the case where neither application has completed its respective process, where the gTLD application does not have the required approval from the relevant government or public authority, a validated request for an IDN ccTLD will prevail and the gTLD application will not be approved.

The term "validated" is defined in the IDN ccTLD Fast Track Process Implementation, which can be found at http://www.icann.org/en/topics/idn.

In the case where a gTLD applicant has obtained the support or non-objection of the relevant government or public authority, but is eliminated due to contention with a string requested in the IDN ccTLD Fast Track process, a full refund of the evaluation fee is available to the applicant if the gTLD application was submitted prior to the publication of the ccTLD request.

Review of 2-character IDN strings

In addition to the above reviews, an applied-for gTLD string that is a 2- character IDN string is reviewed by the String Similarity Panel for visual similarity to:

a. Any one-character label (in any script), and
b. Any possible two-character ASCII combination.

An applied-for gTLD string that is found to be too similar to a) or b) above will not pass this review.

Standard for String Confusion[13]

String confusion exists where a string so nearly resembles another visually that it is likely to deceive or

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[13] Applicant Guidebook version 2012-06-04, section 2.2.1.1.2

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[14].

Outcome of String Similarity Review[15]

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion 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 (including visual, aural, or similarity of meaning) may be claimed by an objector.

An applicant may file a formal objection against another gTLD application on string confusion grounds. Such an objection may, if successful, change the configuration of the preliminary contention sets in that the two applied-for gTLD strings will be considered in direct contention with one another. The objection process wi l not result in removal of an application from a contention set.

New gTLD process: Objection Procedures

This section includes general mechanisms and procedures for objection that may affect an application for country or territory name. Whether these mechanisms apply is unclear. However to ensure the overview is complete they are included for discussion by the members of WG .

The general mechanisms could be relevant if the applied string refers to the name of a country or territory that is not in the format listed in section 2.2.1.4.1 of the Applicant Guidebook (see above). The following mechanisms and procedures could be in particular relevant:

- The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on new gTLDs to the ICANN Board of Directors concerning a specific application.
- Public Objection and Dispute Resolution Process, in particular:
    - Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.
    - Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

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[14] Note the standard for string confusion is similar to the standard under the Fast Track Process

[15] Applicant Guidebook version 2012-06-04, section 2.2.1.1.3

Proposed IDN ccTLD overall policy for the selection of IDN ccTLD strings[16]

A selected IDN ccTLD string should not be confusingly similar with:

1. Any combination of two ISO 646 Basic Version (ISO 646-BV) characters (letter [a-z] codes), nor
2. Existing TLDs or reserved names.

The following supplemental rules provide the thresholds to solve any contention issues between the IDN ccTLD selection process and new gTLD process:

- A gTLD application that is approved by the ICANN Board will be considered an existing TLD unless it is withdrawn.
- A validated request for an IDN ccTLD will be considered an existing TLD unless it is withdrawn.

A selected IDN ccTLD string is considered confusingly similar with one or more other string(s) (which must be either Valid-U-labels or any combination of two or more ISO 646 BV characters) if the appearance of the selected string in common fonts in small sizes at typical screen resolutions is sufficiently close to one or more other strings so that it is probable that a reasonable Internet user who is unfamiliar with the script would perceive the strings to be the same or confuse one for the other .
The review of whether or not a selected IDN ccTLD string is confusingly similar is a process step and should be conducted externally and independently. The recommended procedure is described in Section 4, Processes and Documentation.

The method and criteria to assess confusing similarity should be developed as part of the implementation planning. For reasons of transparency and accountability they should be made public prior to implementation of the overall policy and endorsed by the ccNSO.

The assessment of confusing similarity of strings depends on amongst other things linguistic, technical, and visual perception factors, therefore these elements should be taken into consideration in developing the method and criteria.
Taking into account the overarching principle to preserve and ensure the security, stability and interoperability of the DNS, the method and criteria for the confusing similarity assessment of an IDN ccTLD string should take into account and be guided by the work in progress on Principles for Unicode Point Inclusion in labels in the DNS Root (http://tools.ietf.org/html/draft-iab-dns-zone-codepoint-pples-01).

4. Deliverable 2: Overview of the types and categories of strings associated with Country and Territory names (currently used or proposed to be used as TLDs)

In undertaking the second stage of its work, the Study Group determined to utilise two methodological tools to assist with its deliberations.

The first is a typology that provides a systematic approach to the identification, categorisation and analysis of the wide variety of ways in which country and territory names are represented, both within ICANN processes and the wider community.

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[16] Section 2.1.2 I, Final Report IDN ccPDP, http://ccnso.icann.org/workinggroups/idn-ccpdp-final-29mar13-en.pdf

The second is a survey of a sub-set of UNESCO Member States, based upon the typology, that would test whether the proposed categorisations of country and territory names were relevant and appropriate and provide an evidentiary basis for the Study Group's third phase of work.

As a threshold issue, the Study Group notes that, despite the collective expertise and experience of group members, it is not possible to replicate the extensive body of work that has already occurred in other fora with regard to categorising country and territory names.

Other organisations have devoted many years of effort to the specific and complex issue of standardising country names references, and cataloguing the many examples of toponyms (place names), be they exonyms (references to a country by others) or endonyms (references to a country by locals).

One pertinent example is the extensive work undertaken by the United Nations Group of Experts on Geographical Names[17]. While the Study Group has sought to use existing resources to provide a frame of reference, it is acknowledged that this group's deadlines and specific focus on the Domain Name System and the current and potential future use of TLDs necessitates a more focussed and selective approach.

Country and territory names typology

During initial meetings, Study Group members were able to identify and share anecdotal examples of possible complexities and inconsistencies that arose in the treatment of country and territory names, when various policy frameworks were applied.

However, the group determined to develop a typology, or a set of categories, that would allow it to approach its work in a more comprehensive and methodologically-sound manner. Therefore, the typology was developed in order to provide a thorough framework through which the Study Group could discuss and assess the many different ways in which country and territory names are represented.

It also enabled the Study Group to fulfill its second deliverable – to provide a comprehensive overview of the categories of strings associated with country and territory names that are, *or could be used* as TLDs.

It is however, only an assessment and illustrative tool and is not, and cannot be, an exhaustive list. The Study Group notes that examples discussed below are simply used as case studies, and no judgment or criticism of how the relevant representations have been allocated or used, should be inferred.

The categories developed are:

- Two-letter representations of country or territory names in the International Organization for Standardization's (ISO) 3166-1 Alpha 2 list[18]

- Three-letter representations of country or territory names in the International Organization for Standardization's (ISO) 3166-1 Alpha 3 list

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[17] http://unstats.un.org/unsd/geoinfo/ungegn/default.html

[18] http://www.iso.org/iso/country_codes.htm

- Other commonly-used abbreviations or acronyms

- “Official” long-form names (also referred to as “formal” or “principal” name or “name used for administrative purposes

- “Official” short-form names (also referred to as “formal” or “principal” name or “name used for administrative purposes

- Country / territory name in the six official languages of the United Nations - Arabic, Chinese (Mandarin), English, French, Russian, Spanish

- Commonly used or local names

- Country or territory names in minority or indigenous languages

- Long- and short-form representations of country name in non-official/administrative (or “other”) languages

ISO 3166-1 alpha 2 codes

These two-letter identifiers for countries and territories were included as the first category as they are the basis for the long-standing and commonly-used definition of ccTLDs within the ICANN environment. The ISO list was identified as a relevant resource in RFC1591[19] and underpins IANA’s procedures for root zone management and assessment of delegation and re-delegation requests.[20] [21] The list is maintained by the ISO 3166 Maintenance Agency, which adopts politically neutral procedures for determining which entities are included in the list. ICANN (specifically IANA) is simply a user of the ISO list and, as an interested stakeholder, participates in the Maintenance Agency’s deliberations.

The list itself is dependent upon other United Nations sources, namely the UN Terminology Bulletin Country Names and the list of Country and Region Codes for Statistical Use of the UN Statistics Division[22] A code cannot be allocated unless the relevant country or territory is identified in either of these publications.

Examples of ISO3166-1 alpha two codes used as ccTLD’s include Germany’s “.de”, Australia’s “.au” and Japan’s “.jp”. A full list of codes used as ccTLD’s is available in the IANA root zone database. [23]

The Study Group included these identifiers as an initial, non-contentious categorization that many in the ICANN community are familiar with and understand.

ISO3166-1 Alpha 3 codes

Study group members carefully deliberated the inclusion of ISO-3166-1 three-letter codes as a

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[19] http://www.ietf.org/rfc/rfc1591.txt

[20] http://www.iana.org/domains/root/delegation-guide
[21] http://www.iana.org/procedures/cctld-establishment.html
[22] http://unstats.un.org/unsd/methods/m49/m49alpha.htm
[23] http://www.iana.org/domains/root/db

categorization in the group's typology.

Some Study Group members noted that, while two-letter codes had a long-standing role in policy and procedure, ICANN had not consistently extended the same protections and definitions to three-letter codes. The Study Group also noted that TLDs and the ISO3166-1 alpha 3 list had coexisted, with occasional intersections, for many years, with no significant policy-based conflicts.

However, following the release of the final version of the new gTLD applicant guidebook, which included a total prohibition on the use of ISO3166-1 three-letter codes, it was deemed appropriate to include this categorization in the group's discussions.

Other commonly used acronyms or abbreviations

In part, the Study Group chose to include this categorization in acknowledgement of the fact that the ISO 3166-1 two-letter and three-letter lists are not the only officially- or commonly-used resource for country and territory name abbreviations. Other examples include:

- International Olympic Committee (IOC)codes[24],
- assorted North Atlantic Treaty Organization(NATO) listings[25],
- International Telecommunication Union (ITU) codes,
- distinguishing signs (DS) codes for vehicles
- International Civil Aviation Organization (ICAO) codes
- World Meteorological Organisation codes, and
- the Fédération Internationale de Football Association (FIFA) codes.

While none of these collections have current status within any ICANN policy or procedure, they are potential sources as well.

Official / conventional Long-form and short form names

As with the ISO-3166 codes, country and territory long- and short-form names were included in the Study Group's deliberations as they are the most predictable, common representation of the identity of States.

The wording of this category ("Official" long-form names, also referred to as "formal" or "principal" name or "name used for administrative purposes") was carefully constructed in order to capture all possible international understandings of the term under analysis.

Once again, the Study Group observed that there is no single, authoritative source listing country and territory names. Current resources include:

- The United Nations Group of Experts on Geographical Names (UNGEGN) Manual for the standardization of geographical names[26] provides extensive guidance on the treatment and representation of geographical names.

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[24] http://en.wikipedia.org/wiki/List_of_IOC_country_codes
[25] http://www.nato.int/structur/ac/135/main/links/ncs-country-codes.htm
[26] http://unstats.un.org/unsd/publication/seriesm/seriesm_88e.pdf

- The UNGEGN's working paper, including a list of country names[27] – 193 country names (both "official" names and the names in all 6 UN languages)
- UNTERM – the UN's multilingual terminology database[28] - 197 names (long and short form) of member states.
- The World Intellectual Property Organization's Standard ST.3[29] which includes 221 country and territory names and is also another listed of two-letter code representations.
- The United Nations Statistical Division's Standard Country or Area Codes for Statistical Use[30] – (using Terminology Bulletin No. 347/Rev.1) – over 240 names, also with three-letter code representations
- The ISO-3166-1 list – 249 names

This particular categorization also led the Study Group to consider issues relating to IDNs as, in many cases, the official names of countries are represented in non-Latin scripts.

Country and territory name in the six official languages of the UN

This category was included in the typology in order to further explore the complexities associated with introducing the concept of country name representations in different scripts and languages. In the first instance, the six languages of the UN were utilised to broaden scope in a controlled fashion, in terms familiar to UN Member States, and with the support of UNGEGN resources that provide guidance in this area. The Study Group essentially aimed to introduce the concept of country and territory name representations in (except in limited cases) scripts and strings that do not represent local or official languages.

Commonly used or local names

This category was included in the Study Group's deliberations as a broader grouping that could identify informal or local names for countries that were not captured in previous categories, as they are not in "official" languages, or do not represent the "official" name of the country.

Examples of country / territory name in minority or indigenous languages[31]

This category was included in the acknowledgement that significant ethnic minorities and/or indigenous populations exist in many countries and that the terminology they use to refer to their country or territory may not be captured by other elements of the typology. However, these representations may

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[27] http://unstats.un.org/unsd/geoinfo/UNGEGN/docs/26th-gegn-docs/WP/WP54_UNGEGN%20WG%20Country%20Names%20Document%202011.pdf

[28] http://unterm.un.org/

[29] http://www.wipo.int/standards/en/pdf/03-03-01.pdf

[30] http://unstats.un.org/unsd/methods/m49/m49alpha.htm

[31] Depending on the source used, this category could include 7105 living languages. A living language is defined as one that has at least one speaker for whom it is their first language. See: http://www.ethnologue.com/statistics.

be identified by national governments as relevant terms, and which could also be perceivably used as TLDs[32].

Examples of name in non-official languages

This was, by far, the most expansive category addressed by the Study Group, incorporating many possible country name representations not previously captured in previous categories.

Although “commonly used” or “minority/indigenous” categorisations captured numerous examples, this category was specifically designed as a “catch all” to highlight issues the Study Group may not have previously identified.

Survey of a sub-set of UNESCO Member States

In September 2011, the Study Group formally corresponded with the United Nations Educational, Scientific and Cultural Organization (UNESCO), in order to seek UNESCO’s expert views upon the use of country and territory names as they pertain to the internationalization of the Internet.

The approach was made in accordance with ICANN’s Co-operation Agreement with UNESCO to promote linguistic diversity on the Internet, which was signed in December 2009.

On 30 September 2011, UNESCO Assistant Director-General for Communication, Jānis Kārkliņš, provided UNESCO’s preliminary views on the Study Group’s progress and undertook to collaborate with the group on any relevant activities.

Based upon this high-level agreement, Study Group members and UNESCO commenced work on developing a survey that could be circulated to UNESCO Member States. The survey was based upon the typology developed by the Study Group and was intended to serve as both a test of the typology and an exercise for gathering the expert input of UNESCO Member States on their perspectives relating to country and territory names.

It was determined that, for the sake of administrative and methodological expediency, the survey would be sent to a subset of Member States that display appropriate linguistic, script and geographical diversity.

Accordingly, the questions presented to Member States (in July 2012) were:

- ISO-3166-1 Alpha 2 code: What is your country or territory's two-letter representation in the International Organization for Standardization's (ISO) 3166-1 list?
- ISO-3166-1 Alpha 3 code: What is your country's / territory's three-letter representation in the International Organization for Standardization's (ISO) 3166-1 list?

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[32] See for example submission of the UK government on the IDN ccPDP Interim Report, http://forum.icann.org/lists/comments-idn-ccpdp-05feb13/msg00000.html

- Are there any other commonly-used abbreviations or acronyms for your country or territory? Please provide examples and cite reference materials.

- What is your country or territory's "official" long-form name? This may also be referred to as a "formal" name, "principal" name or "name used for administrative purposes".
- What is your country or territory's "official" short-form name? This may also be referred to as a "formal" name, "principal" name or "name used for administrative purposes".

- Please provide both the long and short form name of your country / territory in the six official languages of the United Nations - Arabic, Chinese (Mandarin), English, French, Russian, Spanish.

- Please provide the long and short form names of the other participants in this survey (listed below) in your designated language/s

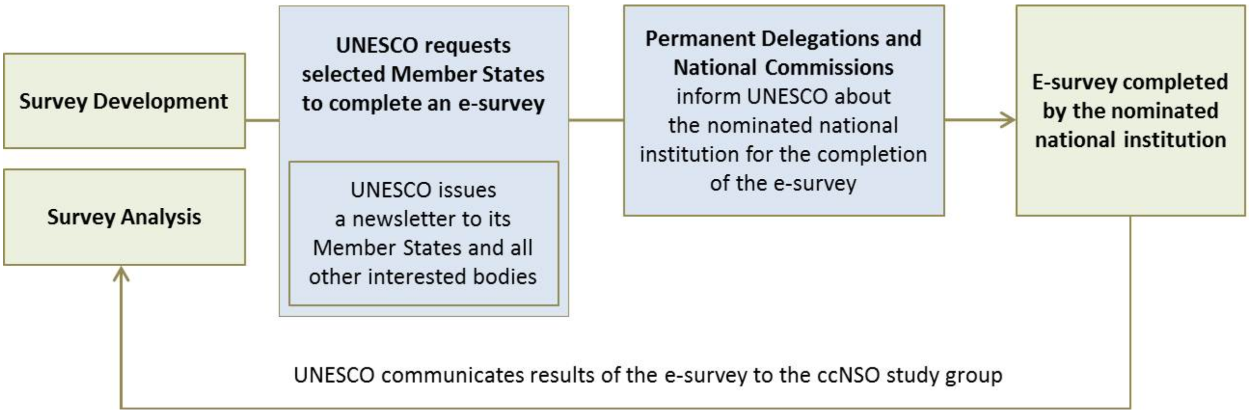
- Please provide examples of any other commonly-used or local representations of your country / territory name. For example: "Holland". If possible, please provide references or citations for these representations.

- Please provide examples of written indigenous or minority representations of your country or territory name. Please provide references or citations for these representations.

- Please provide examples of any other representations of your country or territory name that may not have been captured by the above categories. Please provide explanation and references or citations for these representations.

The survey also requested information regarding whether "civil society" stakeholders were consulted or involved in Member States' responses.

The detailed mechanism for the execution of the survey process is represented diagrammatically, below.



Overall, the survey garnered a moderate rate of response from UNESCO Member States. Of the 39 States that were surveyed, responses were received from 12.

This would not typically represent a statistically-significant response rate in order to ascertain trends across respondents; however the data gathered did confirm Member States' understanding of the typology and provided useful individual exemplars that illuminated the Study Group's deliberations.

The responses received also indicated that it is very difficult and time-consuming to engage and involve the appropriate governmental agency or department in matters relating to country and territory names.

As the survey of its Member States was undertaken by UNESCO, the details of responses remain the property of that agency. Access to the results of the e-survey could be considered upon receipt of an official request on a case-by-case basis, pending the approval of the respective Member State.

5. Deliverable 3: Issues arising or likely to arise in connection with applying policies to current or proposed strings

In the third stage of its work, the Study Group took the extensive list of examples gathered through the typology and feedback from the UNESCO survey and assessed what would happen should various ICANN policies and procedures by applied to these strings. In other words, the group sought to identify any difficulties or inconsistencies that may arise, the extent and applicability of existing frameworks, and whether any inconsistencies or gaps existed.

Once again, the group did not pass judgement on the applicability or appropriateness of current policies and procedures, noting that each was developed at a different time, for a specific purpose and that universally consistent outcomes were unlikely.

ISO 3166-1 alpha 2 codes

With the assistance of the input and guidance from experts familiar with ISO processes, the Study Group noted that the 3166-1 list itself is not static[33] and that geo-political changes, the creation of new countries and the dissolution of others meant that not even this most fundamental guideline document was without its own complexities and challenges.

Such past and potential changes include, though are not limited to:

- the formation of South Sudan and the allocation of the “SS” two letter code;
- the dissolution of the Netherlands Antilles,
    - deletion of the “AN” code
    - subsequent creation of numerous other code allocations including “BQ”, “CW” and “SX” code for Dutch Sint Maarten[34]
- dissolution of the former Soviet Union,
    - exceptional reservation of the “SU” code and continued use as a ccTLD
    - allocation of “RU” for Russia and numerous other codes to countries formerly part of the Soviet Union
- dissolution of the Socialist Federal Republic of Yugoslavia
    - transitional reservation of the “YU” code, following use by the Federal Republic of Yugoslavia,
    - reallocation of the “CS” code (previously-deleted code for Czechoslovakia) to Serbia and Montenegro and subsequent deletion upon the establishment of “RS” (Serbia) and “ME” (Montenegro), creation of .MK, (Macedonia, the former Yugoslav Republic of)

However, on the whole, the Study Group noted that this flexibility in the ISO list did not itself cause instability or uncertainty when it comes to the treatment of two-letter country codes as TLDs. Under well-established precedents, all two-letter codes, whether used as a country code or not, are excluded and can only be delegated or re-delegated for this specific purpose.

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[33] http://www.iso.org/iso/home/standards/country_codes/updates_on_iso_3166.htm?show=tab2

[34] Note that Aruba’s “AW” designation and relevant ccTLD were already in existence. ‘MF” for French Saint Martin is not related to the Netherlands Antilles.

In noting this, the Study Group acknowledges that changes to the ISO list, and the creation or deletion of two-letter codes, have implications for the membership of the ccNSO, though this issue is out-of-scope for this project. Also, the matter of ensuring efficiency and consistency in IANA's processes for managing delegations and re-delegations is within the remit of the Framework of Interpretation Working Group[35] and is also out-of-scope for this group.

ISO3166-1 Alpha 3 codes

As mentioned in the discussion under Deliverable 2, the inclusion of ISO3166-1 alpha 3 codes was not as straightforward a decision as the inclusion of alpha 2 codes. Neither the policies relating to ccTLDs nor IDNs explicitly refer to three-letter codes. Similarly, previous processes such as the December 2003 Request for Proposal for new sponsored TLDs did not explicitly address the issue of three-letter representations of a country or territory.

As such, the range of current TLDs was established and allocated without specific consideration of whether the three-letter strings would intersect with country and territory name abbreviations, nor discussion of whether this eventuality was problematic. The Governmental Advisory Committee has, as far back as 2000 and 2001[36], provided advice to the ICANN Board on the treatment of country (and, more generally, geographic identifiers) though this was largely focused upon the use of such identifiers at the second level of existing or new TLDs.

However, given its responsibility for undertaking a comprehensive analysis of all of the representations of country and territory names that *may* be used as TLD strings, the Study Group determined it appropriate to include this categorization. The appropriateness of this decision was reinforced when ICANN included explicit reference to ISO3166-1 alpha 3 codes in the final version of the Applicant Guidebook.

The first example the Study Group discussed was that of ".com", the largest gTLD, and also an ISO3166-1 alpha 3 code for Comoros. The group acknowledged that this duality has existed since January 1985, when the TLD was first implemented. At the time, there were simply no policy protections in place for country names. However, ".com" has thrived as the pre-eminent gTLD and any attempt at retrospective application of protectionist policies for three-letter codes would provide an undesirable policy conflict and destabilizing, unenforceable influence in the case of this case study.

Furthermore, the Study Group noted the re-launch and rebranding of Colombia's ".co" in 2010 under auspices of the Colombian government with a liberalized policy regime aimed at attracting registrations from companies from both within and outside the country. Irrespective of the commercial success or uptake levels of ".co" domains, the Study Group observed that no prohibitions were placed (nor could be) upon Colombian government to determine the appropriate use of its own ccTLD and that ".co" and ".com" continue to coexist.

Prior to ICANN's 12 June 2012 announcement[37] of the strings applied-for during the first new gTLD round, the Study Group analysed the ISO3166-1 alpha 3 list to identify strings that could, due to dual

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[35] http://ccnso.icann.org/workinggroups/foiwg.htm
[36] For example - http://archive.icann.org/en/committees/gac/communique-09sep01.htm
[37] http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en

meanings, be both meaningful representations of a country or territory and also a possible new gTLD application.

One policy circumstance that was noted in the Applicant Guidebook was the reservation of the code “NIC”, explicitly included on the “top-level domains reserved list” as a representation of “Network Information Center” and yet also an ISO3166-1 alpha 3 code representation for Nicaragua. The group noted that, although this is not an inconsistency *per se,* should future policy changes allow sovereign States to determine the allocation and use of three-letter country codes, this provision could not be afforded to the Government of Nicaragua, under current policy rules.

Similarly, use of “BEN”, the three-letter ISO representing Benin, could perceivably become problematic given confusion rules (that were not applicable in the circumstance of “.co” and “.com”) and the current ccTLD codes of “.be” for Belgium and “.bn” for Brunei Darussalam.

Another example is that of “CYM” - the ISO3166 three-letter code for the Cayman Islands. It could also be perceived as a meaningful abbreviation for “Cymru” (Wales). While applications for both “.cymru” and “.wales” were lodged with ICANN, current policies would prohibit use of “cym” for the same purpose. In addition, relaxation of this protection in future could give rise to issues of confusing similarity.

Following ICANN’s announcement of strings that had been applied for, the Study Group noted that applications had been received for “.AND”, “.ARE”, “.IDN” and “.EST”, representations of Andorra, the United Arab Emirates, Indonesia and Estonia, respectively. Although the Applicant Guidebook provides clear guidance, and includes procedures for objection and / or the possible withdrawal of these applications, the fact that formal interest was expressed for these strings, and applications made, highlights the possibility for confusion and a lack of policy clarity, even for stakeholders that are intimately familiar with the new gTLD process and ICANN’s rules around it. As of early March 2013, three of these applications have been withdrawn, though the application for .IDN remains active, under initial evaluation.

Other commonly used acronyms or abbreviations

Much like the consideration of ISO3166-1 three-letter codes, the Study Group determined to include “other” abbreviations in its deliberations, given the possibility of intersection between existing or future TLDs and meaningful country representations. In part, this was again an acknowledgement that ISO3166-1 is not the only widely used source of country abbreviation codes, and is not necessarily consistent with other lists.

One salient example is the case of Barbados. The ISO’s official designation is “BRB”, while numerous other sources use the abbreviation “BAR”. This is both a common English-language term and an applied-for gTLD string.

Overall, the group concluded that current ICANN policies, particularly with regard to the current new gTLD process, provide an inconsistent framework for treatment of three-letter country representations:

- ISO-related strings that could be of interest to potential new gTLD applicants (such as .BRB or .CAN or .GEO) are currently protected – and cannot be new gTLDs.

- The outcomes of the application round showed pent-up demand in this area with tangible examples such as ".IDN" and ".AND".
- Some codes – such as ".com" already are TLDs.
- Other three-letter codes on the ISO list (such as .NIC) could never be available, even if ICANN were to drop current protections, unless other Reserve List policies were changed
- And yet other three-letter codes – most notably those IDNs involved in the fast track process – are required to meet an entirely different set of eligibility criteria.

3-letter code	Country	Source	Designation
.BRB, .CAN, .GEO	Barbados, Canada, Georgia	ISO	- No allowable use (as for many ASCII codes) - In future???
.BAR	Barbados	IOC	- Potential gTLD - Possible objection?
.CYM	Cayman Isl.	ISO	- No allowable use - Wales (Cymru) ineligible
.COM	Comoros	ISO	- IS a gTLD
.NIC	Nicaragua	ISO List Reserved	- Prohibited new gTLD - Also a reserved name
.BEN	Benin	ISO List	- Prohibited new gTLD - Confusion rules (BE, BN)
.СРБ, .ҚАЗ, .УКР	Serbia, Kazakhstan Ukraine	Fast track	- IDN ccTLD

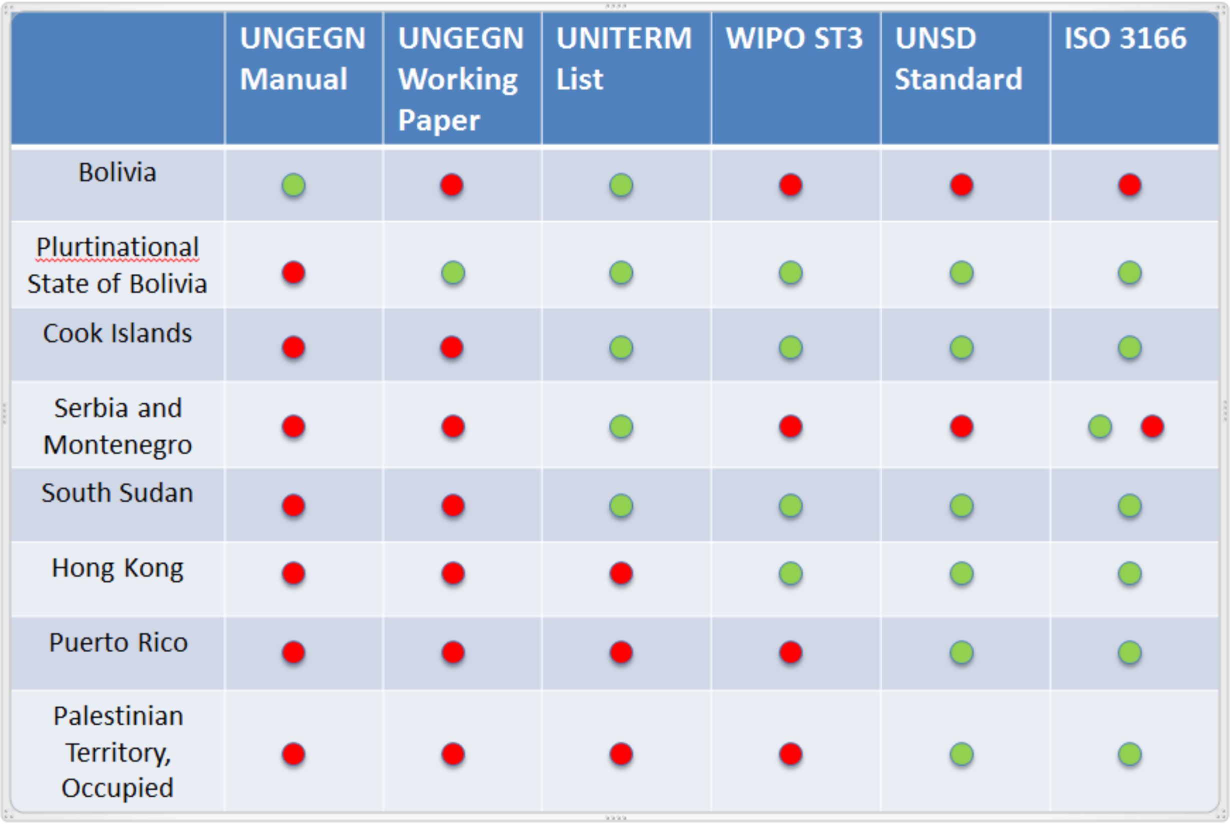
The general observation of the Study Group with regard to this circumstance is that there is no consistency or predictability with how particular three-letter codes will be managed, protected or allocated. It is outside of the scope of this group to recommend how these strings should be treated in future (open market with no restrictions, refined or limited set of protections etc) but it remains a policy issue for ICANN and its stakeholders that should be resolved.

Official / conventional Long-form and short form names

As mentioned in the discussion under Deliverable 2, although the definition of the long and short-form "official" names of countries appears to be a straight-forward process that can be addressed by ISO3166-1, this is not necessarily the case, given that other resources and lists exist that do not necessarily conform with the ISO list.

Their respective contents vary depending upon purpose, scope, frequency of revision and definition – for example whether the list either excludes or includes "territories".

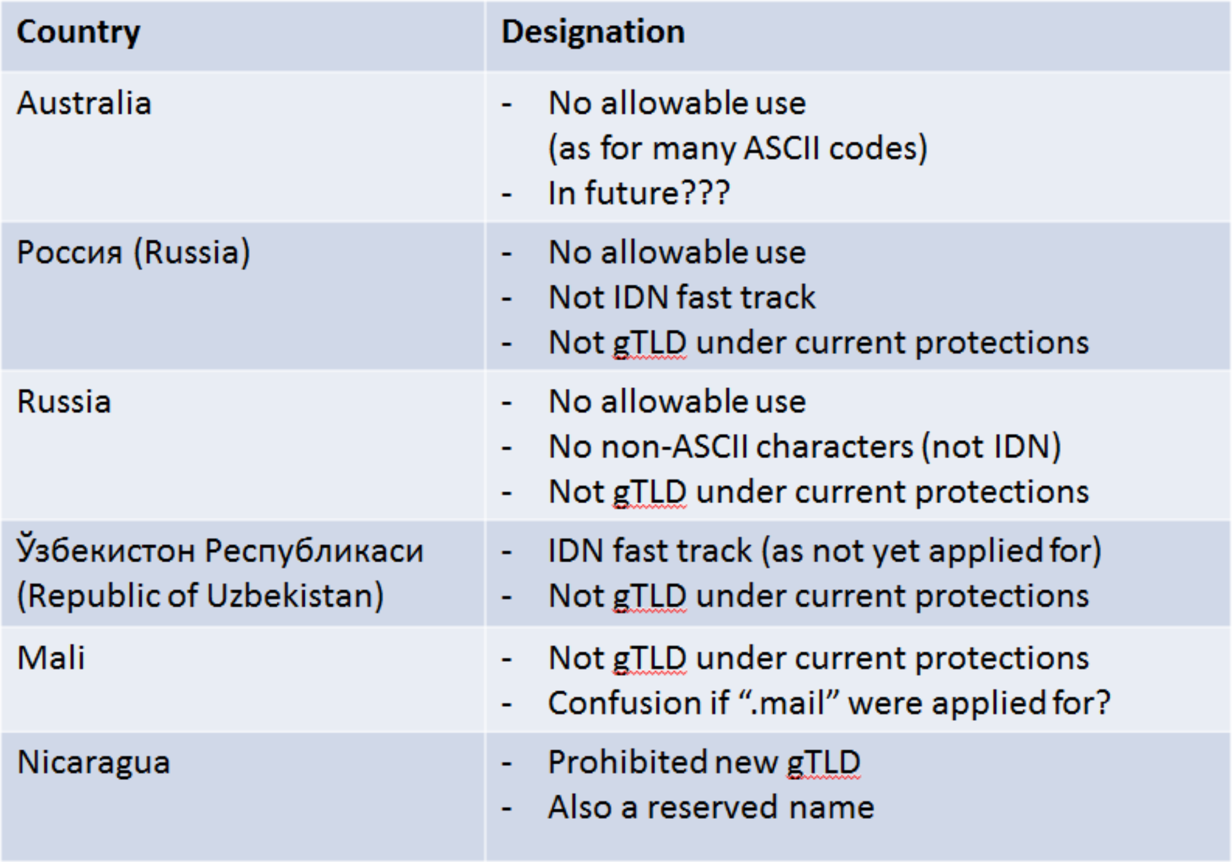
The table below illustrates the above points, with green marks denoting the presence of an entry in the relevant resource list, and red denoting its absence.



	UNGEGN Manual	UNGEGN Working Paper	UNITERM List	WIPO ST3	UNSD Standard	ISO 3166
Bolivia	🟢	🔴	🟢	🔴	🔴	🔴
Plurtinational State of Bolivia	🔴	🟢	🟢	🟢	🟢	🟢
Cook Islands	🔴	🔴	🟢	🟢	🟢	🟢
Serbia and Montenegro	🔴	🔴	🟢	🔴	🔴	🟢 🔴
South Sudan	🔴	🔴	🟢	🟢	🟢	🟢
Hong Kong	🔴	🔴	🔴	🟢	🟢	🟢
Puerto Rico	🔴	🔴	🔴	🔴	🟢	🟢
Palestinian Territory, Occupied	🔴	🔴	🔴	🔴	🟢	🟢

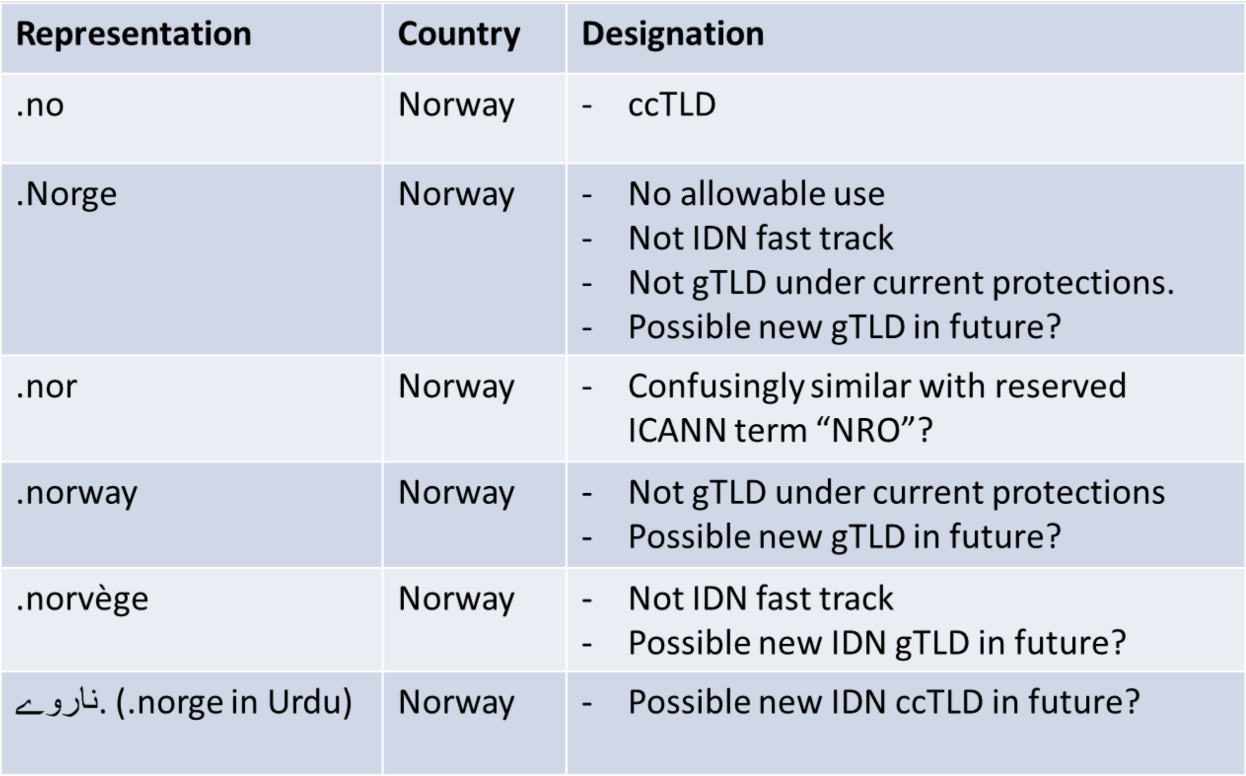
The reason for the Study Group noting these inconsistencies is to highlight the fundamental fallibility of any process that relies upon a single, given resource as an authoritative of "list" of country and territory names. While ISO3166 provides the most expansive list, it is only published in English and French, whereas UNGEGN resources include all six languages of the UN.

As a broader observation, the Study Group noted that rigid application of the current range of ICANN policies and procedures could potentially lead to an inconsistent treatment of country and territory names. That is, certain representations could be deemed as prohibited as new gTLDs according to the Applicant Guidebook, others could be considered IDNs, and yet others could be prohibited from use as an IDNccTLD given current "one per Official/Designated Language/" provisions of the fast track process and future IDN ccTLD policy.



Country	Designation
Australia	- No allowable use (as for many ASCII codes) - In future???
Россия (Russia)	- No allowable use - Not IDN fast track - Not gTLD under current protections
Russia	- No allowable use - No non-ASCII characters (not IDN) - Not gTLD under current protections
Ўзбекистон Республикаси (Republic of Uzbekistan)	- IDN fast track (as not yet applied for) - Not gTLD under current protections
Mali	- Not gTLD under current protections - Confusion if “.mail” were applied for?
Nicaragua	- Prohibited new gTLD - Also a reserved name

Furthermore, on aggregate, the assortment of current ICANN policies and procedures, even with relation to *an individual* country or territory, could cause unclear or inconsistent treatment. That is, multiple meaningful representations of the same country could be considered assessed as ccTLDs, IDN ccTLDs, a gTLD, an IDN gTLD, or prohibited for reserve list reasons.



Representation	Country	Designation
.no	Norway	- ccTLD
.Norge	Norway	- No allowable use - Not IDN fast track - Not gTLD under current protections. - Possible new gTLD in future?
.nor	Norway	- Confusingly similar with reserved ICANN term “NRO”?
.norway	Norway	- Not gTLD under current protections - Possible new gTLD in future?
.norvège	Norway	- Not IDN fast track - Possible new IDN gTLD in future?
ناروے. (.norge in Urdu)	Norway	- Possible new IDN ccTLD in future?

Country and territory name in the six official languages of the UN

For the most part, the Study Group focused upon the broader issue of the representation of country and territory names in multiple languages. This discussion was guided by the current provisions in the new gTLDs Applicant Guidebook where protections are afforded to names in all languages. This provision brings about its own complexities such as what constitutes a “language”, are protections expanded to all minority, spoken, written and historical languages and what authoritative sources can be used upon which to implement this policy position?

As a preliminary step in establishing the complexities and possible expansiveness of broadly-worded policy protections, the Study Group assessed the permutations that arise if “only” the six official UN languages are considered.

Utilizing the UNGEGN’s resources expands the scope of protections to over 1200 names, a figure that is doubled if both long and short-form names are included, and expanded further given many nations have more than one “official” language. Similarly, use of the ISO3166 list conservatively identifies over 1500 names and is multiplied again, if the above criteria are applied.

The Study Group’s motivation in identifying this pattern is to raise awareness that, even if strict, limited definitions are applied to the concept of country names, any resultant protections will be necessarily expansive in nature.

Commonly used or local names

One of the pertinent examples that the Study Group considered was the use of the term “Holland” which is commonly used interchangeably with “The Netherlands”, even though it refers more correctly to two provinces (North and South Holland). The term “Holland” is absent from the official lists of country and territory names previously discussed. However, the use of the term “Holland” to describe the whole of The Netherlands is so expansive that government entities, such as the Netherlands marketing and tourism authority NBTC, adopt the term for official purposes.[38]

Another pertinent example was drawn from the survey response received from the Republic of Armenia that listed a wide range of commonly used / local representations, including "Hayasdan”, "Hayastan", "Aiastan", "Hayk", "Mets Hayk" and "Hayastani Hanrapetutyun" along with historical names such as "Urartu", "Nairi", "Biayna", and "Kilikia".

The identification of such names introduces the issues and complexities associated with regional, geo-political and historical names.

The Study Group chose not to formally categorise and analyse historical and possible future country names, given the incredible difficulty and complexity associated with doing so. However, the group noted that such names could give rise to potential policy conflicts within the ICANN environment. For example, reverting to the example of “Holland”, the Study Group noted that the term “New Holland” is a historical representation of the island continent of Australia, is the tradename, brandname and business name of a large producer of farming and construction equipment and is also a string that has

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[38] http://www.holland.com

been applied for as part of the new gTLDs process. Once again, the Study Group presents this observation as an illustrative example, and provides no judgment as to the preferred treatment of the string.

Examples of country / territory name in minority or indigenous languages

One example considered by the Study Group was “Aotearoa”, the representation of “New Zealand” in the Māori language. However, this is a somewhat unique example, as Māori is recognised as an official language, and would therefore be captured in narrower definitions discussed earlier in the Study Group’s work.

Other examples gleaned from the UNESCO survey process included minority representations of Armenia:

- Russian-"Армения",
- Ezid -"Ерманистан”,
- Assirian-"Armnstan",
- Kurdish-"Ermenistan" and
- Hebrew-"ארמניה רפובליקת"

In Sweden, there are five recognized minority languages[39]: Finnish, Meänkieli (Tornedal Finnish), Sami (all dialects), Romani Chib and Yiddish. Therefore the representations of “Sweden” in these languages are:

- Finnish: Ruotsi
- Meänkieli: Ruotti,
- Ruotsi Sami: Svöörje,
- Sveerje Romani Chib: Sveedi
- Yiddish: שוועדן

Examples of name in non-official languages

In adopting this all-encompassing category, the Study Group attempted to acknowledge the full extent of the permutations and complexities that could arise with regard to country and territory name representations. Such a categorization was deemed appropriate given that ICANN’s own rules for short- and long-form country names under the first round of the new gTLD process extended to representations “in all languages”.

As a threshold observation, the Study Group noted that to attempt to categorise and assess all country name representations, in all languages, creates an insurmountable challenge that can only be managed with a case-by-case objection procedure, rather than through the development of definitive “lists”.

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[39] According to the definition of Designated Language they could qualify as a language for administration.

Numerous problems arise from attempting to define what constitutes a language - be it living, historical, written or oral. Once again, numerous resources exist that attempt to identify the current number of living languages and their minority dialects.

For example, SIL International maintains “Ethnologue” that currently contains descriptions of 7105 known living languages[40]. Alternative language names and dialects expand this list to nearly 40,000.

The International Organization for Standardization set of standards relating to the names of languages or language groups (ISO 639) includes a standard ISO 639-3:2007. This is a superset that contains alpha3 codes for the representation of names of languages –be they living, extinct, ancient or constructed languages. This standard contains 7776 entries[41] and is also maintained by SIL.

The Study Group noted this because, by any reasonable measure, it would be an almost impossible undertaking to comprehensively gather and list all country and territory names, in all languages[42].

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[40] http://www.ethnologue.com/statistics

[41] http://www-01.sil.org/iso639-3/download.asp

[42] Assuming that countries and territories are defined through the ISO 3166-1 list and only documented living languages are relevant, such a list would contain 1,833,090 entries.

6. Deliverable 4: Study Group recommendations

The Country and Territory Names Study Group was tasked, by the ccNSO Council, with providing an analytical overview in three main areas:

- current ICANN policies, procedures and guidelines relating to the use of country and territory names,
- the types of strings that are, or may be, used as TLDs that could also be considered meaningful representations of country and territory names, and
- the issues that may arise if current policies and procedures are applied to these country and territory name-related strings.

This report represents the Study Group's findings in relation to these three main objectives.

However, the Group was also tasked with, if considered appropriate, the provision of advice with regard to a course of further action, to resolve any issues identified in the course of its work.

Study Group members hold that the provision of a detailed "state of play" represents a suitable evidentiary basis upon which to assess the issues at-hand. However, noting its narrow mandate, the members of the Study Group also believe it appropriate that their work should be used to provide meaningful guidance for future deliberations.

Accordingly, the Study Group offers the following comments and observations.

- Throughout its deliberations, the Study Group observed an incredible level of complexity associated with any attempt to definitively categorize country or territory names, especially when such an effort includes multiple languages or scripts.

- A consistent observation was the inability of individual "lists" or resources to provide comprehensive, consistent or universal guidance regarding the various representations of country and territory names, in particular as a result of geo-political changes, the creation of new countries and the dissolution of others.

- ICANN's current policies and procedures (as they may relate to ccTLDs, IDNs or current and potential new gTLDs) do not afford consistent treatment of country and territory names. This may give rise to stakeholder and end-user confusion and uncertainty.

- ICANN's current policy framework (the Applicant Guidebook) for the introduction of new gTLDs affords an unprecedented level of protection for country and territory names, though notes that such protections are only confirmed for first and current round of new gTLD applications.

- The current Fast Track and IDN ccTLD policy are restricted. The major restrictions are the requirements that:
  1. the IDN ccTLD string is a meaningful representation in a designated language of the territory, and
  2 only one string per designated language

If adopted the IDN ccTLD policy should be reviewed in five years, which includes a review of these restrictions.

Recommendations

It is recommended that the ccNSO Council establish a cross community working group to:

- further review the current status of representations of country and territory names, as they exist under current ICANN policies, guidelines and procedures;
- provide advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable across the respective SO's and AC's; and
- should such a framework be deemed feasible, provide detailed advice as to the content of the framework.

The GNSO, ALAC and GAC should be invited to participate in such a WG.

In light of the need for further work on the treatment of country and territory names, the complexity of the issue at hand and the aforementioned inconsistencies between various ICANN policies, it is also recommended that the ccNSO Council request that the ICANN Board extend the current rule in the new gTLD Applicant Guidebook regarding the exclusion of all country and territory names in all languages, for consecutive rounds of new gTLD applications until such a time when the work of the cross community working group has been concluded.

Annex A: Study Group Membership

In accordance with the Study Group's purpose and scope, membership was open to all ccTLD managers (both members and non-members of the ccNSO), who were appointed by the ccNSO Council after a call for volunteers. The Chair was also appointed by the ccNSO Council, in accordance with the nomination of the SG membership.

The ccNSO Council also invited the GAC, ALAC and GNSO to participate either by appointing members directly according to their own rules and procedures, or by appointing liaisons to participate on equal footing with other SG members.

ccNSO

- Martin Boyle, .uk
- Joke Braeken, .eu
- Becky Burr, NomCom Appointee to the ccNSO Council
- Henry Chan, .hk
- Ian Chiang, .tw
- Keith Davidson, .nz
- Sokol Haxhiu, NomCom Appointee to the ccNSO Council
- Hiro Hotta, .jp
- Annebeth Lange, .no
- Young-Eum Lee, .kr
- Leo Maluwa, .mw
- Nigel Roberts, .gg
- Grigori Saghyan, .am
- Ron Sherwood, .vi
- Paul Szyndler, .au (Chair)
- Maarten Simon, .nl
- Tan Yaling, .cn

GAC

- Elise Lindeberg, Norway

GNSO

- Carlos Aguirre - GNSO Nominating Committee Appointee
- George Asare-Sakyi - Non Commercial Stakeholder Group
- Iliya Bazlyankov - Registrars Stakeholder Group
- Chris Chaplow - Commercial and Business Users Constituency (Observer)
- Ching Chiao - Registries Stakeholder Group
- Avri Doria - Non Commercial Stakeholder Group
- Heather Forrest, Intellectual Property Constituency
- Volker Greimann - Registrars Stakeholder Group
- Tony Harris- Internet Service Providers and Connectivity Providers Constituency

At-Large

- Hawa Diakite, AFRALO
- Eduardo Diaz (NARALO)
- Cheryl Langdon-Orr, APRALO (liaison)

- Sophie Liang (APRALO)
- Andres Piazza (LACRALO)
- Rudi Vansnick, EURALO

Specialists

- Jānis Kārkliņš, UNESCO
- Irmgarda Kasinskaite-Buddeberg, UNESCO
- Jaap Akkerhuis, member ISO 3166 Maintenance Agency

Support Staff

- Bart Boswinkel, ccNSO
- Kristina Nordström, ccNSO
- Gabriella Schittek, ccNSO
- Marika Konings, GNSO

Annex B: Timeline

Note: In addition to the meetings listed below, the Study Group met via teleconference on a number of occasions. Transcripts of face-to-face and teleconference meetings are available on the ccNSO website. [43]

31 October 2007	ccNSO Council resolves[44] to recommend to the ICANN Board that no name of a territory, as listed in ISO 3166-1, or a meaningful abbreviation of it, should be made available as a gTLD. This resolution was subsequently reaffirmed in December 2008, April 2009, and July 2009.
21 November 2009	Letter from ccNSO Chair to the Chair of the ICANN Board[45] expressing the ccNSO's view that all meaningful representations of country and territory names should be excluded from the process for the introduction of new generic Top Level Domains (gTLDs)
14 June 2010	ICANN Board Chair response to ccNSO Chair[46], citing the Governmental Advisory Committee's interpretation of paragraph 2.2 of the GAC Principles as the catalyst for the reconsideration of the treatment and country and territory names in the new gTLDs process and a decision that no meaningful representations of such names would be allowed during the first round of new gTLD applications. The letter also acknowledged: ○ the ccNSO's policy discussions on this matter; ○ that defining the distinction between country code and generic names may warrant a broader cross-SO/AC policy discussion; and ○ that, once policy is developed, it will be appropriate for the Board to reconsider its position.
8 December 2010	Chair of IDN ccPDP WG 1 advised the ccNSO Council that the use of Country and Territory names as TLD strings, in general, is considered outside the scope of the IDN ccPDP and will therefore not be addressed during the process. ccNSO Council resolved[47] (Resolution 58-02) *"to create an ad-hoc Study Group that will provide the ccTLD community and ccNSO Council with a comprehensive overview of the use of Country and Territory Names as TLD Strings".*
25 January 2011	Study Group's Statement of Purpose and Scope adopted by ccNSO Council
11 May 2011	Following a call for volunteers among ccTLDs and outreach to the broader ICANN community, the Study Group commenced work, via teleconference.
23 June 2011	Face-to-face meeting in Singapore
6 September 2011	Study Group seeks expert input from UNESCO, in accordance with the ICANN – UNESCO Partnership Agreement

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[43] http://www.ccnso.icann.org/workinggroups/unctwg.htm
[44] http://ccnso.icann.org/meetings/losangeles/ccnso-council-minutes-31oct07.pdf
[45] http://www.icann.org/en/correspondence/disspain-to-dengate-thrush-21nov09-en.pdf
[46] http://www.icann.org/en/correspondence/dengate-thrush-to-disspain-14jun10-en.pdf
[47] https://ccnso.icann.org/meetings/cartagena/notes-council-meeting-cartagena-08dec10-en.pdf

30 September 2011	UNESCO provides response to SG letter and undertakes to collaborate on the development of a survey of UNESCO Member States to assist with the SG's deliberations.
27 October 2011	Face-to-face SG meeting of SG in Dakar, Senegal and briefings for ICANN community members
15 March 2012	Face-to-face SG meeting in San Jose, Costa Rica and briefings for ICANN community members
4 June 2012	ICANN releases final new gTLD applicant guidebook. The guidebook prohibits the use of meaningful representations of country and territory names.
25 June 2012	Face-to-face SG meeting in Prague, Czech Republic and briefings for ICANN community members
24 July 2012	UNESCO releases country and territory names survey to a sub-set of Member States and launches dedicated website
15 October 2012	Face-to-face SG meeting in Toronto, Canada and briefings for ICANN community members
March 2013	Development of draft final report and consideration by SG members
April 2013	Discussion of draft final report in Beijing, China.
July 2013	Release of Final Report for public comment
July- August 2013	Public comment period
September 2013	Publication of final report and submission to the ccNSO Council

Annex C: Checklist - Study Group tasks

	Allocated Study Group task	**Study Group action**
A	Develop a work plan, including a high level schedule	The Study Group developed a work plan in the early stages of its deliberations. The SG's work was divided into discreet elements, based upon the identified deliverables. The timeline at **Annex B** reflects the scheduling of this work.
B	Summarise existing and proposed policies, guidelines and implementation rules regarding the use of representations of Country and Territory names as TLDs	Delivered in Section 3: Deliverable 1 of this report.
C	Provide a comprehensive overview of the issues associated with the use of representations of Country and Territory names as TLDs as identified by the ccNSO, GAC and GNSO	Delivered in Section 4: Deliverable 2 (summarisation of current policies) and Section 5: Deliverable 3 of this report.
D	Liaise with the ccNSO, GAC and GNSO as needed to seek further clarification and input regarding Tasks B and C	Delivered through status reports to ACs and SOs throughout the SG's work and the ongoing contributions of SG members participating on behalf of those ACs and SOs.
E	Liaise with the IDN ccPDP working group 1 as necessary and appropriate to seek further clarification and input, and provide input and feedback to that working group	Clarification, where required, was provided by ICANN support staff that were also directly involved in the IDN ccPDP WG1 process.
F	Liaise with ICANN's new gTLD project team as necessary and appropriate to seek further clarification and input and provide input and feed-back, for example to better understand the proposed future scope of excluded Country and Territory names and objection mechanisms	Clarification and input, where required, was provided on an ongoing basis by relevant new gTLD project team members and other ICANN support staff. This was rarely required, given the highly-visible nature of the new gTLD process, and the frequent and detailed publication of supporting documents.
G	Liaise with (IDN) ccTLDs and individual GAC members as necessary and appropriate to solicit their views and perspectives on the use of representations of their Country or Territory names	Both the ccNSO and GAC were briefed on the progress of the Study Group on a number of occasions. At all times, both the ccNSO and GAC were invited to comment, individually, or collectively. These collective briefings led to numerous informal, individual discussions.
H	Prepare sessions to be conducted at ICANN meetings to inform and report to the ccTLD community, and other interested Supporting Organisations and Advisory Committees on the findings and intermediate results of the Study Group	Delivered at numerous ICANN meetings between 2011 and 2013.
I	Provide a Final Report of its findings to the ccNSO Council	Delivered.

Annex D: Summary and Analysis of comments on draft Final Report

Organizations and Groups that have submitted a comment:

Name	Submitted by	Initials
ALAC	Olivier Crepin-LeBlanc	OCL
Government of Montenegro	Milica Vucinic	MV
Hellenic Republic (Greece/Hellas) Ministry of Infrastructure, Transport & Networks	Panagiotis Papaspiliopoulos	PP
Intellectual Property Constituency	Claudio Di Gangi	CDG

Summary of Comments

General disclaimer: In this section a broad and comprehensive summary of the comments is provided. It is not intended to include every specific aspect or stated position by each contributor. If the reader is interested in specific aspects of any of the summarized comments or the full context, she or he is advised to read the specific contributions, which can be found at: http://www.icann.org/en/news/public-comment/unct-final-02jul13-en.htm (View comments submitted).

1. The comments of OCL, PP, and CDG are in support of the recommendation for further study, and the valuable contribution the study provides to the ICANN community on the use of Country and Territory Names as TLD's.

2. OCL and PP also support the second recommendation that the current rule in the Applicant Guidebook regarding the exclusion of all Country and Territory names in all languages needs to be extended until a framework a recommended has been developed.

3. MV is of the opinion the Applicant Guidebook must be modified to close the loophole that strings can be applied, which are simply a repetition of already-exising country codes listed in the ISO 3166 AND 3166-1 (for example: .MEME).

4. In addition to the support for the recommendations, PP represents that, given the complex nature of the issues around country and territory names, and there are a number of disputes regarding country and territory names, the following additional rule is necessary: "The eligibility procedure (of a given TLD process, ccTLD or gTLD, latin or IDN) is not valid in cases there are pending issues or unresolved disputes between countries or territories in the UN."

5. CDG: The IPC questions from a governance perspective whether the ccNSO Study Group's second recommendation is within scope of the ccNSO. The ccNSO develops and recommends to the Board global policies relating to country code top-level domains. The second recommendation relates to generic top-level domains.

6. CDG: in the view of the IPC any specific policy or procedure on the use of Country and Territory Names as TLD's, including as they may relate to current or future new gTLD applications, should not be frozen or made permanent until further study on the topic, as recommended, is complete and fully considered by the community.

7. CDG: Additional considerations should address the interplay of legal rights- intellectual property rights, in the delegation of strings associated with country and territory names.

8. CDG: The IPC notes that a reference to “sovereign rights” by the Study Group, which is considered to beyond the mandate of the group.

Analysis of Comments

This section is intended to provide an analysis and evaluation of the comments received.

1. The Study Groups notes 3 comments (OCL, PP and CDG) are in support of the recommendation of the Study Group to the ccNSO Council on the need of further study and creation of a general framework through a cross-community working group.

2. As to the comment from MV, although it relates to the use of a Country name as a TLD, the proposal focuses on changing specific aspects of the Applicant Guidebook, which is considered to be beyond the remit of the Study Group. In the view of the Study Group this specific aspect could be taken into consideration in further study. It also suggested to include it in the review of the first round of new gTLD applications.

3. As to the proposal by PP, the Study Group is of the view that the complexities PP is alluding to, in particular the case of disputed names, are relevant. However, it is the view of the Study Group that this particular topic, nor the proposed recommendations is within its mandate, and will therefore not include it in its Final Report, but the chair of Study will suggest to the ccNSO Council that it needs to be taken into account in the recommended further study and development of a framework.

4. With regard to the question whether the second recommendation (maintaining the current rule in the Applicant Guidebook until the proposed working group has completed its work) is within scope of the ccNSO, the Study Group view is the following:

- The ccNSO and ccNSO Council have repeatedly provided input and comments to ICANN on the topic of the use of Country and Territory names as generic Top Level Domains. The input and comments were provided as part of the public comment processes on the draft Applicant Guidebook and at the express request from Board members.

- As the Board indicated in its resolution 2012.02.07.07, ICANN will continue to work with the ICANN community to (…) address the prerequisites needed to open the second round of new gTLDs.

- The Study Group beliefs that it is within its mandate to advise to the ccNSO Council, and in particular to advise the ccNSO Council as part of ICANN’s further work and study in preparation the second round and potential consecutive rounds. Both recommendations to the Council should be considered in this context.

5. The Study Group reiterates its recommendation that the current rule in the Applicant Guidebook for the first round of new gTLD’s should be maintained temporarily, up and until such a time when the work of the cross community working group has been concluded. The Study Group sincerely hopes the proposed ccWG will be able to conclude its work prior to a second round of new gTLD applications will be opened. However, if this will no be the case, it is the view of the Study Group that not extending the rule would create irreversible consequences, which among others would further complicate and already complex area and discussions.

6. As with the other specific proposals, the Study Group believes that specific considerations such as the interplay between legal rights, including intellectual property rights and the delegation of strings associated with the names of Countries and Territories is a matter of further study and review and the development of framework that could be applicable across the respective SO's And AC's. The chair of the Study Group will suggest to the ccNSO Council that it needs to be taken into account in the recommended further study and development of a framework.

7. As to the reference to 'sovereign right' (emphasis added by CDG) the IPC noted and considered to be out of the mandate of the Study Group the following:
The Study Group used the term sovereign State in the text (page 8 and 27) as a general term, carefully avoiding any reference to the term "sovereign right" or "rights." In the first instance it was used to describe that (a.) many names have been associated with Countries (sovereign States), and (b.) each of these names are eligible to be chosen. In the second instance it was used to illustrate that a change to the current rules relating to the use of a specific country name as TLD, would create internal inconsistencies within one set of rules (in this case the rules in the Applicant Guidebook), if the government of a particular country would apply under the rules of the Applicant Guidebook. The Study Group considers both cases to be within its mandate.

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ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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As Revised November 21, 1998

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the "Corporation").

2. The name of the Corporation's initial agent for service of process in the State of California, United States of America is C T Corporation System.

3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any further United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the

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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; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

4. 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.

5. Notwithstanding any other provision (other than Article 8) of these Articles:

a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501 (c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.

b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.

c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.

d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.

e. In no event shall the Corporation be controlled directly or indirectly by one or more "disqualified persons" (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.

6. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members, should the Corporation elect to have members in the future, for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 6 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

7. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 3 hereof and, if possible, to a § 501 (c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

8. Notwithstanding anything to the contrary in these Articles, if the Corporation determines that it will not be treated as a corporation exempt from federal income tax under § 501(c)(3) of the Code, all references

herein to § 501(c)(3) of the Code shall be deemed to refer to § 501(c)(6) of the Code and Article 5(a)(ii), (b), (c) and (e) shall be deemed not to be a part of these Articles.

9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.

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AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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Русский中文

1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce ("DOC") and the Internet Corporation for Assigned Names and Numbers ("ICANN"), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system (DNS)[1], globally by a private sector led organization, the parties agree as follows:

2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet's success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet's underlying infrastructure - the DNS - is required to ensure interoperability.

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3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN andDOC recognize that there is a group of participants that engage inICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee(GAC). DOC recognizes the important role of the GAC with respect toICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANNcommits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

> 9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for

> improvement to ensure effective consideration by ICANN of GACinput on the public policy aspects of the technical coordination of theDNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of theDOC, representatives of the relevant ICANN Advisory Committeesand Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.
>
> 9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to theDNS. ICANN will organize a review of its execution of the above

commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of theGAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: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. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further

> review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.
>
> 9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOISinformation, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of theGAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GACmembers) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.

FOR THE NATIONAL
TELECOMMUNICATIONS
INFORMATION ADMINISTRATION:

____

Name: Lawrence E. Strickling
Title: Assistant Secretary for
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION
AND FOR ASSIGNED NAMES AND
NUMBERS:

____

Name: Rod Beckstrom
Title: President and CEO

Date: September 30, 2009

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[1] For the purposes of this Affirmation the Internet's domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

Forrest-012

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

and

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

and

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

International Chamber of Commerce
International Centre for Expertise

Case No.
396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

in re ".AMAZON"; アマゾン and 亚马逊 gTLD

EXPERT DETERMINATION

Prof. Alain Pellet, Independent Objector

– Objector –

vs.

AMAZON EU S.à.r.l.

– Applicant –

Expert

Professor Luca G. Radicati di Brozolo

DEFINITIONS

AGB	ICANN gTLD Applicant Guidebook, version 2012-06-04
Amazon Community	The community defined in § 40 below
Applicant	AMAZON EU S.à.r.l.
Centre	International Centre for Expertise of the International Chamber of Commerce
Expert	Professor Luca G. Radicati di Brozolo
gTLD	Generic top level domain
IO	Independent Objector
Objection Procedures	Module 3 of the AGB
OTCA	Amazon Cooperation Treaty Organization
Procedure	New gTLD Dispute Resolution Procedure, Attachment to Module 3 of the AGB
Strings	".AMAZON", ".アマゾン" and ".亚马逊" gTLDs

1. This Expert Determination is rendered in the consolidated dispute settlement proceedings arising from the community objections to three applications for the generic top-level domain ("**gTLD**") name ".AMAZON", and the Japanese and Chinese terms for AMAZON (respectively アマゾン and 亚马逊) within the framework of the ICANN gTLD Application Process governed by the ICANN gTLD Applicant Guidebook, version 2012-06-04 (the "**AGB**").

I. INTRODUCTION

2. The three community objections at the origin of these proceedings (the "**Objections**") were filed on March 12, 2013 with the International Centre for Expertise of the International Chamber of Commerce (the "**Centre**") by the Independent Objector, Professor Alain Pellet, Contact Information Redacted (the "**IO**").

3. The Objections (EXP/396/ICANN/13, EXP/397/ICANN/14 and EXP/398/ICANN/15) relate to three applications (the "**Applications**") filed by AMAZON EU S.à.r.l., Contact Information Redacted Contact Information Redacted (the "**Applicant**") respectively for the ".AMAZON", ".アマゾン" and ".亚马逊" gTLDs (collectively the "**Strings**").

4. The content of all the Objections is practically identical.

5. On April 23, 2013 the Centre informed the Parties of its decision to consolidate the Objections.

6. The Applicant filed its Responses to the Objections on May 24, 2013.

7. The IO is represented in these proceedings by Ms Heloïse Bajer-Pellet, Contact Information Redacted Mr Daniel Müller, Contact Information Redacted Mr Phon van den Biesen, Contact Information Redacted ; and Mr Sam Wordsworth, Contact Information Redacted Contact Information Redacted

8. The Applicant is represented in these proceedings by Messrs. Nick Bolter and Gareth Dickson, Edwards Wildman Palmer UK LLP, Contact Information Redacted Contact Information Redacted

9. On June 28, 2013 the Centre informed the Parties that on June 24, 2013 the Chairman of the Standing Committee appointed as sole member of the Panel of Experts Professor Luca G. Radicati di Brozolo, Arblit Radicati di Brozolo Sabatini, Contact Information Redacted Contact Information Redacted (the "**Expert**"), who submitted his declaration of acceptance and availability and statement of impartiality and independence on June 26, 2013.

10. The file of the case was transmitted by the Centre to the Expert on August 1, 2013.

Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "*constitution of the Panel*". The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert.

11. Following an exchange of correspondence with the IO and the Applicant (collectively the "**Parties**"), the Expert issued the Expert Mission on September 3, 2013.

12. At the request of the IO, the Expert allowed an exchange of submissions on the Applicant's challenge to the IO. The IO filed his additional written statement on August 16, 2013 whilst the Applicant filed its reply on August 22, 2013.

13. On September 9, 2013 the Centre informed the Expert that the time limit for submission of the draft expert determination was extended until October 5, 2013.

14. On the same date the Centre agreed to the Expert's request to deal with all three Objections in a single expert determination. The request was based on the consideration that the Applicant and the Objector are the same in all the consolidated proceedings and that the issues raised by all three Objections are practically identical and raise almost identical factual and legal issues.

15. In accordance with Article 19 of the the New gTLD Dispute Resolution Procedure (the "**Procedure**"),[1] and in the absence of any request by the Parties, no oral hearing was held.

16. The draft expert determination was submitted by the Expert for scrutiny to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

17. These proceedings are administered by the Centre pursuant to Article 3(d) of the Procedure, which is applicable by virtue of its Article 1(d).

18. The proceedings are governed, as to matters of procedure, by the Procedure and by the Rules for Expertise of the International Chamber of Commerce, as supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (Article 4(a) and 4(b)(iv) of the Procedure).

19. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings was English. Moreover, in accordance with Article 6(a) of the Procedure, all communications by the Parties, the Expert and the Centre were submitted electronically.

20. As dictated by Article 20 of the Procedure, the merits of the dispute before the Expert are to be decided by reference to the relevant standards defined by ICANN, in particular in Module 3 of the AGB (the "**Objection Procedures**"), as well as to any rules and principles that the Expert determines to be applicable, having due regard

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[1] Attachment to Module 3 of the AGB.

to the statements and documents submitted by the Parties. The burden of proof that the Objection should be sustained rests with the Objector in accordance with the applicable standards.

21. As agreed by the Centre, and given that the issues raised by the three Objections are for the most part identical, this Expert Determination deals with all three Objections collectively. Reference to the individual Objections will only be made insofar as they raise different issues from the other Objections.

II. THE CHALLENGE TO THE IO AND THE IO'S STANDING

(a) The Position of the Applicant

22. On April 6, 2013, after the filing of the Objections by the IO, the Applicant wrote to ICANN denouncing that "*the office of the IO exhibits a Conflict of Interest within the meaning of ICANN's Conflict of Interest Policy*". The challenge contended that the IO's Objections were based on comments in the Early Warning Procedure by the Governments of Peru and Brazil, with whom the IO has "*special links*" due to his professional ties with them, as he has with the Governments of Bolivia and Argentina, likewise identified as opponents of the Applications. Those links are asserted to have influenced and to continue to influence the IO's decision-making process in these proceedings. For the Applicant the Objections were used to formalize the objections of the governments of Brazil and Peru, in contrast with the principle that the IO can only act on behalf of the public who uses the global internet. The conflict of interest is viewed as the reason for the alleged inconsistency between the IO's approach to this application and to the ones for similar gTLDs (for instance for ".africa", ".persiangulf" and ".islam"). According to the Applicant, allowing the Objections to proceed would damage the integrity of the gTLD dispute resolution process, because the challenges would be made public, leading to the perception that the IO is not a safety net for the public. The Applicant concluded with the request that ICANN set aside the Objection on account of the conflict of interest and, if deemed necessary, appoint another non-conflicted IO. The Applicant accepted to maintain confidentiality over its challenge, while reserving its right to raise the matter if the Objection were allowed to proceed.

23. The Applicant wrote to ICANN again on April 24 and May 18, 2013 reiterating its challenge and soliciting a response prior to the deadline for responding to the Objection.

24. Referring to its correspondence with ICANN, in the Response to the Objection the Applicant restated that the IO lacks standing in these proceedings because of the conflict of interest. Indeed, under the AGB he has standing only to represent "*the public who use the global internet*", and cannot act on behalf of any particular entity or entities, as he is purportedly doing in these proceedings.

25. In its reply of August 22, 2013 to the IO's additional statement of August 16, 2013, the Applicant puts forward three sets of arguments. *First*, it argues that the IO has a "*clear*" conflict of interest requiring him to recuse himself. It contests that the AGB

does not require the IO to be independent of anyone standing to benefit from the objection and releases him from the "*universally recognized obligation to decline additional work where it would create a conflict of interest with an existing relationship*". While recognizing that the IO does not act as a judge, arbitrator or expert, the Applicant underscores that the AGB binds him to the same basic rules of ethics that apply to those offices in relation not only to ICANN and applicants, but also to any other influences. The Applicant concedes that "*a normal average social life*" does not necessarily entail a conflict of interest or lack of independence, but asserts that the IO's ties to the governments of Brazil or Peru are not merely part of such a social life.

26. *Second*, the Applicant restates that the IO can only represent the community made up of those who use the internet (referred to by the parties also as the "*internet community*") and that it is "*plainly wrong*" that he can only represent a community that is "*delineated and distinguishable from internet users in general*". The IO is granted special standing to fulfill his role within the gTLD program and, unlike "*ordinary*" objectors, does not have to prove an on-going relationship with a community. Consequently, he loses his special standing if he acts outside his role, e.g. on behalf of a community comprising particular persons or entities. In the case at hand the community represented by the IO is not the public who use the internet. The IO requests the same remedy sought by his client Peru, who is the largest financial contributor to the Amazon Cooperation Treaty Organization ("**OTCA**"). Notwithstanding that the Applications generated no reasoned or substantiated comments from the public, unlike similar applications (".gcc", ".islam", ".persiangulf" and ".africa"), the IO only objected to the Applicant's ones. The Applicant also contests that OTCA lacks the capacity to file an objection and differs in this respect from other organizations that could have objected to the strings to which the IO did not object. It adds that objections to the Applications could have been put forward by other entities. Had he followed the same criteria as for other objections, the IO would have concluded that OTCA and the governments of Brazil and Peru were in at least as good a position as the IO to file an objection. The IO's failure to demonstrate his complete independence and his apparent pursuit of the interest of particular persons or entities deprives him of standing in this case.

27. *Third*, the Applicant refers to a statement of the Centre that the decision over the IO's independence falls within the Expert's authority[2]. The Applicant argues that whether the IO has exceeded his role is a serious issue, because the Expert Determination will be accepted by ICANN (Section 3.4.6 of the Objection Procedures). This means that, if the issue is not decided by the Expert, the Applicant

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[2] The Applicant refers to a letter of the Center dated July 8, 2013 in reply to a request submitted by it on this point. Actually the Center's letter of that date states that "*Whether a decision on this question [i.e. the independence of the IO] falls into the Expert Panel's scope and authority pursuant to the applicable rules and procedures, will have to be decided by the Expert Panel itself. Should the Expert Panel decide that it does fall into the scope of its work, it will then be directly on the Expert Panel to take a decision on the raised question.*"

risks "*unjustly and unfairly los[ing] with limited, if any, scope for a remedy*". This would result in irreparable damage to the integrity of the gTLD dispute resolution process.

(b) The position of the IO

28. In a letter to counsel for the Applicant of June 8, 2013 the IO denounced the inappropriateness of the Applicant's direct approach to ICANN on the matter of his independence, stating that it is not for ICANN to take a position on it. The IO argued that the claim concerning his alleged bias "*has to be dealt with by the Expert panel, who has full authority to decide in all impartiality*".

29. In the Objection the IO disclosed his relations with the Governments of Brazil and Peru, but clarified that in the present proceedings he is not representing them and is acting in the sole interests of the public who use the internet and that his relation with a State has nothing to do with his decision to object or not.

30. In his additional statement of August 16, 2013 the IO noted that Article 11(4) of the Rules is not relevant to a challenge of the IO, since the IO is only a party to these proceedings. He acknowledged, however, that the absence of a general procedure concerning the IO's independence and the possibility to challenge him for the entire gTLD program does not mean that no remedy is available. The IO recalls that in his June 8 letter referred to above he recognized that the Expert has the power to assess the IO's independence and to draw the necessary conclusions with regard to the Objection. Indeed, adds the IO, "*the Expert Panel is the guardian of the integrity of the process and it has the duty to ensure that the Expert Determination is soundly based on the standards established by the Guidebook*". Although it affects only the IO's standing, the condition that the IO must not act on behalf of any particular person or entity, but solely in the best interests of the users of the internet (Objection Procedures, Section 3.2.5), needs to be addressed by the Expert even if in Article 2(d) of the Procedure the expert determination is referred to only as a "*decision upon the merits of the objection*". The Expert must also address the standing of the Objector (Objection Procedures, Section 3.2.2). On this point the IO concludes that the Expert has the power to address whether the IO acts in the interest of the internet public or of a particular category of persons, regardless of whether the issue pertains to standing or to the merits. The matter must be decided in a single expert determination, there being no option to have separate decisions on standing and merits.

31. On the merits of the challenge, the IO posits that, pursuant to Section 3.2.5 of the Objection Procedures, he must remain independent and unaffiliated with any gTLD applicant. He considers that the Applicant's understanding that conflicts can occur where an objection is filed in furtherance of the interests of a potential community with ties to the IO "*hardly makes any sense and would ultimately exclude any person having a normal average social life to serve as the Independent Objector*". The Applicant should not be entitled to construct its case on the artificial alleged bias deriving from the IO's professional relationships when he was appointed. While accepting that the AGB directs him to act in the sole interest of "*the public who use*

the global internet", the IO cannot accept that this implies that that public is the only community that he has standing to represent. The fact that the IO is dispensed from proving the regular standing requirements for the types of objections that he can file (Objection Procedures, Section 3.2.5) does not mean that his community objections can concern only the rights and interests of a "*hypothetical*" community of internet users. This would entail a profound change in one of the four tests for community objections, the one relating to the existence of a clearly delineated community, because the public who use the internet is not such a community. Even if the community relevant here were the one of those living in the geographical region with strong links to the Amazon, it would not follow that the IO is acting on its behalf, also considering the Applicant's acknowledgment that such community would not benefit from the rejection of the Application. The AGB does not require that every string which targets a community be applied for by a representative of that community. It is irrelevant whether the Applicant intends to target a specific community or to reserve its gTLD for it. However, the operation of the gTDL must not impinge on the rights and legitimate interests of a significant portion of the community to which the string is explicitly or implicitly targeted. The IO points to Section 1.2.3.2 of the Objection Procedures, which permits community applications even if the application is not designated as community-based or aimed at a particular community. Therefore, what is relevant is not who is targeted by the applicant, but whether a particular community is targeted by the string. The IO acts for a public interest even if he invokes the interest of a particular community and mitigates the risk that in some cases a valid objection might not be raised by those entitled to do so. As such he acts as a safety net. Finally, the IO notes that his policy is not to file an objection when there is "*a single established institution*" that could do so. In the present case there is no such single institution. OTCA, in particular, could not validly have filed an objection because it is not aimed at representing the interests of the Amazon region, but at realizing the economic interest of its Member States within that region.

(c) The Determination of the Expert

32. In light of the Expert's conclusions on the merits of the Objection (Section III below), an analysis of the challenge to the IO's independence could be moot. However, the issues raised by the Applicant in this connection have been amply debated by the Parties and raise important questions of principle for the gTLD dispute resolution process. The Expert therefore deems it appropriate to address them.

(i) <u>The Expert's power to decide the challenge</u>

33. The Parties' arguments raise, as a preliminary matter, the issue whether it falls within the Expert's mandate to address the existence of the IO's alleged conflict of interest and, in the event, to draw the consequences of a finding that a conflict exists.

34. Both the Applicant and the IO concur that the Expert has authority to decide a challenge to the IO's independence.

35. The Expert shares this view.

36. As noted by the Parties, there is no rule explicitly dealing with the power to decide on challenges to the independence of the IO, and in particular vesting it on the Expert. Such a power is not conferred on the Expert by the Rules, Article 11(4) of which deals only with challenges to the independence of the expert panel, nor by the Objection Procedures or the Procedure, the latter of which defines the expert determination as "*the decision on the merits of the Objection*" (Article 2(d)).

37. Nonetheless, as noted by the Applicant, whether the IO has exceeded his role is a serious issue that can impact on the decision on an objection and that must be capable of being decided. This is all the more so because Section 3.4.6 of the Objection Procedures stipulates that expert determinations will be accepted by ICANN, thus in essence making them final.[3] The power to decide a challenge to the IO would therefore seem to inure to the Expert's inherent powers.

38. The issue is even less problematic if, as acknowledged by the Parties, the question of the IO's independence can be characterized as pertaining to the IO's standing. Indeed, it is indisputably within the Expert's powers to rule on the standing requirements of objectors (Objection Procedures, Section 3.2.2). There is no reason to hold that this does not hold true also for the standing of the IO.

(ii) The merits of the challenge to the IO

39. It being accepted that the Expert has jurisdiction to deal with a challenge to the IO's independence, the next question debated by the Parties that needs to be addressed is whether, as contended by the Applicant, the IO may only file objections on behalf of the community consisting of "*the public who uses the global internet*" or whether, instead, he is entitled to object on behalf of, or at least in the interest of, more strictly defined groups or communities.

40. This issue is preliminary to the one of conflict of interest. In the present case, even on the IO's admission, the Objection relates not to the interests of the internet public but to those of a particular group of individuals or entities, which will be referred to here as the "**Amazon Community**" with an expression used also by the Parties[4]. Accepting the Applicant's preliminary arguments would therefore entail that the IO would lack standing altogether, so that the conflict issue would not even have reason to be raised.

41. The Applicant relies on a strict reading of the statement in Section 3.2.5 of the Objection Procedures that the IO "*does not act on behalf of any particular persons or interests, but acts solely in the best interests of the public who use the internet*".

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[3] Section 3.4.6. of the AGB reads as follows: "*The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process*".

[4] This definition leaves unprejudiced whether the Amazon Community is a community within the meaning of the substantive standards for the sustainability of a community objection under Section 3.5.4 of the Objection Procedures. This issue is addressed in Section III below.

42. In the Expert's opinion such a formalistic interpretation would result in an unduly restrictive conception of the IO's role. Indeed, there is merit in the IO's position that the internet community is not clearly delineated (and perhaps even, in his words, "*hypothetical*"). This being so, the Applicant's position would entail that the IO's objections would never meet the clear delineation test. What is more, since the internet community is somewhat amorphous, if the IO's standing to object were limited to applications affecting the interests of that community his role would be seriously curtailed, because few applications would qualify as such.

43. The language of Section 3.2.5 of the Objection Procedures allows a more constructive interpretation. The statement that the IO's role is to file objections when "*no objection has been filed*" can be construed in the sense that his role is to raise objections in situations where, for whatever reason, no objection will be forthcoming, even if the application is "*highly objectionable*". This could occur, for instance, if there is nobody in a position to represent the community or if those who could raise the objection are unwilling to do so for fear of negative repercussions, lack of financial means and so on. Likewise, the statement that the IO "*does not act <u>on behalf</u> of any particular person or entities*" can be understood as permitting the IO to raise an objection in situations where, while not technically acting "*on behalf*" of anybody (in the sense that nobody has given him a mandate to act or would even want him to act), he takes into account what can be considered the interests of a given community that would be prejudiced by an application.

44. The conclusion must therefore be that the Objections' admissibility is not affected by the fact that it concerns interests possibly coinciding with those of the Amazon Community, rather than those of the broader internet community.

45. In light of this conclusion and of the asserted coincidence between the interests of the Amazon Community defended by the Objections and those of the States with which the IO has professional relations, the issue of conflict of interest raised by the Applicant becomes relevant.

46. On the subject of the IO's conflicts of interest Section 3.2.5 of the Objection Procedures requires the IO to be and to remain independent and unaffiliated "*with any of the gTLD applicants*". In this connection, it points to the "*various rules of ethics for judges and international arbitrators*" as models to assess independence. It is silent, instead, on the possible conflicts arising from the IO's relations with the persons or entities whose interests he may be deemed to further by means of a given objection.

47. This silence could be explained by the fact that the Objection Procedures deal with the IO's independence in relation to his selection process, which occurs when the potential objectors are not yet identified and possibly even identifiable. It is therefore not conclusive. Although the IO is not in the same position as a judge or an arbitrator, the requirement that he be independent of one of the parties with an interest in the outcome of the proceedings (the applicant) seems to militate in favor of imposing the same requirement with respect to the other interested party (the group in whose purported interest the objection is filed). The IO's acceptance that

the Expert has jurisdiction to examine the challenge implies an acknowledgement on his part that a conflict with parties standing to benefit from his Objection is potentially fatal to the Objection.

48. The Expert has difficulty accepting the IO's assertion that a finding of conflict in circumstances such as those of the present case would preclude anybody with "*a normal average social life*" from serving as the IO. The question is not whether the existence of special ties with certain persons or entities or categories of entities (which anybody will inevitably have) prevents a person from being appointed IO.[5] Rather, it is whether the existence of such ties becomes problematic in the event that the IO raises an objection that can be correlated to the interests of those with whom the ties exist.

49. The Applicant does have a point when it contests that the IO's professional ties at issue here do not fall within the notion of normal average social life. Such a definition does not sit well with the IO's representation of two sovereign States in international judicial proceedings.

50. In any event, if regard must be had to the standards applicable to judges and arbitrators (as predicated by Section 3.2.5 of the Objection Procedures), the relevant perspective in international arbitration nowadays is an objective one. In the words of the *IBA Guidelines on Conflicts of Interest in International Arbitration* (General Standard 2(c)), it is that of "*a reasonable and informed third party*", whilst the ICC Rules of Arbitration refer to independence "*in the eyes of the parties*" (Article 11.2). By such standards, the IO's ties to two prominent members of the Amazon Community could give rise to a presumption of conflict in this case, completely regardless of whether, in filing the Objection, the IO acted "*on behalf*" of his clients, as contended but in no way substantiated by the Applicant.

51. There is one argument that could be advanced to refute the allegation of conflict of interest. It has to do with the absence of any indication that the two Governments "*on whose behalf*" he is alleged to be acting could not have filed an objection themselves (§ 91 ff. below) and would therefore have had to rely only on the IO to do it for them. In these conditions, the lack of initiative on the part of those Governments could denote that they had no interest in the Objections and that therefore the IO's action was prompted by other considerations. In the view of the Expert, however, such an argument does not carry sufficient weight. The decision on the existence of a conflict of interest cannot be made to depend on speculations as to the reasons why an objection was made by the IO rather than by the entities that could in principle stand to benefit from them.

52. Likewise, the Expert does not believe that the conflicts between the IO and the potential beneficiaries of an objection should be assessed differently from those with applicants. Admittedly, the practical relevance of the two types of conflicts

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[5] The Applicant does not suggest that the IO should not have accepted his role at the outset because of ties of that kind.

could be different.[6] Yet, the Expert considers it paramount for the confidence in the gTLD dispute resolution process that any decision on the IO's independence be taken on purely objective criteria and bearing in mind the need to ensure the perception of complete neutrality and impartiality of the office of the IO.

53. The Expert is of the view that, objectively considered, the links between the IO and two major representatives of the Amazon Community lead to justifiable doubts as to his independence in the eyes of the Applicant and of the broader public. Given the importance of ensuring the perception of neutrality, independence and impartiality of the office of the IO and of the entire gTLD dispute resolution process, the Expert finds that the Applicant's challenge to the independence of the IO must therefore be upheld.

III. THE MERITS OF THE OBJECTION

54. The Objection Procedures do not address the consequences of an upholding of a challenge to the independence of the IO. In particular, they do not provide that, upon a finding of a conflict of interest of the IO, the IO loses standing or that another IO must be appointed for the specific case, as suggested by the Applicant; nor do they provide for any other solution. If the consequence of a finding of lack of independence were a loss of standing by the IO, any consideration on the merits of the challenge would be moot. However, given the silence of the Objection Procedures and the resulting uncertainty on the consequences of the finding that the IO lacks the requisite independence in this case, the Expert considers it appropriate to deal also with the merits of the Objections and to decide whether they would deserve to be upheld, regardless of the IO's standing.

55. In accordance with Section 3.5.4 of the Objection Procedures, objections can be sustained if the Expert ascertains the existence of substantial opposition from a significant portion of the community to which the string may be targeted. This provision applies also to objections filed by the IO.

56. For a showing of such opposition the IO must prove that:

(i) the community invoked by him is clearly delineated;

(ii) there is substantial community opposition to the Applications;

(iii) there is a strong association between the community invoked by the IO and the Strings;

(iv) the Applications create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the

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[6] Conflicts of interest of the IO with respect to an applicant entail a risk that no objection would be raised, despite the application's potential adverse impact on general interests. On the other hand, a conflict with respect to a party standing to benefit from an objection might lead to an objection being filed by the IO where none would otherwise be filed. However, the objection would still have to be assessed on its merits by a third party (the expert panel).

Strings may be explicitly or implicitly targeted.

57. The four criteria will be addressed here in the order in which they have been addressed by the IO in the Objections.

III.A Targeting: the association between the community invoked by the IO and the Strings

(a) The position of the IO

58. According to the IO, although the Applications have not been framed as community-based, since they only target the Applicant and its subsidiaries, the Strings can be implicitly linked to a specific community different from the Applicant. The test to assess the Applications' implicit target is not limited to the intended use of the Strings by the Applicant, but is primarily concerned with the expectation of the average internet users and with their perceptions of the Strings and their associations.

59. The Applications target also "*the South-American region with the same English name around the Amazon River*". The identity between the Applicant's business name and brand and the English word for the South American river is not coincidental. The Applicant itself intentionally links the Strings to the Amazon river and region in its communications. The correlation between the Strings and the Amazon river and region is corroborated by the consistent use of the term "*Amazon*" to describe and characterize the Amazon region and the community. The term "*Amazon region*" is used by the 1978 Treaty for Amazon Cooperation and by UNESCO, which has included parts of the Amazon region in the World Heritage List under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. The denomination is used also by the World Wildlife Fund.

60. In the eyes of the IO, all the foregoing demonstrates a strong association between the Amazon region and its community and the Strings.

(b) The position of the Applicant

61. The Applicant premises its argument on this point on the consideration that under the AGB only one community is targeted by an application, since the AGB requires more than a mere nexus between the applied-for string and the asserted community; it requires a "*strong association*". The IO has failed to show that the Strings target the public who use the global internet, if this is the only community that the IO is entitled to represent, nor has he proved that the Strings target any other community.

62. According to the Applicant, it is not possible to target someone accidentally, since targeting implies precision and looks to the intent of the party alleged to be doing the targeting. The Application makes no mention of the community invoked by the IO and is "*clearly targeted*" at the Applicant's brand. The IO's argument on implicit targeting is too simplistic because it ignores the Applicant's strong brand recognition

in the eyes of the public who use the global internet and holds that the Applicant will forever target Amazonia with its present and future services. The argument that the targeting test is based on the existence of a certain link or possible association by the public based on string similarity has been rejected by ICANN, which acknowledges that brand names and other strings that happen to relate to some geographic entities may also have legitimate unrelated uses. The Applicant "*clearly has 'legitimate uses'*" for its marks, global brand and company name as a gTLD string, including in local languages, which it has used since 1994. The Applicant cites the example of the ".patagonia" gTLD, that was found not to target the community of Patagonia.

(c) The Determination of the Expert

63. In the Objection Procedures (Section 3.5.4) the term "*targeting*" is used in relation to the third substantive test that must be satisfied by a community objection, i.e. the one of strong association between the invoked community and the applied-for string.

64. The Objection Procedures point to the following non-exclusive factors that can be balanced to indicate a strong association between a community and the applied-for-string: (*i*) statements contained in the application; (*ii*) other public statements by the applicant; (*iii*) associations by the public.

65. The reason for dealing with this test at the outset in the present case is that, prior to establishing whether there is a strong association between the Strings and a community, the community having the purportedly strong association must be identified. As seen above, in the context of the challenge to the IO's independence the Parties debated the IO's standing to file an objection in the interest of a community other than the internet community. In relation to the substantive test, the dispute between the Parties on the identification of the community is framed in terms of whether the community in whose interest an objection is brought can differ from the one "*targeted*" by the applicant.

66. The Applicant contends that consideration can only be given to the community "*explicitly*" targeted by the Applications, which in this case is the one revolving around the business activities of the Applicant's group and the Amazon brand. No relevance can be given to the Amazon Community which is, instead, the focus of the Objections. The IO, for his part, adopts a broader approach, which relies on the community "*implicitly*" targeted by the Applications, which in this case is the Amazon Community.

67. The Objection Procedures do not bear out the Applicant's interpretation. Although the standard of strong association is dealt with under the heading "*targeting*", the "*target*" of the objection is not considered in Section 3.5.4. This provision requires proof that the applied-for gTLD be strongly associated with the community "*represented by the objector*". The focus is therefore on the community that the objector, and in this case the IO, considers to be affected, or prejudiced, by an application (and, in this sense, targeted) and on whose behalf or interest he acts. It

is not relevant whether that community is the one to which the applicant intends to direct its gTLD. The IO is persuasive in his argument that the association between a community and a string depends primarily on the expectations and perceptions of the average internet user.

68. The Applicant implies that only one community can be "*targeted*" by a gTLD and an application. The Expert finds no support in the Objection Procedures for this position, which is actually counterintuitive. If the term "*targeted*" is properly understood as meaning "*affected*", there is no reason why there cannot be more than one community affected by a given application for a gTLD. A gTLD can well have an impact on a broader range of persons or entities than the one envisaged by the applicant. The requirement invoked by the Applicant that the association between the community and the string be "*strong*" is not conclusive, since more than one of a string's possible multiple associations can be strong.

69. The Applicant's argument also risks upsetting the functioning of the gTLD objection procedure, which is aimed at protecting interests other than those of gTLD applicants. If applicants were in a position to render objections virtually impossible, in practice by determining themselves the community on whose behalf objections can be brought, in most cases no objection would be possible.

70. In light of this, the Applicant's emphasis on the intent of the party alleged to be doing the targeting and on the impossibility to target something accidentally is misplaced, because it relies on a notion that is not relevant for the strong association test. For the same reason, the insistence on the Applicant's "*legitimate uses*" for the applied-for gTLDs and on its "*strong brand recognition in the eyes of the public*" is beside the point in this context.

71. In the case at hand, therefore, the point is not the undisputed link between the Strings and the Amazon company name and brand, which quite probably exists in the perception of a large number of internet users. Rather, the point is whether there may also exist an at least equally strong association between the Strings and other communities affected by the Application, and in particular the one whose interests the IO purports to further.

72. The answer can only be affirmative. The Strings coincide with the name of the Amazon River and thereby entail an obvious association with the Amazon Community. Leaving aside for the moment whether there is such a community (which will be addressed in the following subsection III.B), there is no doubt that not only there exists an association between the Strings and the alleged Amazon Community, but that such association is "*strong*" in the perception of internet users.

73. This is borne out by the IO's evidence. As a matter of fact, not even the Applicant seems to dispute this, since its arguments go only to the preliminary points of whether the Amazon Community can be relevant for this test and of whether it exists at all, which is the subject of the next substantive test to be addressed.

74. The Expert is thus satisfied that the IO's Objection meets the test of "*strong association*" between the Strings and the community in whose interest it is filed.

III.B The clear delineation of the community invoked by the IO

(a) The position of the IO

75. The IO recalls that the AGB does not define the term "*community*". However, in requiring that the community expressing opposition be "*clearly delineated*" it lists certain non-limited factors, such as the recognition at local or global level, the level of formal boundaries and length of existence, the global distribution or the size of the community. The term community refers to a group of people living in the same place or having some characteristic in common, such as a territory, a region or place of residence, a language, a religion, an activity or values, interests or goals.

76. One of the relevant criteria is whether the group of individuals or entities can be delineated from others and whether members of the community are delineated from internet users in general and whether the community is recognized amongst its members and by the general public at global or local level. The IO quotes the description of the World Wildlife Fund which points to the Amazon's vast geographic expanse that embraces the territories of nine countries, to the features of its landscape in terms of variety of species, extension of the forests and in particular tropical ones, and the number and length of rivers, to the variety of ethnic and indigenous groups and to the link between the health of the region and the health of the planet.

77. The Amazon community can be clearly delineated from the general public by its strong link with the Amazon region. The community does not only share the geographic region. It has more far-reaching common interests and ties, including economic ones and those relating to the respect of the environment and the preservation of the indigenous culture and of the archeological and ethnological wealth. These common interests are recognized and protected through OTCA by the States which share the region and a common understanding of the specificities of the Amazon community and have put in place a process of cooperation, *inter alia* to achieve sustainable development.

78. The most interested States that share the Amazon territory have thus recognized the specificities of the region, the interests of the community and their particular needs. Their cooperation shows that the community is clearly recognized as a whole, irrespective of the divisions of sovereign States. All this leads to the conclusion that the community is clearly delineated.

(b) The position of the Applicant

79. The Applicant points to Section 4.2.3 of the AGB which states the need for "*very stringent*" requirements for a clearly delineated community and that community implies "*more of cohesion that mere commonality of interest*". It then acknowledges that, if the IO may only represent the public who use the global internet, that class meets the requirements of clear delineation. If, on the other hand, it is accepted that the IO may act on behalf of particular persons or entities, then the IO has not shown that the community he claims to be acting for has the required cohesiveness to be

considered as a community. The asserted community comprises eight separate and sovereign countries with their own geography, economy, history, population and bio-diversities, which entail a diversity that rules out the idea of cohesiveness. Even the existence of common interests, ties and characteristics, assuming it could be proved factually, does not establish a community under the AGB. In any event, the alleged community is not clearly delineated because it lacks formal boundaries, which is a strict requirement under the AGB. Specific and strong links with a region are insufficient to establish clear delineation.

(c) The Determination of the Expert

80. As discussed above, the community whose clear delineation must be considered here is the Amazon Community, and not that of internet users in general, as contended by the Applicant.

81. The Expert recalls that, in accordance with Section 3.5.4 of the Objection Procedures, the factors that can be balanced to determine whether the invoked community is clearly delineated include, but are not limited to, (*i*) the level of the community's public recognition, (*ii*) the level of formal boundaries around it and what persons or entities are considered to form it, (*iii*) the length of time it has been in existence, (*iv*) its global distribution and (*v*) the number of people or entities that make it up.

82. The Expert considers that some of the factors highlighted by the IO could indicate the existence of an Amazon Community. The economic interests and ties within the Amazon region, and the community that can be considered related to it, are significant. More pertinently, the Amazon Community is characterized by its importance in terms of wealth of culture, archeology, ethnology and environment, as well as by its impact on the environment of the world as a whole. It therefore has its own specificity and interests, and its interests to a certain extent coincide with those of the broader public, in particular as concerns the environment. In general terms it can also be seen to be recognized as a community by outsiders. Moreover, the Amazon Community unquestionably has a very large population and has been in existence for a long time.

83. On the other hand, as underlined by the Applicant, the purported community is composed of several different countries and exhibits within itself a considerable diversity in terms of geography, economy, population and bio-diversity. This could rule out the idea of cohesiveness, that arguably lies at the core of the notion of community and might imply something more than a mere commonality of interests. Furthermore, the IO has not focused particularly on the existence of formal barriers, which is one of the possible relevant criteria for the clear delineation test.

84. The record is therefore mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied. However, in light of the conclusions on the other tests, there is no need to reach a conclusive finding on clear delineation.

III.C Whether there is a substantial opposition to the Strings within the community

(a) The position of the IO

85. The IO avers that the mere numerical criterion was not the intent of the drafters of the AGB, so that the Expert is not limited to a simple comparison between the number of those having expressed opposition and the overall size of the community. The word "*substantial*" can also be used to designate something of considerable importance or worth. In addition to the number of oppositions, regard must be had to their material content. Particular importance should be paid in that regard to the comments of the Governments in the Early Warning Procedure.

86. The broad meaning of the term substantial opposition is confirmed by the fact that the possibility to file community objections was granted to the IO, who has pointed out that he will abstain from filing an opposition if a single established institution is better placed to represent the community concerned. This shows that the IO's role is to defend the public interest by acting on behalf of the public for the defense of rights and interests that lack an institution which obviously could represent it. The IO also refers to Section 3.2.5 of the Objection Procedures, which makes the IO's objection conditional upon at least one comment in opposition having been made.

87. The IO acknowledges that the Application for the ".Amazon" string has triggered "*only a small number of comments*" and that those for the other two Strings have triggered "*no direct comments*". This can be explained by the limited awareness of members of the community of the new gTLD program and, in the case of the Strings in the Japanese and Chinese languages, by their language. This in itself is not enough to disqualify the Objection. Indeed, it is an essential part of the IO's mission to protect the users of the internet who are less aware of the ICANN Program and of its impact on their rights and interests. Particular importance must be accorded to the Early Warning issued by the Brazilian and Peruvian members of the GAC[7], given that Brazil shares more than half of the Amazon region and Peru is particularly interested in the protection and promotion of the interests and rights of the Amazon Community. In support of its position on the weight of the opposition the IO points also to the endorsement by Bolivia, Ecuador and Guayana. He further notes that the Application has not received the support of any government in the region.

(b) The position of the Applicant

88. For the Applicant, the IO has not proved substantial opposition within "*his asserted community*" or the larger one of the internet public. In its words, "*[t]here are many significant voices who could speak out in the event of genuine community opposition*

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[7] The IO acknowledged that the Early Warning related only to the ".Amazon" string, but noted that it is equally relevant for the other two Strings. The concerns expressed by the Brazilian GAC member were expressed to relate also "*to possible future or existing applications in other languages, including IDN applications*".

to the gTLDs before any opposition could be said to be 'substantial'". The Applicant points to OTCA,[8] of which eight States are members and four are on ICANN's Governmental Advisory Committee, to the millions of people who live and do business in the region, to the many environmental groups working to preserve the region's environment and to the representatives of its indigenous peoples. The Applicant notes that, despite having knowledge of the process and the means to object, none of these potential opponents felt the need to file an objection, or even to comment or register concern regarding the Applications in the Applications Comments Forum or to oppose them in ICANN's At-Large Advisory Committee ("ALAC"), including the Regional At-Large Organization ("RALO") for Latin America and the Caribbean Islands. The Early Warning filed by the Governments of Brazil and Peru in November 2012, which was only directed at the Application for ".Amazon", only requested that the Application "*be included in the GAC early warning process*", which is not an objection. According to Section 1.1.2.4 of the AGB, it is up to governments to file an objection if they remain opposed to an application. In response to the early warning, and before the lapse of the objection period, the Applicant established contacts with the Governments involved, who have preferred to continue negotiations rather than file objections. This means that the Governments "*believe this objection does not have to succeed to protect their interests*".

(c) The Determination of the Expert

89. According to the Objection Procedures (Section 3.5.4) the factors that can be balanced to establish substantial opposition to the application within the community purported to be represented by an objector include (*i*) the number of expressions of opposition relative to the composition of the community, (*ii*) the representative nature of the entities expressing opposition, (*iii*) their stature and weight, (*iv*) their distribution or diversity, (*v*) their historical defense of the community in other contexts and (*vi*) the costs incurred by the objector to convey opposition.

90. As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

91. This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The

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[8] As mentioned in the discussion on the Applicant's challenge, the Applicant is of the view that OTCA does have the power to object to the Application.

Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

92. The IO acknowledges that the Applications triggered only a small number of comments, and that actually the Applications for the Chinese and Japanese translations of "Amazon" triggered none at all. He explains this with the alleged limited awareness of the Applications within the Amazon Community. This is not entirely convincing.

93. It is not necessary here to enter into the discussion between the Parties on whether, in strict legal terms, the OTCA would have had the power to file an Objection, or to consider whether, albeit lacking formal powers, it could nonetheless have made its voice heard in a debate on the Applications' potential negative consequences. However, it is difficult to ignore the argument that there were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications.

94. These considerations lead the Expert to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community.

III.D Whether the Applications create a likelihood of material detriment to a significant portion of the Amazon community

(a) The position of the IO

95. The IO underscores that the Applications are aimed exclusively at providing "*a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation*" and that the only eligible registrants are the Applicant and its subsidiaries. If the Applications were upheld, the Strings would become closed brand gTLDs which the Applicant intends to operate without taking into account the Amazon Community's particular needs and interests. Domain names in the gTLDs in question will be "*used to support the business goals of Amazon*" and will not be offered to third parties, including the Governments and members of the targeted community.

96. This entails a risk of misappropriation, because granting exclusive rights on the Strings to a private company would prevent the use of the domains for public interest purposes related to the protection, promotion and awareness-raising on issues related to the Amazon region. The "*confiscation*" of the entire name space within the Strings by a single corporate entity would deprive the members of the

community and owning its cultural heritage of the possibility of obtaining the Strings and of benefitting from the reputation linked to the name of their community and region. This would lead to a disappearance of the link between the term Amazon and the Amazon region "*with far reaching consequences for the region and its population*", because the users of the global internet "*will probably link the [Strings] exclusively to the Applicant and its corporate entities*". Furthermore, the global internet users' awareness of the existence and importance of the region will suffer, causing harm to the core issues of the region, and ultimately to the health of the planet which is clearly linked to the health of the Amazon.

97. The IO concludes that the launch of closed-brand gTLDs as foreseen in the Applications is very likely to interfere with the legitimate interests of the Amazon Community and to cause material harm to it and to the public who use the global internet.

(b) The position of the Applicant

98. The Applicant premises its discussion of this point by underscoring the self-standing nature of the criterion of detriment. It also notes that ICANN amended the AGB to include the qualification that the detriment should be material and to the community, and not just to the objector. It also points to ICANN's statement that there is a "*presumption*" in favor of granting new gTLDs to eligible applicants. The Applicant contests the relevance of the IO's argument that, in case of success of the Applications, "*the peoples and entities being part of the Amazon community*" would be unable to obtain the Strings, underlining that the AGB makes it clear that "*an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment*". Moreover, the detriment to the community would be the same even if the Applications were rejected, because it would still be unable to use the Strings, since neither it nor anyone else applied for them. In relation to the Chinese and Japanese translations of "Amazon" the Applicant adds that there is no evidence that the asserted community would want to use the Chinese or Japanese domain names. The Applicant also underscores that it has used "Amazon" as a trademark in many countries, including the ones of the Amazon region, for many years with no evidence of reduced awareness of, or confusion with, the Amazon region. Indeed, even the countries in the Amazon region have granted Amazon trademark registrations or lower-level domain names for "Amazon". The Applicant highlights the absence of negative impact of the Amazon brand (described as "*one of the world's most recognized and trusted brands*") on the Amazon region since its introduction in 1994. Since then, only the Applicant and its group of companies have used "Amazon.com" and other "Amazon" domain names and trademarks, including in Latin America. There is no evidence that this has been detrimental to the Amazon region, nor that the elimination of the "inconsequential '.com'" would change the perception of users of the global internet in such a way that Amazonia will be removed from public consciousness and the region and the world will suffer the dire consequences presented by the IO.

(c) The Determination of the Expert

99. The Objection Procedures list the following factors that can be taken into account to assess whether the Application is likely to create material detriment to the rights and legitimate interests of a significant proportion of the community: (*i*) the nature and extent of the damage to the community's reputation; (*ii*) evidence that the applicant does not act, or intend to act, in accordance with the interests of the community; (*iii*) interference with core activities of the community; (*iv*) nature and extent of the concrete or economic damages to the community and (*v*) level of certainty of alleged detrimental outcomes.

100. There is no dispute that the Applicant intends to use the Strings to operate closed domains. Consequently, no one, including the Amazon Community or anyone with coinciding interests, will be allowed to use the Strings. However, as the Applicant remarks, even if the Objections were sustained the Amazon Community would still not be entitled to use the Strings, since it did not apply for them. The Expert considers that, in and of itself, the failure of the Amazon Community, or of anybody sharing its interests, to apply for the Strings can be regarded as an indication that the inability to use the Strings is not crucial to the protection of the Amazon Community's interests.

101. In any event, the Amazon Community's inability to use the Strings is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that "*[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment*" (Section 3.5.4).

102. Furthermore, the IO does not explain how the impossibility for the Amazon Community or entities or persons connected to it to use the Strings and their use by the Applicant would lead to a loss of the link between the term Amazon and the Amazon region. On the other hand, as the Applicant points out, "Amazon" has been used as a brand, trademark and domain name for nearly two decades also in the States arguably forming part of the Amazon Community. It is even registered in those States. There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

103. As further noted by the Applicant, it is unlikely that the loss of the ".com" after "Amazon" will change matters. More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and its specificities and importance for the world will be removed from public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. ".Amazonia" springs to mind.

104. Indirect confirmation of the absence of a risk of detriment to the interests of the

Amazon Community comes also from the lack of serious opposition to the Application by those that might be considered to have the Community's interests at heart, which has already been underscored in Section III.C above. Of course, opposition to an application and detriment are considered under two different tests in the Objection Procedures. Opposition is not necessarily evidence of detriment, just as non-opposition is not conclusive evidence of lack of detriment. However, in this case very significant potential consequences are alleged and there are many entities that could have expressed opposition had their interests been threatened. The fact that none of them was prompted to raise any objection, whether formally or at least informally, can be taken as a significant indication of lack of likelihood of detriment. It further corroborates the position that the use by the Applicant of the Strings for closed gTLDs cannot impair the interests of the Amazon Community

105. In these conditions the Expert holds that the IO has failed to satisfy its burden of proof in relation to the material detriment requirement.

IV. CONCLUSION

106. The Expert finds that he has jurisdiction to rule on the challenge to the IO's independence and that, given the need to guarantee the perception of neutrality of the gTDL dispute resolution system, the challenge must be upheld.

107. On the merits of the Objections the Expert has found that the IO has sufficiently proven the strong relation between the Strings and the Amazon Community. Instead, the IO has not shown that there is substantial opposition to the Application within that community or that the Application would lead to substantial detriment. These findings make it unnecessary to decide on the clear delineation test.

108. Since pursuant to Section 3.5.4 of the Objection Procedures all four tests must be met for a community objection to prevail, the Objections must be rejected.

V. DECISION

109. For the reasons set out above and in accordance with Art. 21(d) of the Procedure, the Panel hereby renders the following Expert Determination:

(i) The Independent Objector's Objections are dismissed and therefore the Applicant is the prevailing party in all consolidated cases;

(ii) The Applicant AMAZON EU S.à.r.l is entitled to the refund of the advance payment of costs in all consolidated cases by the Centre pursuant to Article 14(e) of the Procedure.

Place of the Expertise: Paris

January 27, 2014

The Expert

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Professor Luca G. Radicati di Brozolo

Forrest-013

gTLD Applicant Guidebook

Version 2012-06-04

ICANN

4 June 2012

Preamble

New gTLD Program Background

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at http://gnso.icann.org/issues/new-gtlds.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

ICANN

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 1

4 June 2012

Module 1

Introduction to the gTLD Application Process

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required, and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the stages of the application life cycle.

Prospective applicants are encouraged to read and become familiar with the contents of this entire module, as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see http://gnso.icann.org/issues/new-gtlds/.

This Applicant Guidebook is the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.

1.1 Application Life Cycle and Timelines

This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

1.1.1 Application Submission Dates

The user registration and application submission periods open at **00:01 UTC 12 January 2012**.

The user registration period closes at **23:59 UTC 29 March 2012.** New users to TAS will not be accepted beyond this time. Users already registered will be able to complete the application submission process.

Applicants should be aware that, due to required processing steps (i.e., online user registration, application submission, fee submission, and fee reconciliation) and security measures built into the online application system, it might take substantial time to perform all of the necessary steps to submit a complete application. Accordingly, applicants are encouraged to submit their completed applications and fees as soon as practicable after the Application Submission Period opens. Waiting until the end of this period to begin the process may not provide sufficient time to submit a complete application before the period closes. Accordingly, new user registrations will not be accepted after the date indicated above.

The application submission period closes at **23:59 UTC 12 April 2012.**

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the close of the application submission period.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

ICANN has gone to significant lengths to ensure that the online application system will be available for the duration of the application submission period. In the event that the system is not available, ICANN will provide alternative instructions for submitting applications on its website.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. Figure 1-1 provides a simplified depiction of the process. The shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be applicable in any given case are also shown. A brief description of each stage follows.

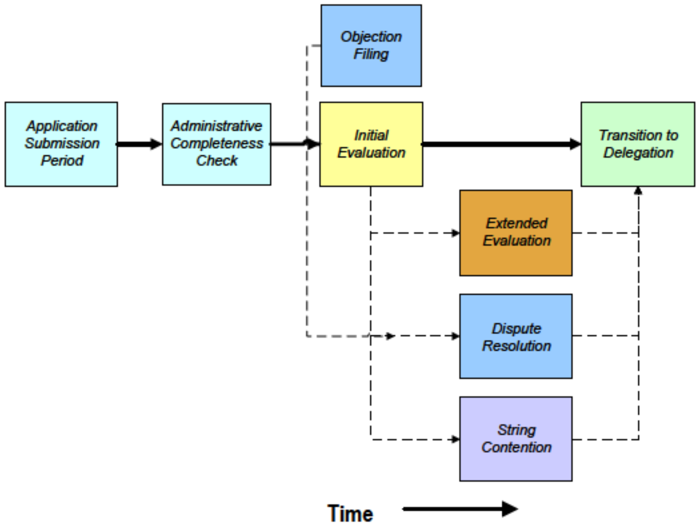

Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, those wishing to submit new gTLD applications can become registered users of the TLD Application System (TAS).

After completing the user registration, applicants will supply a deposit for each requested application slot (see section 1.4), after which they will receive access to the full application form. To complete the application, users will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. The supporting documents listed in subsection 1.2.2 of this module must also be submitted through the online application system as instructed in the relevant questions.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Each application slot is for one gTLD. An applicant may submit as many applications as desired; however, there is no means to apply for more than one gTLD in a single application.

Following the close of the application submission period, ICANN will provide applicants with periodic status updates on the progress of their applications.

1.1.2.2 Administrative Completeness Check

Immediately following the close of the application submission period, ICANN will begin checking all applications for completeness. This check ensures that:

- All mandatory questions are answered;
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. Certain questions relate to internal processes or information: applicant responses to these questions will not be posted. Each question is labeled in the application form as to whether the information will be posted. See posting designations for the full set of questions in the attachment to Module 2.

The administrative completeness check is expected to be completed for all applications in a period of approximately 8 weeks, subject to extension depending on volume. In the event that all applications cannot be processed within this period, ICANN will post updated process information and an estimated timeline.

1.1.2.3 Comment Period

Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). This period will allow time for the community to review and submit comments on posted application materials (referred to as "application comments.") The comment forum will require commenters to associate comments with specific applications and the relevant panel. Application comments received within a 60-day period from the posting of the application materials will be available to the evaluation panels performing the Initial Evaluation reviews. This period is subject to extension, should the volume of applications or other circumstances require. **To be considered by evaluators, comments must be received in the designated comment forum within the stated time period.**

Evaluators will perform due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration. In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant. Statements concerning consideration of application comments that have impacted the evaluation decision will be reflected in the evaluators' summary reports, which will be published at the end of Extended Evaluation.

Comments received after the 60-day period will be stored and available (along with comments received during the comment period) for other considerations, such as the dispute resolution process, as described below.

In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum.

Comments and the Formal Objection Process: A distinction should be made between application comments, which may be relevant to ICANN's task of determining whether applications meet the established criteria, and formal objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits (see subsection 3.2).

Public comments will not be considered as formal objections. Comments on matters associated with formal objections will not be considered by panels during Initial Evaluation. These comments will be available to and may be subsequently considered by an expert panel during a dispute resolution proceeding (see subsection 1.1.2.9). However, in general, application comments have a very limited role in the dispute resolution process.

String Contention: Comments designated for the Community Priority Panel, as relevant to the criteria in Module 4, may be taken into account during a Community Priority Evaluation.

Government Notifications: Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below.

Governments may also communicate directly to applicants using the contact information posted in the application, e.g., to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicant.

General Comments: A general public comment forum will remain open through all stages of the evaluation process, to provide a means for the public to bring forward any other relevant information or issues.

1.1.2.4 GAC Early Warning

Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC) may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.

A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities. A GAC Early Warning may be issued for any reason.[1] The GAC may then send that notice to the Board – constituting the GAC Early Warning. ICANN will notify applicants of GAC Early Warnings as soon as practicable after receipt from the GAC. The GAC Early Warning notice may include a nominated point of contact for further information.

GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN Board, and be clearly labeled as a GAC Early Warning. This may take the form of an email from the GAC Chair to the ICANN Board. For GAC Early Warnings to be most effective, they should include the reason for the warning and identify the objecting countries.

Upon receipt of a GAC Early Warning, the applicant may elect to withdraw the application for a partial refund (see subsection 1.5.1), or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern). To qualify for the refund described in subsection 1.5.1, the applicant must provide notification to ICANN of its election to withdraw the application within 21 calendar days of the date of GAC Early Warning delivery to the applicant.

To reduce the possibility of a GAC Early Warning, all applicants are encouraged to identify potential sensitivities in advance of application submission, and to work with the relevant parties (including governments) beforehand to mitigate concerns related to the application.

1.1.2.5 Initial Evaluation

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation. At the beginning of this period, background screening on the applying entity and the individuals named in the application will be conducted. Applications

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[1] While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include those that "purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive)" and "those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse."

must pass this step in conjunction with the Initial Evaluation reviews.

There are two main elements of the Initial Evaluation:

1. String reviews (concerning the applied-for gTLD string). String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names.
2. Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Applicant reviews include a determination of whether the applicant has the requisite technical, operational, and financial capabilities to operate a registry.

By the conclusion of the Initial Evaluation period, ICANN will post notice of all Initial Evaluation results. Depending on the volume of applications received, such notices may be posted in batches over the course of the Initial Evaluation period.

The Initial Evaluation is expected to be completed for all applications in a period of approximately 5 months. If the volume of applications received significantly exceeds 500, applications will be processed in batches and the 5-month timeline will not be met. The first batch will be limited to 500 applications and subsequent batches will be limited to 400 to account for capacity limitations due to managing extended evaluation, string contention, and other processes associated with each previous batch.

If batching is required, a secondary time-stamp process will be employed to establish the batches. (Batching priority will not be given to an application based on the time at which the application was submitted to ICANN, nor will batching priority be established based on a random selection method.)

The secondary time-stamp process will require applicants to obtain a time-stamp through a designated process which will occur after the close of the application submission period. The secondary time stamp process will occur, if required, according to the details to be published on ICANN's website. (Upon the Board's approval of a final designation of the operational details of the "secondary timestamp" batching process, the final plan will be added as a process within the Applicant Guidebook.)

If batching is required, the String Similarity review will be completed on all applications prior to the establishment of evaluation priority batches. For applications identified as part of a contention set, the entire contention set will be kept together in the same batch.

If batches are established, ICANN will post updated process information and an estimated timeline.

Note that the processing constraints will limit delegation rates to a steady state even in the event of an extremely high volume of applications. The annual delegation rate will not exceed 1,000 per year in any case, no matter how many applications are received.[2]

1.1.2.6 Objection Filing

Formal objections to applications can be filed on any of four enumerated grounds, by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in subsection 1.1.2.2, and will last for approximately 7 months.

Objectors must file such formal objections directly with dispute resolution service providers (DRSPs), not with ICANN. The objection filing period will close following the end of the Initial Evaluation period (refer to subsection 1.1.2.5), with a two-week window of time between the posting of the Initial Evaluation results and the close of the objection filing period. Objections that have been filed during the objection filing period will be addressed in the dispute resolution stage, which is outlined in subsection 1.1.2.9 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during the objection filing period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures. An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

Applicants are encouraged to identify possible regional, cultural, property interests, or other sensitivities regarding TLD strings and their uses before applying and, where

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[2] See "Delegation Rate Scenarios for New gTLDs" at http://icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf for additional discussion.

possible, consult with interested parties to mitigate any concerns in advance.

1.1.2.7 Receipt of GAC Advice on New gTLDs

The GAC may provide public policy advice directly to the ICANN Board on any application. The procedure for GAC Advice on New gTLDs described in Module 3 indicates that, to be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period. A GAC Early Warning is not a prerequisite to use of the GAC Advice process.

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

See Module 3 for additional detail on the procedures concerning GAC Advice on New gTLDs.

1.1.2.8 Extended Evaluation

Extended Evaluation is available only to certain applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not pass Initial Evaluation and does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for an additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An application may be required to enter an Extended Evaluation if one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such a review is required by the end of the Initial Evaluation period.

Evaluators and any applicable experts consulted will communicate the conclusions resulting from the additional review by the end of the Extended Evaluation period.

At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

1.1.2.9 Dispute Resolution

Dispute resolution applies only to applicants whose applications are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.

1.1.2.10 String Contention

String contention applies only when there is more than one qualified application for the same or similar gTLD strings.

String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage. In the absence of resolution by the contending applicants, string contention cases are resolved either through a community priority evaluation (if a community-based applicant elects it) or through an auction.

In the event of contention between applied-for gTLD strings that represent geographic names, the parties may be required to follow a different process to resolve the contention. See subsection 2.2.1.4 of Module 2 for more information.

Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B requests Extended Evaluation. A third party files an objection to Applicant C’s application, and Applicant C enters the dispute resolution process. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.

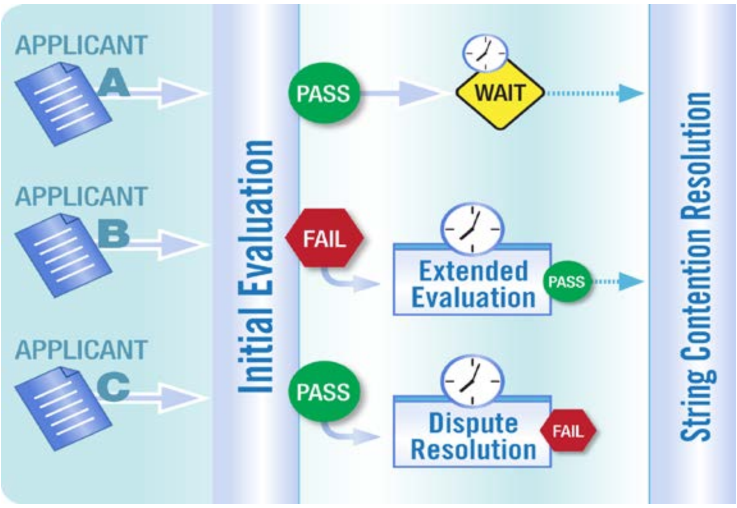

Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of the applied-for gTLDs.

String contention resolution for a contention set is estimated to take from 2.5 to 6 months to complete. The time required will vary per case because some contention cases may be resolved in either a community priority evaluation or an auction, while others may require both processes.

1.1.2.11 Transition to Delegation

Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and show satisfactory performance on a set of technical tests before delegation of the gTLD into the root zone may be initiated. If the pre-delegation testing requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD into the DNS root zone.

It is expected that the transition to delegation steps can be completed in approximately 2 months, though this could take more time depending on the applicant's level of preparedness for the pre-delegation testing and the volume of applications undergoing these steps concurrently.

1.1.3 Lifecycle Timelines

Based on the estimates for each stage described in this section, the lifecycle for a straightforward application could be approximately 9 months, as follows:

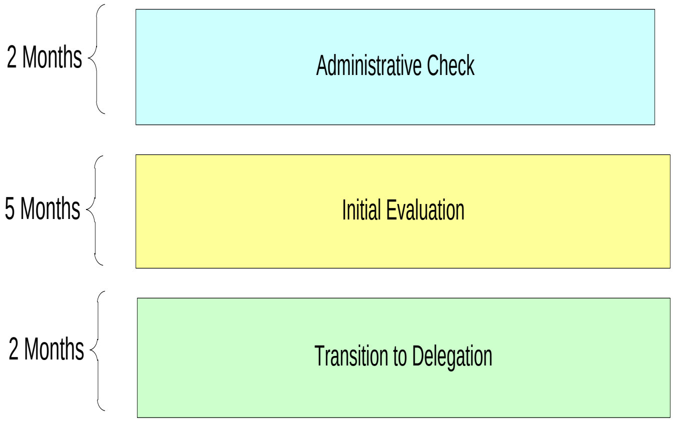

Figure 1-3 – A straightforward application could have an approximate 9-month lifecycle.

The lifecycle for a highly complex application could be much longer, such as 20 months in the example below:

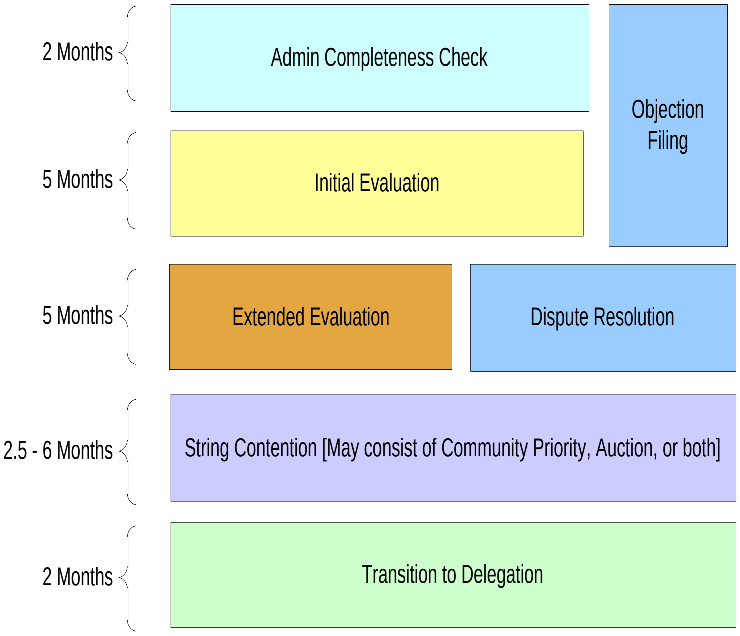

Figure 1-4 – A complex application could have an approximate 20-month lifecycle.

1.1.4 Posting Periods

The results of application reviews will be made available to the public at various stages in the process, as shown below.

Period	Posting Content
During Administrative Completeness Check	Public portions of all applications (posted within 2 weeks of the start of the Administrative Completeness Check).
End of Administrative Completeness Check	Results of Administrative Completeness Check.
GAC Early Warning Period	GAC Early Warnings received.
During Initial Evaluation	Status updates for applications withdrawn or ineligible for further review. Contention sets resulting from String Similarity review.

Period	Posting Content
End of Initial Evaluation	Application status updates with all Initial Evaluation results.
GAC Advice on New gTLDs	GAC Advice received.
End of Extended Evaluation	Application status updates with all Extended Evaluation results. Evaluation summary reports from the Initial and Extended Evaluation periods.
During Objection Filing/Dispute Resolution	Information on filed objections and status updates available via Dispute Resolution Service Provider websites. Notice of all objections posted by ICANN after close of objection filing period.
During Contention Resolution (Community Priority Evaluation)	Results of each Community Priority Evaluation posted as completed.
During Contention Resolution (Auction)	Results from each auction posted as completed.
Transition to Delegation	Registry Agreements posted when executed. Pre-delegation testing status updated.

1.1.5 Sample Application Scenarios

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows exemplifies various processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Estimated time frames for each scenario are also included, based on current knowledge. Actual time frames may vary depending on several factors, including the total number of applications received by ICANN during the application submission period. It should be emphasized that most applications are expected to pass through the process in the shortest period of time, i.e., they will not go through extended evaluation, dispute resolution, or string contention resolution processes. Although most of the scenarios below are for processes extending beyond nine months, it is expected that most applications will complete the process within the nine-month timeframe.

Scenario Number	Initial Eval-uation	Extended Eval-uation	Objec-tion(s) Filed	String Conten-tion	Ap-proved for Dele-gation Steps	Esti-mated Elapsed Time
1	Pass	N/A	None	No	Yes	9 months
2	Fail	Pass	None	No	Yes	14 months
3	Pass	N/A	None	Yes	Yes	11.5 – 15 months
4	Pass	N/A	Applicant prevails	No	Yes	14 months
5	Pass	N/A	Objector prevails	N/A	No	12 months
6	Fail	Quit	N/A	N/A	No	7 months
7	Fail	Fail	N/A	N/A	No	12 months
8	Fail	Pass	Applicant prevails	Yes	Yes	16.5 – 20 months
9	Fail	Pass	Applicant prevails	Yes	No	14.5 – 18 months

Scenario 1 – Pass Initial Evaluation, No Objection, No Contention – In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD. Most applications are expected to complete the process within this timeframe.

Scenario 2 – Extended Evaluation, No Objection, No Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are filed during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 3 – Pass Initial Evaluation, No Objection, Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the application prevails in the contention resolution, so the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 5 – Pass Initial Evaluation, Lose Objection – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple objections are filed by one or more objectors with standing for one or more of the four enumerated objection grounds. Each objection is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

Scenario 6 – Fail Initial Evaluation, Applicant Withdraws – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation -- In this case, the application fails one or more aspects of the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the application fails Extended Evaluation also. The application does not proceed.

Scenario 8 – Extended Evaluation, Win Objection, Pass Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement, and the application can proceed toward delegation of the applied-for gTLD.

Scenario 9 – Extended Evaluation, Objection, Fail Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

Transition to Delegation – After an application has successfully completed Initial Evaluation, and other stages as applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the steps required in this stage.

1.1.6 Subsequent Application Rounds

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.

ICANN has committed to reviewing the effects of the New gTLD Program on the operations of the root zone system after the first application round, and will defer the delegations in a second application round until it is determined that the delegations resulting from the first round did not jeopardize root zone system security or stability.

It is the policy of ICANN that there be subsequent application rounds, and that a systemized manner of applying for gTLDs be developed in the long term.

1.2 Information for All Applicants

1.2.1 Eligibility

Established corporations, organizations, or institutions in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered. Applications from or on behalf of yet-to-be-formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered.

ICANN has designed the New gTLD Program with multiple stakeholder protection mechanisms. Background screening, features of the gTLD Registry Agreement, data and financial escrow mechanisms are all intended to provide registrant and user protections.

The application form requires applicants to provide information on the legal establishment of the applying entity, as well as the identification of directors, officers, partners, and major shareholders of that entity. The names and positions of individuals included in the application will be published as part of the application; other information collected about the individuals will not be published.

Background screening at both the entity level and the individual level will be conducted for all applications to confirm eligibility. This inquiry is conducted on the basis of the information provided in questions 1-11 of the application form. ICANN may take into account information received from any source if it is relevant to the criteria in this section. If requested by ICANN, all applicants will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct background screening activities.

ICANN will perform background screening in only two areas: (1) General business diligence and criminal history; and (2) History of cybersquatting behavior. The criteria used for criminal history are aligned with the "crimes of trust" standard sometimes used in the banking and finance industry.

In the absence of exceptional circumstances, applications from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program.

a. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these;

b. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of the funds of others;

c. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities;

d. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;

e. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;

f. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;

g. has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities;

h. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[3];

i. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols)[4] [5];

j. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes above (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) – (i) above);

k. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents), within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (a) – (d) above, or ever for the crimes listed in (e) – (i) above);

l. is the subject of a disqualification imposed by ICANN and in effect at the time the application is considered;

m. has been involved in a pattern of adverse, final decisions indicating that the applicant

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[3] http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html

[4] http://www.unodc.org/unodc/en/treaties/CTOC/index.html

[5] It is recognized that not all countries have signed on to the UN conventions referenced above. These conventions are being used solely for identification of a list of crimes for which background screening will be performed. It is not necessarily required that an applicant would have been convicted pursuant to the UN convention but merely convicted of a crime listed under these conventions, to trigger these criteria.

or individual named in the application was engaged in cybersquatting as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), the Anti-Cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more such decisions with one occurring in the last four years will generally be considered to constitute a pattern.

n. fails to provide ICANN with the identifying information necessary to confirm identity at the time of application or to resolve questions of identity during the background screening process;

o. fails to provide a good faith effort to disclose all relevant information relating to items (a) – (m).

Background screening is in place to protect the public interest in the allocation of critical Internet resources, and ICANN reserves the right to deny an otherwise qualified application based on any information identified during the background screening process. For example, a final and legally binding decision obtained by a national law enforcement or consumer protection authority finding that the applicant was engaged in fraudulent and deceptive commercial practices as defined in the Organization for Economic Co-operation and Development (OECD) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders[6] may cause an application to be rejected. ICANN may also contact the applicant with additional questions based on information obtained in the background screening process.

All applicants are required to provide complete and detailed explanations regarding any of the above events as part of the application. Background screening information will not be made publicly available by ICANN.

***Registrar Cross-Ownership* --** ICANN-accredited registrars are eligible to apply for a gTLD. However, all gTLD registries

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[6] http://www.oecd.org/document/56/0,3746,en_2649_34267_2515000_1_1_1_1,00.html

are required to abide by a Code of Conduct addressing, *inter alia*, non-discriminatory access for all authorized registrars. ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues.

Legal Compliance -- ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.

1.2.2 Required Documents

All applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment –** Documentation of the applicant's establishment as a specific type of entity in accordance with the applicable laws of its jurisdiction.
2. **Financial statements –** Applicants must provide audited or independently certified financial statements for the most recently completed fiscal year for the applicant. In some cases, unaudited financial statements may be provided.

As indicated in the relevant questions, supporting documentation should be submitted in the original language. English translations are not required.

All documents must be valid at the time of submission. Refer to the Evaluation Criteria, attached to Module 2, for additional details on the requirements for these documents.

Some types of supporting documentation are required only in certain cases:

1. ***Community endorsement* –** If an applicant has designated its application as community-based (see section 1.2.3), it will be asked to submit a written endorsement of its application by one or more established institutions representing the community it has named. An applicant may submit written endorsements from multiple institutions. If applicable, this will be submitted in the section of the application concerning the community-based designation.

   At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement of support for the application, and supply the contact information of the entity providing the endorsement.

   Written endorsements from individuals need not be submitted with the application, but may be submitted in the application comment forum.

2. ***Government support or non-objection*** – If an applicant has applied for a gTLD string that is a geographic name (as defined in this Guidebook), the applicant is required to submit documentation of support for or non-objection to its application from the relevant governments or public authorities. Refer to subsection 2.2.1.4 for more information on the requirements for geographic names. If applicable, this will be submitted in the geographic names section of the application.

3. ***Documentation of third-party funding commitments* –** If an applicant lists funding from third parties in its application, it must provide evidence of commitment by the party committing the funds. If applicable, this will be submitted in the financial section of the application.

1.2.3 Community-Based Designation

All applicants are required to designate whether their application is **community-based**.

1.2.3.1 Definitions

For purposes of this Applicant Guidebook, a **community-based gTLD** is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have its application endorsed in writing by one or more established institutions representing the community it has named.

For purposes of differentiation, an application that has not been designated as community-based will be referred to hereinafter in this document as a **standard application.** A standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. A standard applicant may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions. Standard simply means here that the applicant has not designated the application as community-based.

1.2.3.2 Implications of Application Designation

Applicants should understand how their designation as community-based or standard will affect application processing at particular stages, and, if the application is successful, execution of the registry agreement and subsequent obligations as a gTLD registry operator, as described in the following paragraphs.

Objection / Dispute Resolution – All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community. Refer to Module 3, Objection Procedures.

String Contention – Resolution of string contention may include one or more components, depending on the composition of the contention set and the elections made by community-based applicants.

- A **settlement between the parties** can occur at any time after contention is identified. The parties will be encouraged to meet with an objective to settle the contention. Applicants in contention always have the opportunity to resolve the contention voluntarily, resulting in the withdrawal of one or more applications, before reaching the contention resolution stage.
- A **community priority evaluation** will take place only if a community-based applicant in a contention set elects this option. All community-based applicants in a contention set will be offered this option in the event that there is contention remaining after the applications have successfully completed all previous evaluation stages.
- An **auction** will result for cases of contention not resolved by community priority evaluation or agreement between the parties. Auction occurs as a contention resolution means of last resort. If a community priority evaluation occurs but does not produce a clear winner, an auction will take place to resolve the contention.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

Contract Execution and Post-Delegation – A community-based applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation. Material changes to the contract, including changes to the community-based nature of the gTLD and any associated provisions, may only be made with ICANN's approval. The determination of whether to approve changes requested by the applicant will be at ICANN's discretion. Proposed criteria for approving such changes are the subject of policy discussions.

Community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string. Evaluation of an applicant's designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation. However, any applicant designating its application as community-based will, if the application is approved, be bound by the registry agreement to implement the community-based restrictions it has specified in the application. This is true even if there are no contending applicants.

1.2.3.3 Changes to Application Designation

An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing.

1.2.4 Notice concerning Technical Acceptance Issues with New gTLDs

All applicants should be aware that approval of an application and entry into a registry agreement with ICANN do not guarantee that a new gTLD will immediately function throughout the Internet. Past experience indicates that network operators may not immediately fully support new top-level domains, even when these domains have been delegated in the DNS root zone, since third-party software modification may be required and may not happen immediately.

Similarly, software applications sometimes attempt to validate domain names and may not recognize new or unknown top-level domains. ICANN has no authority or ability to require that software accept new top-level domains, although it does prominently publicize which top-level domains are valid and has developed a basic tool to assist application providers in the use of current root-zone data.

ICANN encourages applicants to familiarize themselves with these issues and account for them in their startup and launch plans. Successful applicants may find themselves expending considerable efforts working with providers to achieve acceptance of their new top-level domains.

Applicants should review http://www.icann.org/en/topics/TLD-acceptance/ for background. IDN applicants should also review the material concerning experiences with IDN test strings in the root zone (see http://idn.icann.org/).

1.2.5 *Notice concerning TLD Delegations*

ICANN is only able to create TLDs as delegations in the DNS root zone, expressed using NS records with any corresponding DS records and glue records. There is no policy enabling ICANN to place TLDs as other DNS record types (such as A, MX, or DNAME records) in the root zone.

1.2.6 *Terms and Conditions*

All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this guidebook.

1.2.7 *Notice of Changes to Information*

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

1.2.8 *Voluntary Designation for High Security Zones*

An ICANN stakeholder group has considered development of a possible special designation for "High Security Zone Top Level Domains" ("HSTLDs"). The group's Final Report can be found at http://www.icann.org/en/topics/new-gtlds/hstld-final-report-11mar11-en.pdf.

The 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.

1.2.9 *Security and Stability*

Root Zone Stability: There has been significant study, analysis, and consultation in preparation for launch of the

New gTLD Program, indicating that the addition of gTLDs to the root zone will not negatively impact the security or stability of the DNS.

It is estimated that 200-300 TLDs will be delegated annually, and determined that in no case will more than 1000 new gTLDs be added to the root zone in a year. The delegation rate analysis, consultations with the technical community, and anticipated normal operational upgrade cycles all lead to the conclusion that the new gTLD delegations will have no significant impact on the stability of the root system. Modeling and reporting will continue during, and after, the first application round so that root-scaling discussions can continue and the delegation rates can be managed as the program goes forward.

All applicants should be aware that delegation of any new gTLDs is conditional on the continued absence of significant negative impact on the security or stability of the DNS and the root zone system (including the process for delegating TLDs in the root zone). In the event that there is a reported impact in this regard and processing of applications is delayed, the applicants will be notified in an orderly and timely manner.

1.2.10 Resources for Applicant Assistance

A variety of support resources are available to gTLD applicants. Financial assistance will be available to a limited number of eligible applicants. To request financial assistance, applicants must submit a separate financial assistance application in addition to the gTLD application form.

To be eligible for consideration, all financial assistance applications must be received by **23:59 UTC 12 April 2012.** Financial assistance applications will be evaluated and scored against pre-established criteria.

In addition, ICANN maintains a webpage as an informational resource for applicants seeking assistance, and organizations offering support.

See http://newgtlds.icann.org/applicants/candidate-support for details on these resources.

1.2.11 Updates to the Applicant Guidebook

As approved by the ICANN Board of Directors, this Guidebook forms the basis of the New gTLD Program. ICANN reserves the right to make reasonable updates and changes to the Applicant Guidebook at any time, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process. Any such updates or revisions will be posted on ICANN's website.

1.3 Information for Internationalized Domain Name Applicants

Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs). IDNs are domain names including characters used in the local representation of languages not written with the basic Latin alphabet (a - z), European-Arabic digits (0 - 9), and the hyphen (-). As described below, IDNs require the insertion of A-labels into the DNS root zone.

1.3.1 IDN-Specific Requirements

An applicant for an IDN string must provide information indicating compliance with the IDNA protocol and other technical requirements. The IDNA protocol and its documentation can be found at http://icann.org/en/topics/idn/rfcs.htm.

Applicants must provide applied-for gTLD strings in the form of both a **U-label** (the IDN TLD in local characters) and an **A-label**.

An A-label is the ASCII form of an IDN label. Every IDN A-label begins with the IDNA ACE prefix, "xn--", followed by a string that is a valid output of the Punycode algorithm, making a maximum of 63 total ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123, and elsewhere.

A U-label is the Unicode form of an IDN label, which a user expects to see displayed in applications.

For example, using the current IDN test string in Cyrillic script, the U-label is <**испытание**> and the A-label is <**xn--80akhbyknj4f>.** An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Meaning or restatement of string in English. The applicant will provide a short description of what the string would mean or represent in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for gTLD string, both according to the ISO codes for the representation of names of languages, and in English.
3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO codes for the representation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator (i.e., the dot).[7]

   If an applicant is applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications. While it is not possible to ensure that all rendering problems are avoided, it is important that as many as possible are identified early and that the potential registry operator is aware of these issues. Applicants can become familiar with these issues by understanding the IDNA protocol (see http://www.icann.org/en/topics/idn/rfcs.htm), and by active participation in the IDN wiki (see http://idn.icann.org/) where some rendering problems are demonstrated.
6. **[Optional]** - Representation of label in phonetic alphabet. The applicant may choose to provide its applied-for gTLD string notated according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/). Note that this information will not be evaluated or scored. The information, if provided, will be used as a guide to ICANN in responding to inquiries or speaking of the application in public presentations.

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[7] See examples at http://stupid.domain.name/node/683

1.3.2 IDN Tables

An IDN table provides the list of characters eligible for registration in domain names according to the registry's policy. It identifies any multiple characters that are considered equivalent for domain name registration purposes ("variant characters"). Variant characters occur where two or more characters can be used interchangeably.

Examples of IDN tables can be found in the Internet Assigned Numbers Authority (IANA) IDN Repository at http://www.iana.org/procedures/idn-repository.html.

In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string (the "top level tables"). IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second or lower levels.

Each applicant is responsible for developing its IDN Tables, including specification of any variant characters. Tables must comply with ICANN's IDN Guidelines[8] and any updates thereto, including:

- Complying with IDN technical standards.
- Employing an inclusion-based approach (i.e., code points not explicitly permitted by the registry are prohibited).
- Defining variant characters.
- Excluding code points not permissible under the guidelines, e.g., line-drawing symbols, pictographic dingbats, structural punctuation marks.
- Developing tables and registration policies in collaboration with relevant stakeholders to address common issues.
- Depositing IDN tables with the IANA Repository for IDN Practices (once the TLD is delegated).

An applicant's IDN tables should help guard against user confusion in the deployment of IDN gTLDs. Applicants are strongly urged to consider specific linguistic and writing system issues that may cause problems when characters are used in domain names, as part of their work of defining variant characters.

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[8] *See* http://www.icann.org/en/topics/idn/implementation-guidelines.htm

To avoid user confusion due to differing practices across TLD registries, it is recommended that applicants cooperate with TLD operators that offer domain name registration with the same or visually similar characters.

As an example, languages or scripts are often shared across geographic boundaries. In some cases, this can cause confusion among the users of the corresponding language or script communities. Visual confusion can also exist in some instances between different scripts (for example, Greek, Cyrillic and Latin).

Applicants will be asked to describe the process used in developing the IDN tables submitted. ICANN may compare an applicant's IDN table with IDN tables for the same languages or scripts that already exist in the IANA repository or have been otherwise submitted to ICANN. If there are inconsistencies that have not been explained in the application, ICANN may ask the applicant to detail the rationale for differences. For applicants that wish to conduct and review such comparisons prior to submitting a table to ICANN, a table comparison tool will be available.

ICANN will accept the applicant's IDN tables based on the factors above.

Once the applied-for string has been delegated as a TLD in the root zone, the applicant is required to submit IDN tables for lodging in the IANA Repository of IDN Practices. For additional information, see existing tables at http://iana.org/domains/idn-tables/, and submission guidelines at http://iana.org/procedures/idn-repository.html.

1.3.3 IDN Variant TLDs

A variant TLD string results from the substitution of one or more characters in the applied-for gTLD string with variant characters based on the applicant's top level tables.

Each application contains one applied-for gTLD string. The applicant may also declare any variant strings for the TLD in its application. However, no variant gTLD strings will be delegated through the New gTLD Program until variant management solutions are developed and implemented.[9] Declaring variant strings is informative only and will not imply any right or claim to the declared variant strings.

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[9] The ICANN Board directed that work be pursued on variant management in its resolution on 25 Sep 2010, http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.5.

When a variant delegation process is established, applicants may be required to submit additional information such as implementation details for the variant TLD management mechanism, and may need to participate in a subsequent evaluation process, which could contain additional fees and review steps.

The following scenarios are possible during the gTLD evaluation process:

a. Applicant declares variant strings to the applied-for gTLD string in its application. If the application is successful, the applied-for gTLD string will be delegated to the applicant. The declared variant strings are noted for future reference. These declared variant strings will not be delegated to the applicant along with the applied-for gTLD string, nor will the applicant have any right or claim to the declared variant strings.

   Variant strings listed in successful gTLD applications will be tagged to the specific application and added to a "Declared Variants List" that will be available on ICANN's website. A list of pending (i.e., declared) variant strings from the IDN ccTLD Fast Track is available at http://icann.org/en/topics/idn/fast-track/string-evaluation-completion-en.htm.

   ICANN may perform independent analysis on the declared variant strings, and will not necessarily include all strings listed by the applicant on the Declared Variants List.

b. Multiple applicants apply for strings that are identified by ICANN as variants of one another. These applications will be placed in a contention set and will follow the contention resolution procedures in Module 4.

c. Applicant submits an application for a gTLD string and does not indicate variants to the applied-for gTLD string. ICANN will not identify variant strings unless scenario (b) above occurs.

Each variant string declared in the application must also conform to the string requirements in section 2.2.1.3.2.

Variant strings declared in the application will be reviewed for consistency with the top-level tables submitted in the application. Should any declared variant strings not be based on use of variant characters according to the submitted top-level tables, the applicant will be notified and the declared string will no longer be considered part of the application.

Declaration of variant strings in an application does not provide the applicant any right or reservation to a particular string. Variant strings on the Declared Variants List may be subject to subsequent additional review per a process and criteria to be defined.

It should be noted that while variants for second and lower-level registrations are defined freely by the local communities without any ICANN validation, there may be specific rules and validation criteria specified for variant strings to be allowed at the top level. It is expected that the variant information provided by applicants in the first application round will contribute to a better understanding of the issues and assist in determining appropriate review steps and fee levels going forward.

1.4 Submitting an Application

Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the system, each applicant must first register as a TAS user.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

Except where expressly provided within the question, all application materials must be submitted in English.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

1.4.1 Accessing the TLD Application System

The TAS site will be accessible from the New gTLD webpage (http://www.icann.org/en/topics/new-gtld-program.htm), and will be highlighted in communications regarding the opening of the application submission period. Users of TAS will be expected to agree to a standard set of terms of use including user rights, obligations, and restrictions in relation to the use of the system.

1.4.1.1 User Registration

TAS user registration (creating a TAS user profile) requires submission of preliminary information, which will be used to validate the identity of the parties involved in the application. An overview of the information collected in the user registration process is below:

No.	Questions
1	Full legal name of Applicant
2	Principal business address
3	Phone number of Applicant
4	Fax number of Applicant
5	Website or URL, if applicable
6	Primary Contact: Name, Title, Address, Phone, Fax, Email
7	Secondary Contact: Name, Title, Address, Phone, Fax, Email
8	Proof of legal establishment
9	Trading, subsidiary, or joint venture information
10	Business ID, Tax ID, VAT registration number, or equivalent of Applicant
11	Applicant background: previous convictions, cybersquatting activities
12	Deposit payment confirmation and payer information

A subset of identifying information will be collected from the entity performing the user registration, in addition to the applicant information listed above. The registered user could be, for example, an agent, representative, or employee who would be completing the application on behalf of the applicant.

The registration process will require the user to request the desired number of application slots. For example, a user intending to submit five gTLD applications would complete five application slot requests, and the system would assign the user a unique ID number for each of the five applications.

Users will also be required to submit a deposit of USD 5,000 per application slot. This deposit amount will be credited against the evaluation fee for each application. The deposit requirement is in place to help reduce the risk of frivolous access to the online application system.

After completing the registration, TAS users will receive access enabling them to enter the rest of the application information into the system. Application slots will be populated with the registration information provided by the applicant, which may not ordinarily be changed once slots have been assigned.

No new user registrations will be accepted after **23:59 UTC 29 March 2012.**

ICANN will take commercially reasonable steps to protect all applicant data submitted from unauthorized access, but cannot warrant against the malicious acts of third parties who may, through system corruption or other means, gain unauthorized access to such data.

1.4.1.2 Application Form

Having obtained the requested application slots, the applicant will complete the remaining application questions. An overview of the areas and questions contained in the form is shown here:

No.	Application and String Information
12	Payment confirmation for remaining evaluation fee amount
13	Applied-for gTLD string
14	IDN string information, if applicable
15	IDN tables, if applicable

16	Mitigation of IDN operational or rendering problems, if applicable
17	Representation of string in International Phonetic Alphabet (Optional)
18	Mission/purpose of the TLD
19	Is the application for a community-based TLD?
20	If community based, describe elements of community and proposed policies
21	Is the application for a geographic name? If geographic, documents of support required
22	Measures for protection of geographic names at second level
23	Registry Services: name and full description of all registry services to be provided
	Technical and Operational Questions (External)
24	Shared registration system (SRS) performance
25	EPP
26	Whois
27	Registration life cycle
28	Abuse prevention & mitigation
29	Rights protection mechanisms
30(a)	Security
	Technical and Operational Questions (Internal)
30(b)	Security
31	Technical overview of proposed registry
32	Architecture

33	Database capabilities
34	Geographic diversity
35	DNS service compliance
36	IPv6 reachability
37	Data backup policies and procedures
38	Escrow
39	Registry continuity
40	Registry transition
41	Failover testing
42	Monitoring and fault escalation processes
43	DNSSEC
44	IDNs (Optional)
	Financial Questions
45	Financial statements
46	Projections template: costs and funding
47	Costs: setup and operating
48	Funding and revenue
49	Contingency planning: barriers, funds, volumes
50	Continuity: continued operations instrument

1.4.2 Customer Service during the Application Process

Assistance will be available to applicants throughout the application process via the Applicant Service Center (ASC). The ASC will be staffed with customer service agents to answer questions relating to the New gTLD Program, the application process, and TAS.

1.4.3 Backup Application Process

If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

1.5 Fees and Payments

This section describes the fees to be paid by the applicant. Payment instructions are also included here.

1.5.1 gTLD Evaluation Fee

The gTLD evaluation fee is required from all applicants. This fee is in the amount of USD 185,000. The evaluation fee is payable in the form of a 5,000 deposit submitted at the time the user requests an application slot within TAS, and a payment of the remaining 180,000 submitted with the full application. ICANN will not begin its evaluation of an application unless it has received the full gTLD evaluation fee by **23:59 UTC 12 April 2012**.

The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded and revenue neutral and is not subsidized by existing contributions from ICANN funding sources, including generic TLD registries and registrars, ccTLD contributions and RIR contributions.

The gTLD evaluation fee covers all required reviews in Initial Evaluation and, in most cases, any required reviews in Extended Evaluation. If an extended Registry Services review takes place, an additional fee will be incurred for this review (see section 1.5.2). There is no additional fee to the applicant for Extended Evaluation for geographic names, technical and operational, or financial reviews.

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, as follows:

Refund Available to Applicant	**Percentage of Evaluation Fee**	**Amount of Refund**
Within 21 calendar days of a GAC Early	80%	USD 148,000

Refund Available to Applicant	**Percentage of Evaluation Fee**	**Amount of Refund**
Warning		
After posting of applications until posting of Initial Evaluation 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 entered into a registry agreement with ICANN		None

Thus, any applicant that has not been successful is eligible for at least a 20% refund of the evaluation fee if it withdraws its application.

An applicant that wishes to withdraw an application must initiate the process through TAS. Withdrawal of an application is final and irrevocable. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN, or any unpaid evaluation fees, will be deducted from the amount paid. Any refund paid will be in full satisfaction of ICANN's obligations to the applicant. The applicant will have no entitlement to any additional amounts, including for interest or currency exchange rate changes.

Note on 2000 proof-of-concept round applicants -- Participants in ICANN's proof-of-concept application process in 2000 may be eligible for a credit toward the evaluation fee. The credit is in the amount of USD 86,000 and is subject to:

- submission of documentary proof by the applicant that it is the same entity, a successor in interest to the same entity, or an affiliate of the same entity that applied previously;
- a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof–of-concept application round and that the applicant has no legal claims arising from the 2000 proof-of-concept process; and
- submission of an application, which may be modified from the application originally submitted in 2000, for the same TLD string that such entity applied for in the 2000 proof-of-concept application round.

Each participant in the 2000 proof-of-concept application process is eligible for at most one credit. A maximum of one credit may be claimed for any new gTLD application submitted according to the process in this guidebook. Eligibility for this credit is determined by ICANN.

1.5.2 Fees Required in Some Cases

Applicants may be required to pay additional fees in certain cases where specialized process steps are applicable. Those possible additional fees[10] include:

- ***Registry Services Review Fee –*** If applicable, this fee is payable for additional costs incurred in referring an application to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review. Applicants will be notified if such a fee is due. The fee for a three-member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. The amount of the fee will cover the cost of the RSTEP review. In the event that reviews of proposed registry services can be consolidated across multiple applications or applicants, ICANN will apportion the fees in an equitable manner. In every case, the applicant will be advised of the cost before initiation of the review. Refer to subsection 2.2.3 of Module 2 on Registry Services review.

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[10] The estimated fee amounts provided in this section 1.5.2 will be updated upon engagement of panel service providers and establishment of fees.

- ***Dispute Resolution Filing Fee –*** This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable directly to the applicable dispute resolution service provider in accordance with the provider's payment instructions. ICANN estimates that filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.

- ***Advance Payment of Costs –*** In the event of a formal objection, this amount is payable directly to the applicable dispute resolution service provider in accordance with that provider's procedures and schedule of costs. Ordinarily, both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. In cases where disputes are consolidated and there are more than two parties involved, the advance payment will occur according to the dispute resolution service provider's rules.

  The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding. In cases where disputes are consolidated and there are more than two parties involved, the refund of fees will occur according to the dispute resolution service provider's rules.

  ICANN estimates that adjudication fees for a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please refer to the appropriate provider for the relevant amounts or fee structures.

- ***Community Priority Evaluation Fee*** **–** In the event that the applicant participates in a community priority evaluation, this fee is payable as a deposit in an amount to cover the cost of the panel's review of that application (currently estimated at USD 10,000). The deposit is payable to the provider appointed to handle community priority evaluations. Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4 for circumstances in which a community priority evaluation may take place. An applicant who scores at or above the threshold for the community priority evaluation will have its deposit refunded.

ICANN will notify the applicants of due dates for payment in respect of additional fees (if applicable). This list does not include fees (annual registry fees) that will be payable to ICANN following execution of a registry agreement.

1.5.3 Payment Methods

Payments to ICANN should be submitted by **wire transfer**. Instructions for making a payment by wire transfer will be available in TAS.[11]

Payments to Dispute Resolution Service Providers should be submitted in accordance with the provider's instructions.

1.5.4 Requesting a Remittance Form

The TAS interface allows applicants to request issuance of a remittance form for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

1.6 Questions about this Applicant Guidebook

For assistance and questions an applicant may have in the process of completing the application form, applicants should use the customer support resources available via the ASC. Applicants who are unsure of the information being sought in a question or the parameters for acceptable documentation are encouraged to communicate these questions through the appropriate

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[11] Wire transfer is the preferred method of payment as it offers a globally accessible and dependable means for international transfer of funds. This enables ICANN to receive the fee and begin processing applications as quickly as possible.

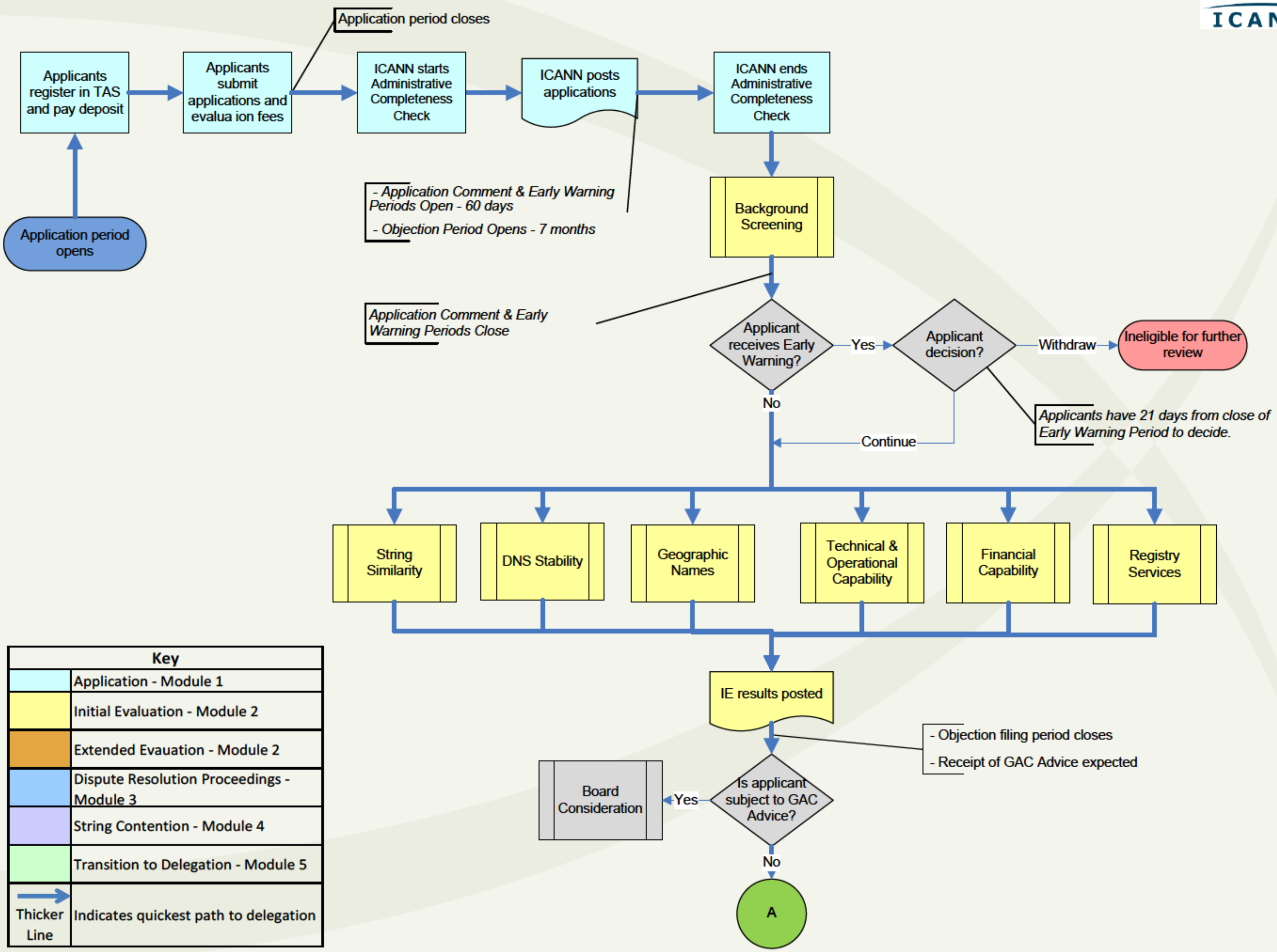
support channels before the application is submitted. This helps avoid the need for exchanges with evaluators to clarify information, which extends the timeframe associated with processing the application.

Currently, questions may be submitted via <newgtld@icann.org>. To provide all applicants equitable access to information, ICANN will make all questions and answers publicly available.

All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted to the ASC. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the ASC.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.

DRAFT - New gTLD Program - Evaluation Process



Application period opens

Applicants register in TAS and pay deposit

Applicants submit applications and evaluation fees

Application period closes

ICANN starts Administrative Completeness Check

ICANN posts applications

ICANN ends Administrative Completeness Check

- Application Comment & Early Warning Periods Open - 60 days

- Objection Period Opens - 7 months

Background Screening

Application Comment & Early Warning Periods Close

Applicant receives Early Warning?

Yes

Applicant decision?

Withdraw

Ineligible for further review

Applicants have 21 days from close of Early Warning Period to decide.

Continue

No

String Similarity

DNS Stability

Geographic Names

Technical & Operational Capability

Financial Capability

Registry Services

IE results posted

- Objection filing period closes
- Receipt of GAC Advice expected

Is applicant subject to GAC Advice?

Yes

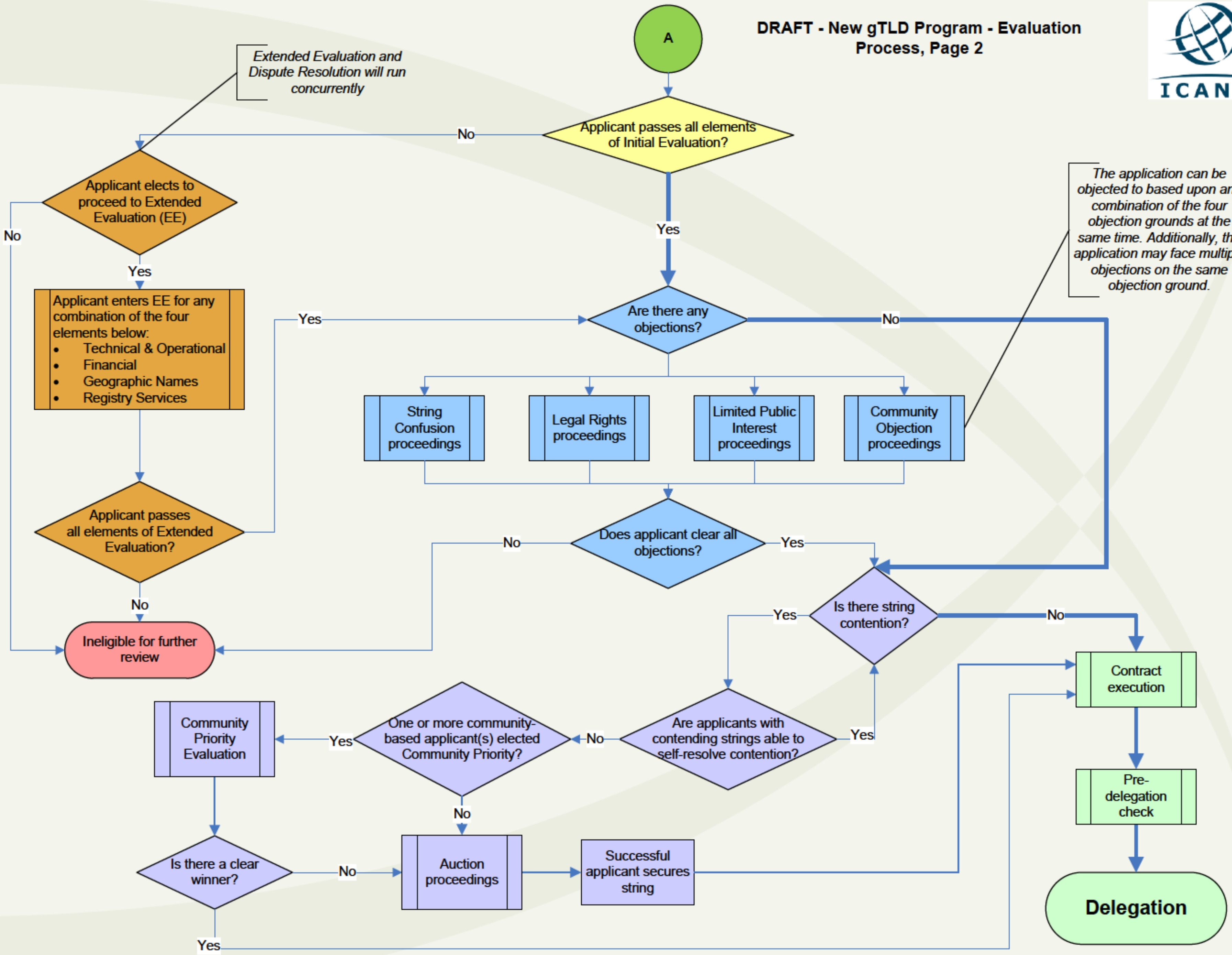
Board Consideration

No

A

Key	
🟦	Application - Module 1
🟨	Initial Evaluation - Module 2
🟧	Extended Evauation - Module 2
🟦	Dispute Resolution Proceedings - Module 3
🟪	String Contention - Module 4
🟩	Transition to Delegation - Module 5
→ Thicker Line	Indicates quickest path to delegation

DRAFT - New gTLD Program - Evaluation Process, Page 2



A

Extended Evaluation and Dispute Resolution will run concurrently

Applicant passes all elements of Initial Evaluation?

No

Applicant elects to proceed to Extended Evaluation (EE)

No

Yes

Applicant enters EE for any combination of the four elements below:
- Technical & Operational
- Financial
- Geographic Names
- Registry Services

Applicant passes all elements of Extended Evaluation?

Yes

No

Ineligible for further review

Yes

Are there any objections?

No

The application can be objected to based upon any combination of the four objection grounds at the same time. Additionally, the application may face multiple objections on the same objection ground.

String Confusion proceedings

Legal Rights proceedings

Limited Public Interest proceedings

Community Objection proceedings

Does applicant clear all objections?

No

Yes

Is there string contention?

Yes

No

Contract execution

Pre-delegation check

Delegation

Are applicants with contending strings able to self-resolve contention?

Yes

No

One or more community-based applicant(s) elected Community Priority?

Yes

No

Community Priority Evaluation

Is there a clear winner?

No

Yes

Auction proceedings

Successful applicant secures string

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 2

4 June 2012

Module 2

Evaluation Procedures

This module describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation. All applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN assesses an applied-for gTLD string, an applicant's qualifications, and its proposed registry services.

The following assessments are performed in the **Initial Evaluation**:

- String Reviews
    - String similarity
    - Reserved names
    - DNS stability
    - Geographic names
- Applicant Reviews
    - Demonstration of technical and operational capability
    - Demonstration of financial capability
    - Registry services reviews for DNS stability issues

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.

Extended Evaluation may be applicable in cases in which an applicant does not pass the Initial Evaluation. See Section 2.3 below.

2.1 Background Screening

Background screening will be conducted in two areas:

(a) General business diligence and criminal history; and

(b) History of cybersquatting behavior.

The application must pass both background screening areas to be eligible to proceed. Background screening results are evaluated according to the criteria described in section 1.2.1. Due to the potential sensitive nature of the material, applicant background screening reports will not be published.

The following sections describe the process ICANN will use to perform background screening.

2.1.1 General business diligence and criminal history

Applying entities that are publicly traded corporations listed and in good standing on any of the world's largest 25 stock exchanges (as listed by the World Federation of Exchanges) will be deemed to have passed the general business diligence and criminal history screening. The largest 25 will be based on the domestic market capitalization reported at the end of the most recent calendar year prior to launching each round.[1]

Before an entity is listed on an exchange, it must undergo significant due diligence including an investigation by the exchange, regulators, and investment banks. As a publicly listed corporation, an entity is subject to ongoing scrutiny from shareholders, analysts, regulators, and exchanges. All exchanges require monitoring and disclosure of material information about directors, officers, and other key personnel, including criminal behavior. In totality, these requirements meet or exceed the screening ICANN will perform.

For applicants not listed on one of these exchanges, ICANN will submit identifying information for the entity, officers, directors, and major shareholders to an international background screening service. The service provider(s) will use the criteria listed in section 1.2.1 and return results that match these criteria. Only publicly available information will be used in this inquiry.

ICANN is in discussions with INTERPOL to identify ways in which both organizations can collaborate in background screenings of individuals, entities and their identity documents consistent with both organizations' rules and regulations. Note that the applicant is expected to disclose potential problems in meeting the criteria in the application, and provide any clarification or explanation at the time of application submission. Results returned from

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[1] See http://www.world-exchanges.org/statistics/annual/2010/equity-markets/domestic-market-capitalization

the background screening process will be matched with the disclosures provided by the applicant and those cases will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

2.1.2 History of cybersquatting

ICANN will screen applicants against UDRP cases and legal databases as financially feasible for data that may indicate a pattern of cybersquatting behavior pursuant to the criteria listed in section 1.2.1.

The applicant is required to make specific declarations regarding these activities in the application. Results returned during the screening process will be matched with the disclosures provided by the applicant and those instances will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

2.2 Initial Evaluation

The Initial Evaluation consists of two types of review. Each type is composed of several elements.

String review: The first review focuses on the applied-for gTLD string to test:

- Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;
- Whether the applied-for gTLD string might adversely affect DNS security or stability; and
- Whether evidence of requisite government approval is provided in the case of certain geographic names.

Applicant review: The second review focuses on the applicant to test:

- Whether the applicant has the requisite technical, operational, and financial capability to operate a registry; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

2.2.1 String Reviews

In the Initial Evaluation, ICANN reviews every applied-for gTLD string. Those reviews are described in greater detail in the following subsections.

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names;
- Applied-for gTLD strings against other applied-for gTLD strings;
- Applied-for gTLD strings against strings requested as IDN ccTLDs; and
- Applied-for 2-character IDN gTLD strings against:
    - Every other single character.
    - Any other 2-character ASCII string (to protect possible future ccTLD delegations).

Similarity to Existing TLDs or Reserved Names – This review involves cross-checking between each applied-for string and the lists of existing TLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion.

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

Testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. For example, protocols treat equivalent labels as alternative forms of the same label, just as “foo” and “Foo” are treated as alternative forms of the same label (RFC 3490).

All TLDs currently in the root zone can be found at http://iana.org/domains/root/db/.

IDN tables that have been submitted to ICANN are available at http://www.iana.org/domains/idn-tables/.

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

ICANN will notify applicants who are part of a contention set as soon as the String Similarity review is completed. (This provides a longer period for contending applicants to reach their own resolution before reaching the contention resolution stage.) These contention sets will also be published on ICANN’s website.

Similarity to TLD strings requested as IDN ccTLDs -- Applied-for gTLD strings will also be reviewed for similarity to TLD strings requested in the IDN ccTLD Fast Track process (see http://www.icann.org/en/topics/idn/fast-track/). Should a conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take the following approach to resolving the conflict.

If one of the applications has completed its respective process before the other is lodged, that TLD will be delegated. A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request. Similarly, an IDN ccTLD request that has completed evaluation (i.e., is validated) will be considered complete and therefore would not be disqualified by a newly-filed gTLD application.

In the case where neither application has completed its respective process, where the gTLD application does not have the required approval from the relevant government or public authority, a validated request for an IDN ccTLD will prevail and the gTLD application will not be approved. The term "validated" is defined in the IDN ccTLD Fast Track Process Implementation, which can be found at http://www.icann.org/en/topics/idn.

In the case where a gTLD applicant has obtained the support or non-objection of the relevant government or public authority, but is eliminated due to contention with a string requested in the IDN ccTLD Fast Track process, a full refund of the evaluation fee is available to the applicant if the gTLD application was submitted prior to the publication of the ccTLD request.

Review of 2-character IDN strings — In addition to the above reviews, an applied-for gTLD string that is a 2-character IDN string is reviewed by the String Similarity Panel for visual similarity to:

a) Any one-character label (in any script), and

b) Any possible two-character ASCII combination.

An applied-for gTLD string that is found to be too similar to a) or b) above will not pass this review.

2.2.1.1.2 Review Methodology

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes.[2] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

The algorithm supports the common characters in Arabic, Chinese, Cyrillic, Devanagari, Greek, Japanese, Korean, and Latin scripts. It can also compare strings in different scripts to each other.

The panel will also take into account variant characters, as defined in any relevant language table, in its determinations. For example, strings that are not visually similar but are determined to be variant TLD strings based on an IDN table would be placed in a contention set. Variant TLD strings that are listed as part of the application will also be subject to the string similarity analysis.[3]

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – 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.

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation,

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[2] *See* http://icann.sword-group.com/algorithm/

[3] In the case where an applicant has listed Declared Variants in its application (see subsection 1.3.3), the panel will perform an analysis of the listed strings to confirm that the strings are variants according to the applicant's IDN table. This analysis may include comparison of applicant IDN tables with other existing tables for the same language or script, and forwarding any questions to the applicant.

and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion 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 (including visual, aural, or similarity of meaning) may be claimed by an objector. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

An applicant may file a formal objection against another gTLD application on string confusion grounds. Such an objection may, if successful, change the configuration of the preliminary contention sets in that the two applied-for gTLD strings will be considered in direct contention with one another (see Module 4, String Contention Procedures). The objection process will not result in removal of an application from a contention set.

2.2.1.2 Reserved Names and Other Unavailable Strings

Certain names are not available as gTLD strings, as detailed in this section.

2.2.1.2.1 Reserved Names

All applied-for gTLD strings are compared with the list of top-level Reserved Names to ensure that the applied-for gTLD string does not appear on that list.

Top-Level Reserved Names List

AFRINIC	*IANA-SERVERS*	*NRO*
ALAC	*ICANN*	*RFC-EDITOR*
APNIC	*IESG*	*RIPE*
ARIN	*IETF*	*ROOT-SERVERS*
ASO	*INTERNIC*	*RSSAC*
CCNSO	*INVALID*	*SSAC*
*EXAMPLE**	*IRTF*	*TEST**
GAC	*ISTF*	*TLD*

GNSO	*LACNIC*	*WHOIS*
GTLD-SERVERS	*LOCAL*	*WWW*
IAB	*LOCALHOST*	
IANA	*NIC*	
*Note that in addition to the above strings, ICANN will reserve translations of the terms "test" and "example" in multiple languages. The remainder of the strings are reserved only in the form included above.		

If an applicant enters a Reserved Name as its applied-for gTLD string, the application system will recognize the Reserved Name and will not allow the application to be submitted.

In addition, applied-for gTLD strings are reviewed during the String Similarity review to determine whether they are similar to a Reserved Name. An application for a gTLD string that is identified as too similar to a Reserved Name will not pass this review.

2.2.1.2.2 Declared Variants

Names appearing on the Declared Variants List (see section 1.3.3) will be posted on ICANN's website and will be treated essentially the same as Reserved Names, until such time as variant management solutions are developed and variant TLDs are delegated. That is, an application for a gTLD string that is identical or similar to a string on the Declared Variants List will not pass this review.

2.2.1.2.3 Strings Ineligible for Delegation

The following names are prohibited from delegation as gTLDs in the initial application round. Future application rounds may differ according to consideration of further policy advice.

These names are not being placed on the Top-Level Reserved Names List, and thus are not part of the string similarity review conducted for names on that list. Refer to subsection 2.2.1.1: where applied-for gTLD strings are reviewed for similarity to existing TLDs and reserved names, the strings listed in this section are not reserved names and accordingly are not incorporated into this review.

Applications for names appearing on the list included in this section will not be approved.

International Olympic Committee		
OLYMPIC	OLYMPIAD	OLYMPIQUE
OLYMPIADE	OLYMPISCH	OLÍMPICO
OLIMPÍADA	أوليمبي	أوليمبياد
奥林匹克	奥林匹亚	奧林匹克
奧林匹亞	Ολυμπιακοί	Ολυμπιάδα
올림픽	올림피아드	Олимпийский
Олимпиада		

International Red Cross and Red Crescent Movement		
REDCROSS	REDCRESCENT	REDCRYSTAL
REDLIONANDSUN	MAGENDDAVIDADOM	REDSTAROFDAVID
CROIXROUGE	CROIX-ROUGE	CROISSANTROUGE
CROISSANT-ROUGE	CRISTALROUGE	CRISTAL-ROUGE
מגן דוד אדום	CRUZROJA	MEDIALUNAROJA
CRISTALROJO	Красный Крест	Красный Полумесяц
Красный Кристалл	الصليب الأحمر	الأحمر الهلال
البلورة الحمراء	الكريستالة الحمراء	紅十字
红十字	紅新月	红新月
紅水晶	红水晶	

2.2.1.3 DNS Stability Review

This review determines whether an applied-for gTLD string might cause instability to the DNS. In all cases, this will involve a review for conformance with technical and other requirements for gTLD strings (labels). In some exceptional cases, an extended review may be necessary to investigate possible technical stability problems with the applied-for gTLD string.

Note: All applicants should recognize issues surrounding invalid TLD queries at the root level of the DNS.

Any new TLD registry operator may experience unanticipated queries, and some TLDs may experience a non-trivial load of unanticipated queries. For more information, see the Security and Stability Advisory Committee (SSAC)'s report on this topic at http://www.icann.org/en/committees/security/sac045.pdf. Some publicly available statistics are also available at http://stats.l.root-servers.org/.

ICANN will take steps to alert applicants of the issues raised in SAC045, and encourage the applicant to prepare to minimize the possibility of operational difficulties that would pose a stability or availability problem for its registrants and users. However, this notice is merely an advisory to applicants and is not part of the evaluation, unless the string raises significant security or stability issues as described in the following section.

2.2.1.3.1 DNS Stability: String Review Procedure

New gTLD labels must not adversely affect the security or stability of the DNS. During the Initial Evaluation period, ICANN will conduct a preliminary review on the set of applied-for gTLD strings to:

- ensure that applied-for gTLD strings comply with the requirements provided in section 2.2.1.3.2, and
- determine whether any strings raise significant security or stability issues that may require further review.

There is a very low probability that extended analysis will be necessary for a string that fully complies with the string requirements in subsection 2.2.1.3.2 of this module. However, the string review process provides an additional safeguard if unanticipated security or stability issues arise concerning an applied-for gTLD string.

In such a case, the DNS Stability Panel will perform an extended review of the applied-for gTLD string during the Initial Evaluation period. The panel will determine whether the string fails to comply with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, and will report on its findings.

If the panel determines that the string complies with relevant standards and does not create the conditions described above, the application will pass the DNS Stability review.

If the panel determines that the string does not comply with relevant technical standards, or that it creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, the application will not pass the Initial Evaluation, and no further reviews are available. In the case where a string is determined likely to cause security or stability problems in the DNS, the applicant will be notified as soon as the DNS Stability review is completed.

2.2.1.3.2 String Requirements

ICANN will review each applied-for gTLD string to ensure that it complies with the requirements outlined in the following paragraphs.

If an applied-for gTLD string is found to violate any of these rules, the application will not pass the DNS Stability review. No further reviews are available.

Part I -- Technical Requirements for all Labels (Strings) – The technical requirements for top-level domain labels follow.

1.1 The ASCII label (i.e., the label as transmitted on the wire) must be valid as specified in technical standards *Domain Names: Implementation and Specification* (RFC 1035), and *Clarifications to the DNS Specification* (RFC 2181) and any updates thereto. This includes the following:

  1.1.1 The label must have no more than 63 characters.

  1.1.2 Upper and lower case characters are treated as identical.

1.2 The ASCII label must be a valid host name, as specified in the technical standards *DOD Internet Host Table Specification* (RFC 952), *Requirements for Internet Hosts — Application and Support* (RFC 1123), and *Application Techniques for Checking and Transformation of Names (RFC 3696), Internationalized Domain Names in Applications (IDNA)(RFCs 5890-5894), and any updates thereto.* This includes the following:

  1.2.1 The ASCII label must consist entirely of letters (alphabetic characters a-z), or

1.2.2 The label must be a valid IDNA A-label (further restricted as described in Part II below).

Part II -- Requirements for Internationalized Domain Names – These requirements apply only to prospective top-level domains that contain non-ASCII characters. Applicants for these internationalized top-level domain labels are expected to be familiar with the Internet Engineering Task Force (IETF) IDNA standards, Unicode standards, and the terminology associated with Internationalized Domain Names.

2.1 The label must be an A-label as defined in IDNA, converted from (and convertible to) a U-label that is consistent with the definition in IDNA, and further restricted by the following, non-exhaustive, list of limitations:

2.1.1 Must be a valid A-label according to IDNA.

2.1.2 The derived property value of all codepoints used in the U-label, as defined by IDNA, must be PVALID or CONTEXT (accompanied by unambiguous contextual rules).[4]

2.1.3 The general category of all codepoints, as defined by IDNA, must be one of (Ll, Lo, Lm, Mn, Mc).

2.1.4 The U-label must be fully compliant with Normalization Form C, as described in *Unicode Standard Annex #15: Unicode Normalization Forms.* See also examples in http://unicode.org/faq/normalization.html.

2.1.5 The U-label must consist entirely of characters with the same directional property, or fulfill the requirements of the Bidi rule per RFC 5893.

2.2 The label must meet the relevant criteria of the ICANN *Guidelines for the Implementation of Internationalised Domain Names*. See http://www.icann.org/en/topics/idn/implementatio

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[4] It is expected that conversion tools for IDNA will be available before the Application Submission period begins, and that labels will be checked for validity under IDNA. In this case, labels valid under the previous version of the protocol (IDNA2003) but not under IDNA will not meet this element of the requirements. Labels that are valid under both versions of the protocol will meet this element of the requirements. Labels valid under IDNA but not under IDNA2003 may meet the requirements; however, applicants are strongly advised to note that the duration of the transition period between the two protocols cannot presently be estimated nor guaranteed in any specific timeframe. The development of support for IDNA in the broader software applications environment will occur gradually. During that time, TLD labels that are valid under IDNA, but not under IDNA2003, will have limited functionality.

n-guidelines.htm. This includes the following, non-exhaustive, list of limitations:

2.2.1 All code points in a single label must be taken from the same script as determined by the Unicode Standard Annex #24: Unicode Script Property (See http://www.unicode.org/reports/tr24/).

2.2.2 Exceptions to 2.2.1 are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. However, even with this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table are clearly defined.

Part III - Policy Requirements for Generic Top-Level Domains – These requirements apply to all prospective top-level domain strings applied for as gTLDs.

3.1 Applied-for gTLD strings in ASCII must be composed of three or more visually distinct characters. Two-character ASCII strings are not permitted, to avoid conflicting with current and future country codes based on the ISO 3166-1 standard.

3.2 Applied-for gTLD strings in IDN scripts must be composed of two or more visually distinct characters in the script, as appropriate.[5] Note, however, that a two-character IDN string will not be approved if:

3.2.1 It is visually similar to any one-character label (in any script); or

3.2.2 It is visually similar to any possible two-character ASCII combination.

See the String Similarity review in subsection 2.2.1.1 for additional information on this requirement.

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[5] Note that the Joint ccNSO-GNSO IDN Working Group (JIG) has made recommendations that this section be revised to allow for single-character IDN gTLD labels. See the JIG Final Report at http://gnso.icann.org/drafts/jig-final-report-30mar11-en.pdf. Implementation models for these recommendations are being developed for community discussion.

2.2.1.4 Geographic Names Review

Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. The requirements and procedure ICANN will follow in the evaluation process are described in the following paragraphs. Applicants should review these requirements even if they do not believe their intended gTLD string is a geographic name. All applied-for gTLD strings will be reviewed according to the requirements in this section, regardless of whether the application indicates it is for a geographic name.

2.2.1.4.1 Treatment of Country or Territory Names[6]

Applications for strings that are <u>country or territory names</u> will not be approved, as they are not available under the New gTLD Program in this application round. A string shall be considered to be a country or territory name if:

i. it is an alpha-3 code listed in the ISO 3166-1 standard.

ii. it is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.

iii. it is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.

iv. it is the short- or long-form name association with a code that has been designated as "exceptionally reserved" by the ISO 3166 Maintenance Agency.

v. it is a separable component of a country name designated on the "Separable Country Names List," or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module.

vi. it is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or

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[6] Country and territory names are excluded from the process based on advice from the Governmental Advisory Committee in recent communiqués providing interpretation of Principle 2.2 of the GAC Principles regarding New gTLDs to indicate that strings which are a meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccPDP, and other geographic strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.

removal of grammatical articles like "the." A transposition is considered a change in the sequence of the long or short–form name, for example, "RepublicCzech" or "IslandsCayman."

vii. it is 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.

2.2.1.4.2 Geographic Names Requiring Government Support

The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities:

1. 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.

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

   City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected. However, the process does provide a means for cities and applicants to work together where desired.

   An application for a city name will be subject to the geographic names requirements (i.e., will require documentation of support or non-objection from the relevant governments or public authorities) if:

   (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and

(b) The applied-for string is a city name as listed on official city documents.[7]

3. 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.

4. An application for a string listed as a UNESCO region[8] or appearing on the "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list.[9]

   In the case of an application for a string appearing on either of the lists above, documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.

   Where the 60% rule is applied, and there are common regions on both lists, the regional composition contained in the "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" takes precedence.

An applied-for gTLD string that falls into any of 1 through 4 listed above is considered to represent a geographic name. In the event of any doubt, it is in the applicant's interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements.

Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and therefore will not require documentation of government support in the evaluation process.

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[7] City governments with concerns about strings that are duplicates, nicknames or close renderings of a city name should not rely on the evaluation process as the primary means of protecting their interests in a string. Rather, a government may elect to file a formal objection to an application that is opposed by the relevant community, or may submit its own application for the string.

[8] *See* http://www.unesco.org/new/en/unesco/worldwide/.

[9] *See* http://unstats.un.org/unsd/methods/m49/m49regin.htm.

For each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis. In the event that there is more than one relevant government or public authority for the applied-for gTLD string, the applicant must provide documentation of support or non-objection from all the relevant governments or public authorities. It is anticipated that this may apply to the case of a sub-national place name.

It is the applicant's responsibility to:

- identify whether its applied-for gTLD string falls into any of the above categories; and
- identify and consult with the relevant governments or public authorities; and
- identify which level of government support is required.

Note: the level of government and which administrative agency is responsible for the filing of letters of support or non-objection is a matter for each national administration to determine. Applicants should consult within the relevant jurisdiction to determine the appropriate level of support.

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 (refer to subsection 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

2.2.1.4.3 Documentation Requirements

The documentation of support or non-objection should include a signed letter from the relevant government or public authority. Understanding that this will differ across the respective jurisdictions, the letter could be signed by the minister with the portfolio responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister or President of the relevant jurisdiction; or a senior representative of the agency or department responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister. To assist the applicant in determining who the relevant government or public authority may be for a potential geographic name, the applicant may wish to consult with the relevant

Governmental Advisory Committee (GAC) representative.[10]

The letter must clearly express the government's or public authority's support for or non-objection to the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and its intended use.

The letter should also demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus policies and payment of fees. (See Module 5 for a discussion of the obligations of a gTLD registry operator.)

A sample letter of support is available as an attachment to this module.

Applicants and governments may conduct discussions concerning government support for an application at any time. Applicants are encouraged to begin such discussions at the earliest possible stage, and enable governments to follow the processes that may be necessary to consider, approve, and generate a letter of support or non-objection.

It is important to note that a government or public authority is under no obligation to provide documentation of support or non-objection in response to a request by an applicant.

It is also possible that a government may withdraw its support for an application at a later time, including after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or non-objection. Applicants should be aware that ICANN has committed to governments 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.

2.2.1.4.4 Review Procedure for Geographic Names

A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic

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[10] *See* https://gacweb.icann.org/display/gacweb/GAC+Members

name, and verify the relevance and authenticity of the supporting documentation where necessary.

The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name. For any application where the GNP determines that the applied-for gTLD string is a country or territory name (as defined in this module), the application will not pass the Geographic Names review and will be denied. No additional reviews will be available.

For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.

For any application where the GNP determines that the applied-for gTLD string is a geographic name requiring government support, the GNP will confirm that the applicant has provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority is legitimate and contains the required content. ICANN may confirm the authenticity of the communication by consulting with the relevant diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact within their administration for communications.

The GNP may communicate with the signing entity of the letter to confirm their intent and their understanding of the terms on which the support for an application is given.

In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation. If the applicant is able to provide the documentation before the close of the Initial Evaluation period, and the documentation is found to meet the requirements, the applicant will pass the Geographic Names review. If not, the applicant will have additional time to obtain the required documentation; however, if the applicant has not produced the required documentation by the required date (at least 90 calendar days from the date of notice), the application will be considered incomplete and will be ineligible for further review. The applicant may reapply in subsequent application rounds, if desired, subject to the fees and requirements of the specific application rounds.

If there is more than one application for a string representing a certain geographic name as described in this section, and the applications have requisite government approvals, the applications will be suspended pending resolution by the applicants. If the applicants have not reached a resolution by either the date of the end of the application round (as announced by ICANN), or the date on which ICANN opens a subsequent application round, whichever comes first, the applications will be rejected and applicable refunds will be available to applicants according to the conditions described in section 1.5.

However, in the event that a contention set is composed of multiple applications with documentation of support from the same government or public authority, the applications will proceed through the contention resolution procedures described in Module 4 when requested by the government or public authority providing the documentation.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographical names, the string contention will be resolved using the string contention procedures described in Module 4.

2.2.2 Applicant Reviews

Concurrent with the applied-for gTLD string reviews described in subsection 2.2.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

2.2.2.1 Technical/Operational Review

In its application, the applicant will respond to a set of questions (see questions 24 – 44 in the Application Form) intended to gather information about the applicant's technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

2.2.2.2 Financial Review

In its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans identifying system hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment. That is, the evaluation criteria scale with the applicant plans to provide flexibility.

2.2.2.3 Evaluation Methodology

Dedicated technical and financial evaluation panels will conduct the technical/operational and financial reviews, according to the established criteria and scoring mechanism included as an attachment to this module. These reviews are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the Application Form.

The evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators. These communications will occur via TAS. Unless otherwise noted, such communications will include a 2-week deadline for the applicant to respond. Any supplemental information provided by the applicant will become part of the application.

It is the applicant's responsibility to ensure that the questions have been fully answered and the required documentation is attached. Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and are not obliged to take into account any information or evidence that is not made available in the application and submitted by the due date, unless explicitly requested by the evaluators.

2.2.3 Registry Services Review

Concurrent with the other reviews that occur during the Initial Evaluation period, ICANN will review the applicant's proposed registry services for any possible adverse impact on security or stability. The applicant will be required to provide a list of proposed registry services in its application.

2.2.3.1 Definitions

Registry services are defined as:

1. operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement;

2. other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and

3. any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

Proposed registry services will be examined to determine if they might raise significant stability or security issues. Examples of services proposed by existing registries can be found at http://www.icann.org/en/registries/rsep/. In most cases, these proposed services successfully pass this inquiry.

Registry services currently provided by gTLD registries can be found in registry agreement appendices. See http://www.icann.org/en/registries/agreements.htm.

A full definition of registry services can be found at http://www.icann.org/en/registries/rsep/rsep.html.

For purposes of this review, security and stability are defined as follows:

Security – an effect on security by the proposed registry service means (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

Stability – an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.

2.2.3.2 *Customary Services*

The following registry services are customary services offered by a registry operator:

- Receipt of data from registrars concerning registration of domain names and name servers
- Dissemination of TLD zone files
- Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois)
- DNS Security Extensions

The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.

Any additional registry services that are unique to the proposed gTLD registry should be described in detail. Directions for describing the registry services are provided at http://www.icann.org/en/registries/rsep/rrs_sample.html.

2.2.3.3 *TLD Zone Contents*

ICANN receives a number of inquiries about use of various record types in a registry zone, as entities contemplate different business and technical models. Permissible zone contents for a TLD zone are:

- Apex SOA record.
- Apex NS records and in-bailiwick glue for the TLD's DNS servers.

- NS records and in-bailiwick glue for DNS servers of registered names in the TLD.
- DS records for registered names in the TLD.
- Records associated with signing the TLD zone (i.e., RRSIG, DNSKEY, NSEC, and NSEC3).

An applicant wishing to place any other record types into its TLD zone should describe in detail its proposal in the registry services section of the application. This will be evaluated and could result in an extended evaluation to determine whether the service would create a risk of a meaningful adverse impact on security or stability of the DNS. Applicants should be aware that a service based on use of less-common DNS resource records in the TLD zone, even if approved in the registry services review, might not work as intended for all users due to lack of application support.

2.2.3.4 Methodology

Review of the applicant's proposed registry services will include a preliminary determination of whether any of the proposed registry services could raise significant security or stability issues and require additional consideration.

If the preliminary determination reveals that there may be significant security or stability issues (as defined in subsection 2.2.3.1) surrounding a proposed service, the application will be flagged for an extended review by the Registry Services Technical Evaluation Panel (RSTEP), see http://www.icann.org/en/registries/rsep/rstep.html). This review, if applicable, will occur during the Extended Evaluation period (refer to Section 2.3).

In the event that an application is flagged for extended review of one or more registry services, an additional fee to cover the cost of the extended review will be due from the applicant. Applicants will be advised of any additional fees due, which must be received before the additional review begins.

2.2.4 Applicant's Withdrawal of an Application

An applicant who does not pass the Initial Evaluation may withdraw its application at this stage and request a partial refund (refer to subsection 1.5 of Module 1).

2.3 Extended Evaluation

An applicant may request an Extended Evaluation if the application has failed to pass the Initial Evaluation elements concerning:

- Geographic names (refer to subsection 2.2.1.4). There is no additional fee for an extended evaluation in this instance.
- Demonstration of technical and operational capability (refer to subsection 2.2.2.1). There is no additional fee for an extended evaluation in this instance.
- Demonstration of financial capability (refer to subsection 2.2.2.2). There is no additional fee for an extended evaluation in this instance.
- Registry services (refer to subsection 2.2.3). Note that this investigation incurs an additional fee (the Registry Services Review Fee) if the applicant wishes to proceed. See Section 1.5 of Module 1 for fee and payment information.

An Extended Evaluation does not imply any change of the evaluation criteria. The same criteria used in the Initial Evaluation will be used to review the application in light of clarifications provided by the applicant.

From the time an applicant receives notice of failure to pass the Initial Evaluation, eligible applicants will have 15 calendar days to submit to ICANN the Notice of Request for Extended Evaluation. If the applicant does not explicitly request the Extended Evaluation (and pay an additional fee in the case of a Registry Services inquiry) the application will not proceed.

2.3.1 Geographic Names Extended Evaluation

In the case of an application that has been identified as a geographic name requiring government support, but where 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 has additional time in the Extended Evaluation period to obtain and submit this documentation.

If the applicant submits the documentation to the Geographic Names Panel by the required date, the GNP will perform its review of the documentation as detailed in section 2.2.1.4. If the applicant has not provided the documentation by the required date (at least 90 calendar days from the date of the notice), the application will not pass the Extended Evaluation, and no further reviews are available.

2.3.2 Technical/Operational or Financial Extended Evaluation

The following applies to an Extended Evaluation of an applicant's technical and operational capability or financial capability, as described in subsection 2.2.2.

An applicant who has requested Extended Evaluation will again access the online application system (TAS) and clarify its answers to those questions or sections on which it received a non-passing score (or, in the case of an application where individual questions were passed but the total score was insufficient to pass Initial Evaluation, those questions or sections on which additional points are possible). The answers should be responsive to the evaluator report that indicates the reasons for failure, or provide any amplification that is not a material change to the application. Applicants may not use the Extended Evaluation period to substitute portions of new information for the information submitted in their original applications, i.e., to materially change the application.

An applicant participating in an Extended Evaluation on the Technical / Operational or Financial reviews will have the option to have its application reviewed by the same evaluation panelists who performed the review during the Initial Evaluation period, or to have a different set of panelists perform the review during Extended Evaluation.

The Extended Evaluation allows an additional exchange of information between the evaluators and the applicant to further clarify information contained in the application. This supplemental information will become part of the application record. Such communications will include a deadline for the applicant to respond.

ICANN will notify applicants at the end of the Extended Evaluation period as to whether they have passed. If an application passes Extended Evaluation, it continues to the next stage in the process. If an application does not pass Extended Evaluation, it will proceed no further. No further reviews are available.

2.3.3 Registry Services Extended Evaluation

This section applies to Extended Evaluation of registry services, as described in subsection 2.2.3.

If a proposed registry service has been referred to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review, the RSTEP will form a review team of members with the appropriate qualifications.

The review team will generally consist of three members, depending on the complexity of the registry service proposed. In a 3-member panel, the review could be conducted within 30 to 45 calendar days. In cases where a 5-member panel is needed, this will be identified before the extended evaluation starts. In a 5-member panel, the review could be conducted in 45 calendar days or fewer.

The cost of an RSTEP review will be covered by the applicant through payment of the Registry Services Review Fee. Refer to payment procedures in section 1.5 of Module 1. The RSTEP review will not commence until payment has been received.

If the RSTEP finds that one or more of the applicant's proposed registry services may be introduced without risk of a meaningful adverse effect on security or stability, these services will be included in the applicant's registry agreement with ICANN. If the RSTEP finds that the proposed service would create a risk of a meaningful adverse effect on security or stability, the applicant may elect to proceed with its application without the proposed service, or withdraw its application for the gTLD. In this instance, an applicant has 15 calendar days to notify ICANN of its intent to proceed with the application. If an applicant does not explicitly provide such notice within this time frame, the application will proceed no further.

2.4 Parties Involved in Evaluation

A number of independent experts and groups play a part in performing the various reviews in the evaluation process. A brief description of the various panels, their evaluation roles, and the circumstances under which they work is included in this section.

2.4.1 Panels and Roles

The **String Similarity Panel** will assess whether a proposed gTLD string creates a probability of user confusion due to similarity with any reserved name, any existing TLD, any requested IDN ccTLD, or any new gTLD string applied for in the current application round. This occurs during the String Similarity review in Initial Evaluation. The panel may also review IDN tables submitted by applicants as part of its work.

The **DNS Stability Panel** will determine whether a proposed string might adversely affect the security or stability of the DNS. This occurs during the DNS Stability String review in Initial Evaluation.

The **Geographic Names Panel** will review each application to determine whether the applied-for gTLD represents a geographic name, as defined in this guidebook. In the event that the string is a geographic name requiring government support, the panel will ensure that the required documentation is provided with the application and verify that the documentation is from the relevant governments or public authorities and is authentic.

The **Technical Evaluation Panel** will review the technical components of each application against the criteria in the Applicant Guidebook, along with proposed registry operations, in order to determine whether the applicant is technically and operationally capable of operating a gTLD registry as proposed in the application. This occurs during the Technical/Operational reviews in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Financial Evaluation Panel** will review each application against the relevant business, financial and organizational criteria contained in the Applicant Guidebook, to determine whether the applicant is financially capable of maintaining a gTLD registry as proposed in the application. This occurs during the Financial review in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Registry Services Technical Evaluation Panel (RSTEP)** will review proposed registry services in the application to determine if they pose a risk of a meaningful adverse impact on security or stability. This occurs, if applicable, during the Extended Evaluation period.

Members of all panels are required to abide by the established Code of Conduct and Conflict of Interest guidelines included in this module.

2.4.2 Panel Selection Process

ICANN has selected qualified third-party providers to perform the various reviews, based on an extensive selection process.[11] In addition to the specific subject matter expertise required for each panel, specified qualifications are required, including:

- The provider must be able to convene – or have the capacity to convene - globally diverse panels and be able to evaluate applications from all regions of the world, including applications for IDN gTLDs.
- The provider should be familiar with the IETF IDNA standards, Unicode standards, relevant RFCs and the terminology associated with IDNs.
- The provider must be able to scale quickly to meet the demands of the evaluation of an unknown number of applications. At present it is not known how many applications will be received, how complex they will be, and whether they will be predominantly for ASCII or non-ASCII gTLDs.
- The provider must be able to evaluate the applications within the required timeframes of Initial and Extended Evaluation.

2.4.3 Code of Conduct Guidelines for Panelists

The purpose of the New gTLD Program ("Program") Code of Conduct ("Code") is to prevent real and apparent conflicts of interest and unethical behavior by any Evaluation Panelist ("Panelist").

Panelists shall conduct themselves as thoughtful, competent, well prepared, and impartial professionals throughout the application process. Panelists are expected to comply with equity and high ethical standards while assuring the Internet community, its constituents, and the public of objectivity, integrity, confidentiality, and credibility. Unethical actions, or even the appearance of compromise, are not acceptable. Panelists are expected

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[11] http://newgtlds.icann.org/about/evaluation-panels-selection-process

to be guided by the following principles in carrying out their respective responsibilities. This Code is intended to summarize the principles and nothing in this Code should be considered as limiting duties, obligations or legal requirements with which Panelists must comply.

Bias -- Panelists shall:

- not advance personal agendas or non-ICANN approved agendas in the evaluation of applications;
- examine facts as they exist and not be influenced by past reputation, media accounts, or unverified statements about the applications being evaluated;
- exclude themselves from participating in the evaluation of an application if, to their knowledge, there is some predisposing factor that could prejudice them with respect to such evaluation; and
- exclude themselves from evaluation activities if they are philosophically opposed to or are on record as having made generic criticism about a specific type of applicant or application.

Compensation/Gifts -- Panelists shall not request or accept any compensation whatsoever or any gifts of substance from the Applicant being reviewed or anyone affiliated with the Applicant. (Gifts of substance would include any gift greater than USD 25 in value).

If the giving of small tokens is important to the Applicant's culture, Panelists may accept these tokens; however, the total of such tokens must not exceed USD 25 in value. If in doubt, the Panelist should err on the side of caution by declining gifts of any kind.

Conflicts of Interest -- Panelists shall act in accordance with the "New gTLD Program Conflicts of Interest Guidelines" (see subsection 2.4.3.1).

Confidentiality -- Confidentiality is an integral part of the evaluation process. Panelists must have access to sensitive information in order to conduct evaluations. Panelists must maintain confidentiality of information entrusted to them by ICANN and the Applicant and any other confidential information provided to them from whatever source, except when disclosure is legally mandated or has been authorized by ICANN. "Confidential information" includes all elements of the Program and information gathered as part of the process – which includes but is not limited to: documents, interviews, discussions, interpretations, and analyses – related to the review of any new gTLD application.

Affirmation -- All Panelists shall read this Code prior to commencing evaluation services and shall certify in writing that they have done so and understand the Code.

2.4.3.1 Conflict of Interest Guidelines for Panelists

It is recognized that third-party providers may have a large number of employees in several countries serving numerous clients. In fact, it is possible that a number of Panelists may be very well known within the registry / registrar community and have provided professional services to a number of potential applicants.

To safeguard against the potential for inappropriate influence and ensure applications are evaluated in an objective and independent manner, ICANN has established detailed Conflict of Interest guidelines and procedures that will be followed by the Evaluation Panelists. To help ensure that the guidelines are appropriately followed ICANN will:

- Require each Evaluation Panelist (provider and individual) to acknowledge and document understanding of the Conflict of Interest guidelines.
- Require each Evaluation Panelist to disclose all business relationships engaged in at any time during the past six months.
- Where possible, identify and secure primary and backup providers for evaluation panels.
- In conjunction with the Evaluation Panelists, develop and implement a process to identify conflicts and re-assign applications as appropriate to secondary or contingent third party providers to perform the reviews.

Compliance Period -- All Evaluation Panelists must comply with the Conflict of Interest guidelines beginning with the opening date of the Application Submission period and ending with the public announcement by ICANN of the final outcomes of all the applications from the Applicant in question.

Guidelines -- The following guidelines are the minimum standards with which all Evaluation Panelists must comply. It is recognized that it is impossible to foresee and cover all circumstances in which a potential conflict of interest might arise. In these cases the Evaluation Panelist should evaluate whether the existing facts and circumstances would lead a reasonable person to conclude that there is an actual conflict of interest.

Evaluation Panelists and Immediate Family Members:

- Must not be under contract, have or be included in a current proposal to provide Professional Services for or on behalf of the Applicant during the Compliance Period.
- Must not currently hold or be committed to acquire any interest in a privately-held Applicant.
- Must not currently hold or be committed to acquire more than 1% of any publicly listed Applicant's outstanding equity securities or other ownership interests.
- Must not be involved or have an interest in a joint venture, partnership or other business arrangement with the Applicant.
- Must not have been named in a lawsuit with or against the Applicant.
- Must not be a:
    - Director, officer, or employee, or in any capacity equivalent to that of a member of management of the Applicant;
    - Promoter, underwriter, or voting trustee of the Applicant; or
    - Trustee for any pension or profit-sharing trust of the Applicant.

Definitions--

Evaluation Panelist: An Evaluation Panelist is any individual associated with the review of an application. This includes any primary, secondary, and contingent third party Panelists engaged by ICANN to review new gTLD applications.

Immediate Family Member: Immediate Family Member is a spouse, spousal equivalent, or dependent (whether or not related) of an Evaluation Panelist.

Professional Services: include, but are not limited to legal services, financial audit, financial planning / investment, outsourced services, consulting services such as business / management / internal audit, tax, information technology, registry / registrar services.

2.4.3.2 Code of Conduct Violations

Evaluation panelist breaches of the Code of Conduct, whether intentional or not, shall be reviewed by ICANN, which may make recommendations for corrective action, if deemed necessary. Serious breaches of the Code may be cause for dismissal of the person, persons or provider committing the infraction.

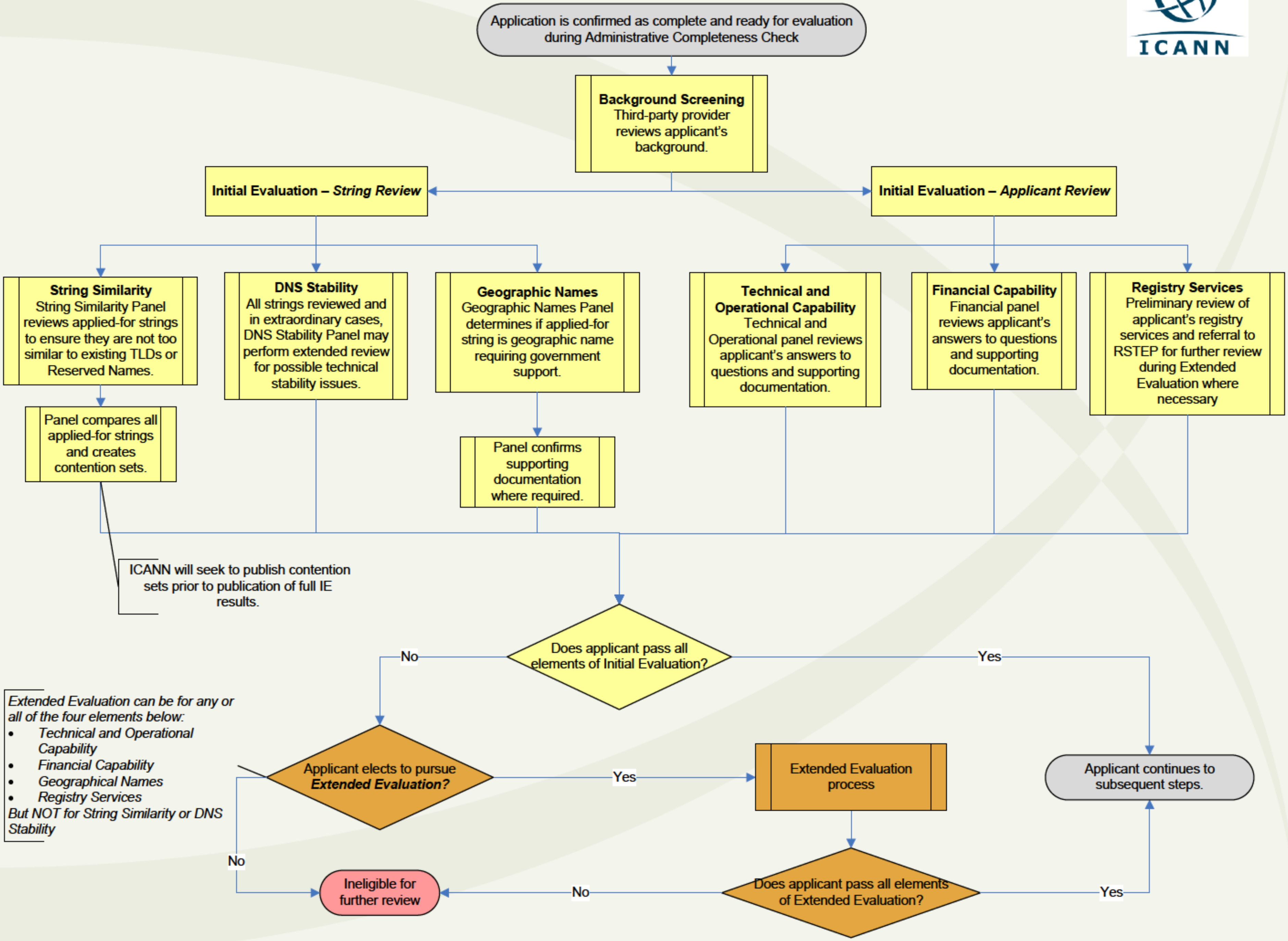
In a case where ICANN determines that a Panelist has failed to comply with the Code of Conduct, the results of that Panelist's review for all assigned applications will be discarded and the affected applications will undergo a review by new panelists.

Complaints about violations of the Code of Conduct by a Panelist may be brought to the attention of ICANN via the public comment and applicant support mechanisms, throughout the evaluation period. Concerns of applicants regarding panels should be communicated via the defined support channels (see subsection 1.4.2). Concerns of the general public (i.e., non-applicants) can be raised via the public comment forum, as described in Module 1.

2.4.4 Communication Channels

Defined channels for technical support or exchanges of information with ICANN and with evaluation panels are available to applicants during the Initial Evaluation and Extended Evaluation periods. Contacting individual ICANN staff members, Board members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate. In the interests of fairness and equivalent treatment for all applicants, any such individual contacts will be referred to the appropriate communication channels.

DRAFT - New gTLD Program – Initial Evaluation and Extended Evaluation



Application is confirmed as complete and ready for evaluation during Administrative Completeness Check

Background Screening
Third-party provider reviews applicant's background.

Initial Evaluation – *String Review*

Initial Evaluation – *Applicant Review*

String Similarity
String Similarity Panel reviews applied-for strings to ensure they are not too similar to existing TLDs or Reserved Names.

Panel compares all applied-for strings and creates contention sets.

ICANN will seek to publish contention sets prior to publication of full IE results.

DNS Stability
All strings reviewed and in extraordinary cases, DNS Stability Panel may perform extended review for possible technical stability issues.

Geographic Names
Geographic Names Panel determines if applied-for string is geographic name requiring government support.

Panel confirms supporting documentation where required.

Technical and Operational Capability
Technical and Operational panel reviews applicant's answers to questions and supporting documentation.

Financial Capability
Financial panel reviews applicant's answers to questions and supporting documentation.

Registry Services
Preliminary review of applicant's registry services and referral to RSTEP for further review during Extended Evaluation where necessary

Does applicant pass all elements of Initial Evaluation?

No

Yes

Applicant elects to pursue ***Extended Evaluation?***

Yes

No

Extended Evaluation process

Does applicant pass all elements of Extended Evaluation?

No

Yes

Ineligible for further review

Applicant continues to subsequent steps.

Extended Evaluation can be for any or all of the four elements below:

- *Technical and Operational Capability*
- *Financial Capability*
- *Geographical Names*
- *Registry Services*

But NOT for String Similarity or DNS Stability

Annex: Separable Country Names List

gTLD application restrictions on country or territory names are tied to listing in property fields of the ISO 3166-1 standard. Notionally, the ISO 3166-1 standard has an “English short name” field which is the common name for a country and can be used for such protections; however, in some cases this does not represent the common name. This registry seeks to add additional protected elements which are derived from definitions in the ISO 3166-1 standard. An explanation of the various classes is included below.

Separable Country Names List

Code	English Short Name	Cl.	Separable Name
ax	Åland Islands	B1	Åland
as	American Samoa	C	Tutuila
		C	Swain’s Island
ao	Angola	C	Cabinda
ag	Antigua and Barbuda	A	Antigua
		A	Barbuda
		C	Redonda Island
au	Australia	C	Lord Howe Island
		C	Macquarie Island
		C	Ashmore Island
		C	Cartier Island
		C	Coral Sea Islands
bo	Bolivia, Plurinational State of	B1	Bolivia
bq	Bonaire, Sint Eustatius and Saba	A	Bonaire
		A	Sint Eustatius
		A	Saba
ba	Bosnia and Herzegovina	A	Bosnia
		A	Herzegovina
br	Brazil	C	Fernando de Noronha Island
		C	Martim Vaz Islands
		C	Trinidade Island
io	British Indian Ocean Territory	C	Chagos Archipelago
		C	Diego Garcia
bn	Brunei Darussalam	B1	Brunei
		C	Negara Brunei Darussalam
cv	Cape Verde	C	São Tiago
		C	São Vicente
ky	Cayman Islands	C	Grand Cayman
cl	Chile	C	Easter Island
		C	Juan Fernández Islands
		C	Sala y Gómez Island
		C	San Ambrosio Island
		C	San Félix Island
cc	Cocos (Keeling) Islands	A	Cocos Islands
		A	Keeling Islands
co	Colombia	C	Malpelo Island
		C	San Andrés Island
		C	Providencia Island
km	Comoros	C	Anjouan
		C	Grande Comore
		C	Mohéli
ck	Cook Islands	C	Rarotonga
cr	Costa Rica	C	Coco Island
ec	Ecuador	C	Galápagos Islands
gq	Equatorial Guinea	C	Annobón Island
		C	Bioko Island

		C	Río Muni
fk	Falkland Islands (Malvinas)	B1	Falkland Islands
		B1	Malvinas
fo	Faroe Islands	A	Faroe
fj	Fiji	C	Vanua Levu
		C	Viti Levu
		C	Rotuma Island
pf	French Polynesia	C	Austral Islands
		C	Gambier Islands
		C	Marquesas Islands
		C	Society Archipelago
		C	Tahiti
		C	Tuamotu Islands
		C	Clipperton Island
tf	French Southern Territories	C	Amsterdam Islands
		C	Crozet Archipelago
		C	Kerguelen Islands
		C	Saint Paul Island
gr	Greece	C	Mount Athos
		B1	**
gd	Grenada	C	Southern Grenadine Islands
		C	Carriacou
gp	Guadeloupe	C	la Désirade
		C	Marie-Galante
		C	les Saintes
hm	Heard Island and McDonald Islands	A	Heard Island
		A	McDonald Islands
va	Holy See (Vatican City State)	A	Holy See
		A	Vatican
hn	Honduras	C	Swan Islands
in	India	C	Amindivi Islands
		C	Andaman Islands
		C	Laccadive Islands
		C	Minicoy Island
		C	Nicobar Islands
ir	Iran, Islamic Republic of	B1	Iran
ki	Kiribati	C	Gilbert Islands
		C	Tarawa
		C	Banaba
		C	Line Islands
		C	Kiritimati
		C	Phoenix Islands
		C	Abariringa
		C	Enderbury Island
kp	Korea, Democratic People’s Republic of	C	North Korea
kr	Korea, Republic of	C	South Korea
la	Lao People’s Democratic Republic	B1	Laos
mk	Macedonia, the Former Yugoslav Republic of	B1	**
my	Malaysia	C	Sabah
		C	Sarawak
mh	Marshall Islands	C	Jaluit
			Kwajalein
			Majuro
mu	Mauritius	C	Agalega Islands
		C	Cargados Carajos Shoals
		C	Rodrigues Island
fm	Micronesia, Federated States of	B1	Micronesia

		C	Caroline Islands (see also pw)
		C	Chuuk
		C	Kosrae
		C	Pohnpei
		C	Yap
md	Moldova, Republic of	B1	Moldova
		C	Moldava
nc	New Caledonia	C	Loyalty Islands
mp	Northern Mariana Islands	C	Mariana Islands
		C	Saipan
om	Oman	C	Musandam Peninsula
pw	Palau	C	Caroline Islands (see also fm)
		C	Babelthuap
ps	Palestinian Territory, Occupied	B1	Palestine
pg	Papua New Guinea	C	Bismarck Archipelago
		C	Northern Solomon Islands
		C	Bougainville
pn	Pitcairn	C	Ducie Island
		C	Henderson Island
		C	Oeno Island
re	Réunion	C	Bassas da India
		C	Europa Island
		C	Glorioso Island
		C	Juan de Nova Island
		C	Tromelin Island
ru	Russian Federation	B1	Russia
		C	Kaliningrad Region
sh	Saint Helena, Ascension, and Tristan de Cunha	A	Saint Helena
		A	Ascension
		A	Tristan de Cunha
		C	Gough Island
		C	Tristan de Cunha Archipelago
kn	Saint Kitts and Nevis	A	Saint Kitts
		A	Nevis
pm	Saint Pierre and Miquelon	A	Saint Pierre
		A	Miquelon
vc	Saint Vincent and the Grenadines	A	Saint Vincent
		A	The Grenadines
		C	Northern Grenadine Islands
		C	Bequia
		C	Saint Vincent Island
ws	Samoa	C	Savai'i
		C	Upolu
st	Sao Tome and Principe	A	Sao Tome
		A	Principe
sc	Seychelles	C	Mahé
		C	Aldabra Islands
		C	Amirante Islands
		C	Cosmoledo Islands
		C	Farquhar Islands
sb	Solomon Islands	C	Santa Cruz Islands
		C	Southern Solomon Islands
		C	Guadalcanal
za	South Africa	C	Marion Island
		C	Prince Edward Island
gs	South Georgia and the South Sandwich Islands	A	South Georgia
		A	South Sandwich Islands

sj	Svalbard and Jan Mayen	A	Svalbard
		A	Jan Mayen
		C	Bear Island
sy	Syrian Arab Republic	B1	Syria
tw	Taiwan, Province of China	B1	Taiwan
		C	Penghu Islands
		C	Pescadores
tz	Tanzania, United Republic of	B1	Tanzania
tl	Timor-Leste	C	Oecussi
to	Tonga	C	Tongatapu
tt	Trinidad and Tobago	A	Trinidad
		A	Tobago
tc	Turks and Caicos Islands	A	Turks Islands
		A	Caicos Islands
tv	Tuvalu	C	Fanafuti
ae	United Arab Emirates	B1	Emirates
us	United States	B2	America
um	United States Minor Outlying Islands	C	Baker Island
		C	Howland Island
		C	Jarvis Island
		C	Johnston Atoll
		C	Kingman Reef
		C	Midway Islands
		C	Palmyra Atoll
		C	Wake Island
		C	Navassa Island
vu	Vanuatu	C	Efate
		C	Santo
ve	Venezuela, Bolivarian Republic of	B1	Venezuela
		C	Bird Island
vg	Virgin Islands, British	B1	Virgin Islands
		C	Anegada
		C	Jost Van Dyke
		C	Tortola
		C	Virgin Gorda
vi	Virgin Islands, US	B1	Virgin Islands
		C	Saint Croix
		C	Saint John
		C	Saint Thomas
wf	Wallis and Futuna	A	Wallis
		A	Futuna
		C	Hoorn Islands
		C	Wallis Islands
		C	Uvea
ye	Yemen	C	Socotra Island

Maintenance

A Separable Country Names Registry will be maintained and published by ICANN Staff.

Each time the ISO 3166-1 standard is updated with a new entry, this registry will be reappraised to identify if the changes to the standard warrant changes to the entries in this registry. Appraisal will be based on the criteria listing in the “Eligibility” section of this document.

Codes reserved by the ISO 3166 Maintenance Agency do not have any implication on this registry, only entries derived from normally assigned codes appearing in ISO 3166-1 are eligible.

If an ISO code is struck off the ISO 3166-1 standard, any entries in this registry deriving from that code must be struck.

Eligibility

Each record in this registry is derived from the following possible properties:

Class A:	The ISO 3166-1 English Short Name is comprised of multiple, separable parts whereby the country is comprised of distinct sub-entities. Each of these separable parts is eligible in its own right for consideration as a country name. For example, “Antigua and Barbuda” is comprised of “Antigua” and “Barbuda.”
Class B:	The ISO 3166-1 English Short Name (1) or the ISO 3166-1 English Full Name (2) contains additional language as to the type of country the entity is, which is often not used in common usage when referencing the country. For example, one such short name is “The Bolivarian Republic of Venezuela” for a country in common usage referred to as “Venezuela.” ** Macedonia is a separable name in the context of this list; however, due to the ongoing dispute listed in UN documents between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name “Macedonia” until the dispute over the name has been resolved. See http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/240/37/IMG/N9324037.pdf.
Class C:	The ISO 3166-1 Remarks column containing synonyms of the country name, or sub-national entities, as denoted by “often referred to as,” “includes”, “comprises”, “variant” or “principal islands”.

In the first two cases, the registry listing must be directly derivative from the English Short Name by excising words and articles. These registry listings do not include vernacular or other non-official terms used to denote the country.

Eligibility is calculated in class order. For example, if a term can be derived both from Class A and Class C, it is only listed as Class A.

Attachment to Module 2

Sample Letter of Government Support

[This letter should be provided on official letterhead]

ICANN
Suite 330, 4676 Admiralty Way
Marina del Rey, CA 90292

Attention: New gTLD Evaluation Process

Subject: Letter for support for [TLD requested]

This letter is to confirm that [government entity] fully supports the application for [TLD] submitted to ICANN by [applicant] in the New gTLD Program. As the [Minister/Secretary/position] I confirm that I have the authority of the [x government/public authority] to be writing to you on this matter. [Explanation of government entity, relevant department, division, office, or agency, and what its functions and responsibilities are]

The gTLD will be used to [explain your understanding of how the name will be used by the applicant. This could include policies developed regarding who can register a name, pricing regime and management structures.] [Government/public authority/department] has worked closely with the applicant in the development of this proposal.

The [x government/public authority] supports this application, and in doing so, understands that in the event that the application is successful, [applicant] will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

[Government / public authority] further understands that, in the event of a dispute between [government/public authority] and the applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of [government/public authority].

[Optional] This application is being submitted as a community-based application, and as such it is understood that the Registry Agreement will reflect the community restrictions proposed in the application. In the event that we believe the registry is not complying with these restrictions, possible avenues of recourse include the Registry Restrictions Dispute Resolution Procedure.

[Optional] I can advise that in the event that this application is successful [government/public authority] will enter into a separate agreement with the applicant. This agreement will outline the conditions under which we support them in the operation of the TLD, and circumstances under which we would withdraw that support. ICANN will not be a party to this agreement, and enforcement of this agreement lies fully with [government/public authority].

[Government / public authority] understands that the Geographic Names Panel engaged by ICANN will, among other things, conduct due diligence on the authenticity of this documentation. I would request that if additional information is required during this process, that [name and contact details] be contacted in the first instance.

Thank you for the opportunity to support this application.

Yours sincerely

Signature from relevant government/public authority

Attachment to Module 2

Evaluation Questions and Criteria

Since ICANN was founded in 1998 as a not-for-profit, multi-stakeholder organization, one of its key mandates has been to promote competition in the domain name market. ICANN's mission specifically calls for the corporation to maintain and build on processes that will ensure competition and consumer interests – without compromising Internet security and stability. This includes the consideration and implementation of new gTLDs. It is ICANN's goal to make the criteria and evaluation as objective as possible.

While new gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services, the decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community.

Any public or private sector organization can apply to create and operate a new gTLD. However the process is not like simply registering or buying a second-level domain name. Instead, the application process is to evaluate and select candidates capable of running a registry, a business that manages top level domains such as, for example, .COM or .INFO. Any successful applicant will need to meet published operational and technical criteria in order to preserve Internet stability and interoperability.

I. *Principles of the Technical and Financial New gTLD Evaluation Criteria*

- Principles of conservatism. This is the first round of what is to be an ongoing process for the introduction of new TLDs, including Internationalized Domain Names. Therefore, the criteria in this round require applicants to provide a thorough and thoughtful analysis of the technical requirements to operate a registry and the proposed business model.

- The criteria and evaluation should 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. For example, the business model for a registry targeted to a small community need not possess the same robustness in funding and technical infrastructure as a registry intending to compete with large gTLDs. Therefore purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. The process must provide for an objective evaluation framework, but allow for adaptation according to the differing models applicants will present. Within that framework, applicant responses will be evaluated against the criteria in light of the proposed model.

    - Therefore the criteria should be flexible: able to scale with the overall business approach, providing that the planned approach is consistent and coherent, and can withstand highs and lows.

  - Criteria can be objective in areas of registrant protection, for example:
    - Providing for funds to continue operations in the event of a registry failure.
    - Adherence to data escrow, registry failover, and continuity planning requirements.

- The evaluation must strike the correct balance between establishing the business and technical competence of the applicant to operate a registry (to serve the interests of registrants), while not asking for the detailed sort of information or making the judgment that a venture capitalist would. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.

- New registries must be added in a way that maintains DNS stability and security. Therefore, ICANN asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry. ICANN will ask the applicant to demonstrate actual operational technical compliance prior to delegation. This is in line with current prerequisites for the delegation of a TLD.

- Registrant protection is emphasized in both the criteria and the scoring. Examples of this include asking the applicant to:

  - Plan for the occurrence of contingencies and registry failure by putting in place financial resources to fund the ongoing resolution of names while a replacement operator is found or extended notice can be given to registrants,
  - Demonstrate a capability to understand and plan for business contingencies to afford some protections through the marketplace,
  - Adhere to DNS stability and security requirements as described in the technical section, and
  - Provide access to the widest variety of services.

II. Aspects of the Questions Asked in the Application and Evaluation Criteria

The technical and financial questions are intended to inform and guide the applicant in aspects of registry start-up and operation. The established registry operator should find the questions straightforward while inexperienced applicants should find them a natural part of planning.

Evaluation and scoring (detailed below) will emphasize:

- How thorough are the answers? Are they well thought through and do they provide a sufficient basis for evaluation?

- Demonstration of the ability to operate and fund the registry on an ongoing basis:

  - Funding sources to support technical operations in a manner that ensures stability and security and supports planned expenses,
  - Resilience and sustainability in the face of ups and downs, anticipation of contingencies,
  - Funding to carry on operations in the event of failure.

- Demonstration that the technical plan will likely deliver on best practices for a registry and identification of aspects that might raise DNS stability and security issues.

- Ensures plan integration, consistency and compatibility (responses to questions are not evaluated individually but in comparison to others):
  - Funding adequately covers technical requirements,
  - Funding covers costs,
  - Risks are identified and addressed, in comparison to other aspects of the plan.

III. Scoring

Evaluation

- The questions, criteria, scoring and evaluation methodology are to be conducted in accordance with the principles described earlier in section I. With that in mind, globally diverse evaluation panelists will staff evaluation panels. The diversity of evaluators and access to experts in all regions of the world will ensure application evaluations take into account cultural, technical and business norms in the regions from which applications originate.

- Evaluation teams will consist of two independent panels. One will evaluate the applications against the financial criteria. The other will evaluate the applications against the technical & operational criteria. Given the requirement that technical and financial planning be well integrated, the panels will work together and coordinate information transfer where necessary. Other relevant experts (e.g., technical, audit, legal, insurance, finance) in pertinent regions will provide advice as required.

- Precautions will be taken to ensure that no member of the Evaluation Teams will have any interest or association that may be viewed as a real or potential conflict of interest with an applicant or application. All members must adhere to the Code of Conduct and Conflict of Interest guidelines that are found in Module 2.

- Communications between the evaluation teams and the applicants will be through an online interface. During the evaluation, evaluators may pose a set of clarifying questions to an applicant, to which the applicant may respond through the interface.

Confidentiality: ICANN will post applications after the close of the application submission period. The application form notes which parts of the application will be posted.

Scoring

- Responses will be evaluated against each criterion. A score will be assigned according to the scoring schedule linked to each question or set of questions. In several questions, 1 point is the maximum score that may be awarded. In several other questions, 2 points are awarded for a response that exceeds requirements, 1 point is awarded for a response that meets requirements and 0 points are awarded for a response that fails to meet requirements. Each question must receive at least a score of “1,” making each a “pass/fail” question.

- In the Continuity question in the financial section(see Question #50), up to 3 points are awarded if an applicant provides, at the application stage, a financial instrument that will guarantee ongoing registry operations in the event of a business failure. This extra point can serve to guarantee passing the financial criteria for applicants who score the minimum passing score for each of the individual criteria. The purpose of this weighting is to reward applicants who make early arrangements for the protection of registrants and to accept relatively riskier business plans where registrants are protected.

- There are 21 Technical & Operational questions. Each question has a criterion and scoring associated with it. The scoring for each is 0, 1, or 2 points as described above. One of the questions (IDN implementation) is optional. Other than the optional questions, all Technical & Operational criteria must be scored a 1 or more or the application will fail the evaluation.

- The total technical score must be equal to or greater than 22 for the application to pass. That means the applicant can pass by:

    - Receiving a 1 on all questions, including the optional question, and a 2 on at least one mandatory question; or
    - Receiving a 1 on all questions, excluding the optional question and a 2 on at least two mandatory questions.

  This scoring methodology requires a minimum passing score for each question and a slightly higher average score than the per question minimum to pass.

- There are six Financial questions and six sets of criteria that are scored by rating the answers to one or more of the questions. For example, the question concerning registry operation costs requires consistency between the technical plans (described in the answers to the Technical & Operational questions) and the costs (described in the answers to the costs question).

- The scoring for each of the Financial criteria is 0, 1 or 2 points as described above with the exception of the Continuity question, for which up to 3 points are possible. All questions must receive at least a 1 or the application will fail the evaluation.

- The total financial score on the six criteria must be 8 or greater for the application to pass. That means the applicant can pass by:

    - Scoring a 3 on the continuity criteria, or
    - Scoring a 2 on any two financial criteria.

- Applications that do not pass Initial Evaluation can enter into an extended evaluation process as described in Module 2. The scoring is the same.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Applicant Information	1	Full legal name of the Applicant (the established entity that would enter into a Registry Agreement with ICANN)	Y	Responses to Questions 1 - 12 are required for a complete application. Responses are not scored.			
	2	Address of the principal place of business of the Applicant. This address will be used for contractual purposes. No Post Office boxes are allowed.	Y				
	3	Phone number for the Applicant's principal place of business.	Y				
	4	Fax number for the Applicant's principal place of business.	Y				
	5	Website or URL, if applicable.	Y				
Primary Contact for this Application	6	Name	Y	The primary contact is the individual designated with the primary responsibility for management of the application, including responding to tasks in the TLD Application System (TAS) during the various application phases. Both contacts listed should also be prepared to receive inquiries from the public.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				
		Email address	Y				
Secondary Contact for this Application	7	Name	Y	The secondary contact is listed in the event the primary contact is unavailable to continue with the application process.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Email address	Y				
Proof of Legal Establishment	8	(a) Legal form of the Applicant. (e.g., partnership, corporation, non-profit institution).	Y				
		(b) State the specific national or other jurisdiction that defines the type of entity identified in 8(a).	Y	In the event of questions regarding proof of establishment, the applicant may be asked for additional details, such as the specific national or other law applying to this type of entity			
		(c) Attach evidence of the applicant's establishment as the type of entity identified in Question 8(a) above, in accordance with the applicable laws identified in Question 8(b).	Y	Applications without valid proof of legal establishment will not be evaluated further. Supporting documentation for proof of legal establishment should be submitted in the original language.			
	9	(a) If the applying entity is publicly traded, provide the exchange and symbol.	Y				
		(b) If the applying entity is a subsidiary, provide the parent company.	Y				
		(c) If the applying entity is a joint venture, list all joint venture partners.	Y				
	10	Business ID, Tax ID, VAT registration number, or equivalent of the Applicant.	N				
Applicant Background	11	(a) Enter the full name, date and country of birth, contact information (permanent residence), and position of all directors (i.e., members of the applicant's Board of Directors, if applicable).	Partial	Applicants should be aware that the names and positions of the individuals listed in response to this question will be published as part of the application. The contact information listed for individuals is for identification purposes only and will not be published as part of the application. Background checks may be conducted on individuals named in the applicant's response to question 11. Any material misstatement or misrepresentation (or omission of material information) may cause the application to be rejected. The applicant certifies that it has obtained permission for the posting of the names and positions of individuals included in this application.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(b) Enter the full name, date and country of birth, contact information (permanent residence), and position of all officers and partners. Officers are high-level management officials of a corporation or business, for example, a CEO, vice president, secretary, chief financial officer. Partners would be listed in the context of a partnership or other such form of legal entity.	Partial				
		(c) Enter the full name and contact information of all shareholders holding at least 15% of shares, and percentage held by each. For a shareholder entity, enter the principal place of business. For a shareholder individual, enter the date and country of birth and contact information (permanent residence).	Partial				
		(d) For an applying entity that does not have directors, officers, partners, or shareholders, enter the full name, date and country of birth, contact information (permanent residence), and position of all individuals having overall legal or executive responsibility for the applying entity.	Partial				
		(e) Indicate whether the applicant or any of the individuals named above: i. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these; ii. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others; iii. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities; iv. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		v. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes; vi. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force; vii. has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities; viii. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; ix. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols); x. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) – (ix) above); xi. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) – (iv) above, or ever for the crimes listed in (v) – (ix) above); xii. is the subject of a disqualification imposed by ICANN and in effect at the time of this application. If any of the above events have occurred, please provide details.					

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		(f) Indicate whether the applicant or any of the individuals named above have been involved in any decisions indicating that the applicant or individual named in the application was engaged in cybersquatting, as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), Anti-cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or equivalent legislation.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(g) Disclose whether the applicant or any of the individuals named above has been involved in any administrative or other legal proceeding in which allegations of intellectual property infringement relating to registration or use of a domain name have been made. Provide an explanation related to each such instance.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(h) Provide an explanation for any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility, including any criminal convictions not identified above.	N				
Evaluation Fee	12	(a) Enter the confirmation information for payment of the evaluation fee (e.g., wire transfer confirmation number).	N	The evaluation fee is paid in the form of a deposit at the time of user registration, and submission of the remaining amount at the time the full application is submitted. The information in question 12 is required for each payment. The full amount in USD must be received by ICANN. Applicant is responsible for all transaction fees and exchange rate fluctuation. Fedwire is the preferred wire mechanism; SWIFT is also acceptable. ACH is not recommended as these funds will take longer to clear and could affect timing of the application processing.			
		(b) Payer name	N				
		(c) Payer address	N				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(d) Wiring bank	N				
		(e) Bank address	N				
		(f) Wire date	N				
Applied-for gTLD string	13	Provide the applied-for gTLD string. If applying for an IDN, provide the U-label.	Y	Responses to Questions 13-17 are not scored, but are used for database and validation purposes. The U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character.			
	14	(a) If applying for an IDN, provide the A-label (beginning with "xn--").	Y				
		(b) If an IDN, provide the meaning, or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.	Y				
		(c) If an IDN, provide the language of the label (both in English and as referenced by ISO-639-1).	Y				
		(d) If an IDN, provide the script of the label (both in English and as referenced by ISO 15924).	Y				
		(e) If an IDN, list all code points contained in the U-label according to Unicode form.	Y	For example, the string "HELLO" would be listed as U+0048 U+0065 U+006C U+006C U+006F.			
	15	(a) If an IDN, upload IDN tables for the proposed registry. An IDN table must include: 1. the applied-for gTLD string relevant to the tables, 2. the script or language designator (as defined in BCP 47), 3. table version number, 4. effective date (DD Month YYYY), and 5. contact name, email address, and phone number. Submission of IDN tables in a standards-based format is encouraged.	Y	In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string. IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second level (see question 44). IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.			
		(b) Describe the process used for development of the IDN tables submitted, including consultations and sources used.	Y				
		(c) List any variants to the applied-for gTLD string according to the relevant IDN tables.	Y	Variant TLD strings will not be delegated as a result of this application. Variant strings will be checked for consistency and, if the application is approved, will be entered on a Declared IDN Variants List to allow for future allocation once a variant management mechanism is established for the top level. Inclusion of variant TLD strings in this application is for information only and confers no right or claim to these strings upon the applicant.			
	16	Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.	Y				
	17	OPTIONAL. Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).	Y	If provided, this information will be used as a guide to ICANN in communications regarding the application.			
Mission/Purpose	18	(a) Describe the mission/purpose of your proposed gTLD.	Y	The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and sufficiently quantitative and detailed to inform future study on plans vs. results.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. The information gathered in this section will be one source of input to help inform this review. This information is not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored. An applicant wishing to designate this application as community-based should ensure that these responses are consistent with its responses for question 20 below.			
		(b) How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?	Y	Answers should address the following points: i. What is the goal of your proposed gTLD in terms of areas of specialty, service levels, or reputation? ii. What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation, or innovation? iii. What goals does your proposed gTLD have in terms of user experience? iv. Provide a complete description of the applicant's intended registration policies in support of the goals listed above. v. Will your proposed gTLD impose any measures for			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				protecting the privacy or confidential information of registrants or users? If so, please describe any such measures. Describe whether and in what ways outreach and communications will help to achieve your projected benefits.			
	18	(c) What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?	Y	Answers should address the following points: i. How will multiple applications for a particular domain name be resolved, for example, by auction or on a first-come/first-serve basis? ii. Explain any cost benefits for registrants you intend to implement (e.g., advantageous pricing, introductory discounts, bulk registration discounts). iii. Note that the Registry Agreement requires that registrars be offered the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Additionally, the Registry Agreement requires advance written notice of price increases. Do you intend to make contractual commitments to registrants regarding the magnitude of price escalation? If so, please describe your plans.			
Community-based Designation	19	Is the application for a community-based TLD?	Y	There is a presumption that the application is a standard application (as defined in the Applicant Guidebook) if this question is left unanswered.			

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				The applicant's designation as standard or community-based cannot be changed once the application is submitted.			
	20	(a) Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.	Y	Descriptions should include: • How the community is delineated from Internet users generally. Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language. • How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required. • When the community was established, including the date(s) of formal organization, if any, as well as a description of community activities to date. • The current estimated size of the community, both as to membership and geographic extent.		Responses to Question 20 will be regarded as firm commitments to the specified community and reflected in the Registry Agreement, provided the application is successful. Responses are not scored in the Initial Evaluation. Responses may be scored in a community priority evaluation, if applicable. Criteria and scoring methodology for the community priority evaluation are described in Module 4 of the Applicant Guidebook.	
		(b) Explain the applicant's relationship to the community identified in 20(a).	Y	Explanations should clearly state: • Relations to any community organizations. • Relations to the community and its constituent parts/groups. • Accountability mechanisms of the applicant to the community.			
		(c) Provide a description of the community-based purpose of the applied-for gTLD.	Y	Descriptions should include: • Intended registrants in the TLD. • Intended end-users of the TLD. • Related activities the applicant has carried out or intends to carry out in service of this purpose. • Explanation of how the purpose is of a lasting nature.			
		(d) Explain the relationship between the applied-for gTLD string and the community identified in 20(a).	Y	Explanations should clearly state: • relationship to the established name, if any, of the community.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				- relationship to the identification of community members. - any connotations the string may have beyond the community.			
		(e) Provide a complete description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD. Policies and enforcement mechanisms are expected to constitute a coherent set.	Y	Descriptions should include proposed policies, if any, on the following: - Eligibility: who is eligible to register a second-level name in the gTLD, and how will eligibility be determined. - Name selection: what types of second-level names may be registered in the gTLD. - Content/Use: what restrictions, if any, the registry operator will impose on how a registrant may use its registered name. - Enforcement: what investigation practices and mechanisms exist to enforce the policies above, what resources are allocated for enforcement, and what appeal mechanisms are available to registrants.			
		(f) Attach any written endorsements for the application from established institutions representative of the community identified in 20(a). An applicant may submit written endorsements by multiple institutions, if relevant to the community.	Y	At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement support for the application, and the supply the contact information of the entity providing the endorsement. Endorsements from institutions not mentioned in the response to 20(b) should be accompanied by a clear description of each such institution's relationship to the community. Endorsements presented as supporting documentation for this question should be submitted in the original language.			

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Geographic Names	21	(a) Is the application for a geographic name?	Y	An applied-for gTLD string is considered a geographic name requiring government support if it is: (a) the capital city name of a country or territory listed in the ISO 3166-1 standard; (b) a city name, where it is clear from statements in the application that the applicant intends to use the gTLD for purposes associated with the city name; (c) a sub-national place name listed in the ISO 3166-2 standard; or (d) a name listed as a UNESCO region or appearing on the "Composition of macro geographic (continental) or regions, geographic sub-regions, and selected economic and other groupings" list. See Module 2 for complete definitions and criteria. An application for a country or territory name, as defined in the Applicant Guidebook, will not be approved.			
		(b) If a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities.	N	See the documentation requirements in Module 2 of the Applicant Guidebook. Documentation presented in response to this question should be submitted in the original language.			
Protection of Geographic Names	22	Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.	Y	Applicants should consider and describe how they will incorporate Governmental Advisory Committee (GAC) advice in their management of second-level domain name registrations. See "Principles regarding New gTLDs" at https://gacweb.icann.org/display/GACADV/New+gTLDs. For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain. See the Dot Info Circular at https://gacweb.icann.org/display/GACADV/New+gTLDs . Proposed measures will be posted for public comment as part of the application. However, note that procedures for release of geographic names at the second level			

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				must be separately approved according to Specification 5 of the Registry Agreement. That is, approval of a gTLD application does not constitute approval for release of any geographic names under the Registry Agreement. Such approval must be granted separately by ICANN.			
Registry Services	23	Provide name and full description of all the Registry Services to be provided. Descriptions should include both technical and business components of each proposed service, and address any potential security or stability concerns. The following registry services are customary services offered by a registry operator: A. Receipt of data from registrars concerning registration of domain names and name servers. B. Dissemination of TLD zone files. C. Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois service). D. Internationalized Domain Names, where offered. E. DNS Security Extensions (DNSSEC). The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD. Additional proposed registry services that are unique to the registry must also be described.	Y	Registry Services are defined as the following: (1) operations of the Registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the Registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the Registry Agreement; and (2) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy; (3) any other products or services that only a Registry Operator is capable of providing, by reason of its designation as the Registry Operator. A full definition of Registry Services can be found at http://www.icann.org/en/registries/rsep/rsep.html. Security: For purposes of this Applicant Guidebook, an effect on security by the proposed Registry Service means (1) the unauthorized disclosure, alteration, insertion or destruction of Registry Data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with applicable standards. Stability: For purposes of this Applicant Guidebook, an effect on stability shall mean that the proposed Registry Service (1) is not compliant with applicable relevant standards that are authoritative and published by a well-established, recognized and		Responses are not scored. A preliminary assessment will be made to determine if there are potential security or stability issues with any of the applicant's proposed Registry Services. If any such issues are identified, the application will be referred for an extended review. See the description of the Registry Services review process in Module 2 of the Applicant Guidebook. Any information contained in the application may be considered as part of the Registry Services review. If its application is approved, applicant may engage in only those registry services defined in the application, unless a new request is submitted to ICANN in accordance with the Registry Agreement.	

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				authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs and relying on Registry Operator's delegation information or provisioning.			
Demonstration of Technical & Operational Capability (External)	24	Shared Registration System (SRS) Performance: describe • the plan for operation of a robust and reliable SRS. SRS is a critical registry function for enabling multiple registrars to provide domain name registration services in the TLD. SRS must include the EPP interface to the registry, as well as any other interfaces intended to be provided, if they are critical to the functioning of the registry. Please refer to the requirements in Specification 6 (section 1.2) and Specification 10 (SLA Matrix) attached to the Registry Agreement; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer should include, but is not limited to: • A high-level SRS system description; • Representative network diagram(s); • Number of servers; • Description of interconnectivity with other registry systems; • Frequency of synchronization between servers; and • Synchronization scheme (e.g., hot standby, cold standby).	Y	The questions in this section (24-44) are intended to give applicants an opportunity to demonstrate their technical and operational capabilities to run a registry. In the event that an applicant chooses to outsource one or more parts of its registry operations, the applicant should still provide the full details of the technical arrangements. Note that the resource plans provided in this section assist in validating the technical and operational plans as well as informing the cost estimates in the Financial section below. Questions 24-30(a) are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are outward-facing, i.e., interactions with registrars, registrants, and various DNS users. Responses to these questions will be published to allow review by affected parties.	0-1	Complete answer demonstrates: (1) a plan for operating a robust and reliable SRS, one of the five critical registry functions; (2) scalability and performance consistent with the overall business approach, and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 (section 1.2) to the Registry Agreement.	**1 - meets requirements**: Response includes (1) An adequate description of SRS that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of a well-developed plan to operate a robust and reliable SRS; (3) SRS plans are sufficient to result in compliance with Specification 6 and Specification 10 to the Registry Agreement; (4) SRS is consistent with the technical, operational and financial approach described in the application; and (5) Demonstrates that adequate technical resources are already on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.

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		A complete answer is expected to be no more than 5 pages. (As a guide, one page contains approximately 4000 characters).					
	25	Extensible Provisioning Protocol (EPP): provide a detailed description of the interface with registrars, including how the applicant will comply with EPP in RFCs 3735 (if applicable), and 5730-5734. If intending to provide proprietary EPP extensions, provide documentation consistent with RFC 3735, including the EPP templates and schemas that will be used. Describe resourcing plans (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages. If there are proprietary EPP extensions, a complete answer is also expected to be no more than 5 pages per EPP extension.	Y		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (4) ability to comply with relevant RFCs; (5) if applicable, a well-documented implementation of any proprietary EPP extensions; and (6) if applicable, how proprietary EPP extensions are consistent with the registration lifecycle as described in Question 27.	**1 - meets requirements**: Response includes (1) Adequate description of EPP that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Sufficient evidence that any proprietary EPP extensions are compliant with RFCs and provide all necessary functionalities for the provision of registry services; (3) EPP interface is consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates that technical resources are already on hand, or committed or readily available. **0 - fails requirements**: Does not meet all the requirements to score 1.
	26	Whois: describe • how the applicant will comply with Whois specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement; • how the Applicant's Whois service will comply with RFC 3912; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer should include, but is not limited to:	Y	The Registry Agreement (Specification 4) requires provision of Whois lookup services for all names registered in the TLD. This is a minimum requirement. Provision for Searchable Whois as defined in the scoring column is a requirement for achieving a score of 2 points.	0-2	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements, (one of the five critical registry functions); (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the	**2 – exceeds requirements**: Response meets all the attributes for a score of 1 and includes: (1) A Searchable Whois service: Whois service includes web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit. Boolean search capabilities may be offered. The service shall include appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users), and the

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		• A high-level Whois system description; • Relevant network diagram(s); • IT and infrastructure resources (e.g., servers, switches, routers and other components); • Description of interconnectivity with other registry systems; and • Frequency of synchronization between servers. To be eligible for a score of 2, answers must also include: • Provision for Searchable Whois capabilities; and • A description of potential forms of abuse of this feature, how these risks will be mitigated, and the basis for these descriptions. A complete answer is expected to be no more than 5 pages.				planned costs detailed in the financial section; (4) ability to comply with relevant RFCs; (5) evidence of compliance with Specifications 4 and 10 to the Registry Agreement; and (6) if applicable, a well-documented implementation of Searchable Whois.	application demonstrates compliance with any applicable privacy laws or policies. **1 - meets requirements:** Response includes (1) adequate description of Whois service that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence that Whois services are compliant with RFCs, Specifications 4 and 10 to the Registry Agreement, and any other contractual requirements including all necessary functionalities for user interface; (3) Whois capabilities consistent with the technical, operational, and financial approach as described in the application; and (4) demonstrates an adequate level of resources that are already on hand or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.
	27	Registration Life Cycle: provide a detailed description of the proposed registration lifecycle for domain names in the proposed gTLD. The description must: • explain the various registration states as well as the criteria and procedures that are used to change state; • describe the typical registration lifecycle of create/update/delete and all intervening steps such as pending, locked, expired, and transferred that may apply; • clearly explain any time elements that are involved - for instance details of add-grace or redemption grace periods, or notice periods for renewals or transfers; and • describe resourcing plans for this aspect of the criteria (number and	Y		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of registration lifecycles and states; (2) consistency with any specific commitments made to registrants as adapted to the overall business approach for the proposed gTLD; and (3) the ability to comply with relevant RFCs.	**1 - meets requirements:** Response includes (1) An adequate description of the registration lifecycle that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of a fully developed registration life cycle with definition of various registration states, transition between the states, and trigger points; (3) A registration lifecycle that is consistent with any commitments to registrants and with technical, operational, and financial plans described in the application; and (4) Demonstrates an adequate level of

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		description of personnel roles allocated to this area). The description of the registration lifecycle should be supplemented by the inclusion of a state diagram, which captures definitions, explanations of trigger points, and transitions from state to state. If applicable, provide definitions for aspects of the registration lifecycle that are not covered by standard EPP RFCs. A complete answer is expected to be no more than 5 pages.					resources that are already on hand or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	28	Abuse Prevention and Mitigation: Applicants should describe the proposed policies and procedures to minimize abusive registrations and other activities that have a negative impact on Internet users. A complete answer should include, but is not limited to: • An implementation plan to establish and publish on its website a single abuse point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller; • Policies for handling complaints regarding abuse; • Proposed measures for removal of orphan glue records for names removed from the zone when provided with evidence in written form that the glue is present in connection with malicious conduct (see Specification 6); and • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must include measures to promote Whois accuracy as well as measures from one other area as	Y	Note that, while orphan glue often supports correct and ordinary operation of the DNS, registry operators will be required to take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.	0-2	Complete answer demonstrates: (1) Comprehensive abuse policies, which include clear definitions of what constitutes abuse in the TLD, and procedures that will effectively minimize potential for abuse in the TLD; (2) Plans are adequately resourced in the planned costs detailed in the financial section; (3) Policies and procedures identify and address the abusive use of registered names at startup and on an ongoing basis; and (4) When executed in accordance with the Registry Agreement, plans will result in compliance with contractual requirements.	**2 – exceeds requirements**: Response meets all the attributes for a score of 1 and includes: (1) Details of measures to promote Whois accuracy, using measures specified here or other measures commensurate in their effectiveness; and (2) Measures from at least one additional area to be eligible for 2 points as described in the question. **1 - meets requirements** Response includes: (1) An adequate description of abuse prevention and mitigation policies and procedures that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of well-developed abuse policies and procedures; (3) Plans are sufficient to result in compliance with contractual requirements; (4) Plans are consistent with the technical, operational, and financial approach described in the application, and any commitments made to registrants; and (5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		described below. • Measures to promote Whois accuracy (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to: o Authentication of registrant information as complete and accurate at time of registration. Measures to accomplish this could include performing background checks, verifying all contact information of principals mentioned in registration data, reviewing proof of establishment documentation, and other means. o Regular monitoring of registration data for accuracy and completeness, employing authentication methods, and establishing policies and procedures to address domain names with inaccurate or incomplete Whois data; and o If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means. Note that the requirements of the RAA will continue to apply to all ICANN-accredited registrars. • A description of policies and procedures that define malicious or abusive behavior, capture metrics, and establish Service Level Requirements for resolution, including service levels for responding to law enforcement requests. This may include rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior with industry partners; • Adequate controls to ensure proper access to domain functions (can be undertaken by the registry directly or by					carry out this function. 0 – fails requirements Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to: o Requiring multi-factor authentication (i.e., strong passwords, tokens, one-time passwords) from registrants to process update, transfers, and deletion requests; o Requiring multiple, unique points of contact to request and/or approve update, transfer, and deletion requests; and o Requiring the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted. A complete answer is expected to be no more than 20 pages.					
	29	Rights Protection Mechanisms: Applicants must describe how their registry will comply with policies and practices that minimize abusive registrations and other activities that affect the legal rights of others, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), Uniform Rapid Suspension (URS) system, and Trademark Claims and Sunrise services at startup. A complete answer should include: • A description of how the registry operator will implement safeguards against allowing unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies), and reduce opportunities for behaviors such as phishing or pharming. At a minimum, the registry operator must offer a Sunrise period and a Trademark Claims service during the required time periods, and implement decisions rendered under the URS on an ongoing basis; and • A description of resourcing plans for the	Y		0-2	Complete answer describes mechanisms designed to: (1) prevent abusive registrations, and (2) identify and address the abusive use of registered names on an ongoing basis.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes: (1) Identification of rights protection as a core objective, supported by a well-developed plan for rights protection; and (2) Mechanisms for providing effective protections that exceed minimum requirements (e.g., RPMs in addition to those required in the registry agreement). **1 - meets requirements:** Response includes (1) An adequate description of RPMs that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) A commitment from the applicant to implement of rights protection mechanisms sufficient to comply with minimum requirements in Specification 7; (3) Plans that are sufficient to result in compliance with contractual requirements;

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include additional measures specific to rights protection, such as abusive use policies, takedown procedures, registrant pre-verification, or authentication procedures, or other covenants. A complete answer is expected to be no more than 10 pages.					(4) Mechanisms that are consistent with the technical, operational, and financial approach described in the application; and (5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score a 1.
	30	(a) Security Policy: provide a summary of the security policy for the proposed registry, including but not limited to: • indication of any independent assessment reports demonstrating security capabilities, and provisions for periodic independent assessment reports to test security capabilities; • description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string, including the identification of any existing international or industry relevant security standards the applicant commits to following (reference site must be provided); • list of commitments made to registrants concerning security levels. To be eligible for a score of 2, answers must also include: • Evidence of an independent assessment report demonstrating effective security controls (e.g., ISO 27001). A summary of the above should be no more than 20 pages. Note that the complete security policy for the registry is required to be submitted in accordance with 30(b).	Y	Criterion 5 calls for security levels to be appropriate for the use and level of trust associated with the TLD string, such as, for example, financial services oriented TLDs. "Financial services" are activities performed by financial institutions, including: 1) the acceptance of deposits and other repayable funds; 2) lending; 3) payment and remittance services; 4) insurance or reinsurance services; 5) brokerage services; 6) investment services and activities; 7) financial leasing; 8) issuance of guarantees and commitments; 9) provision of financial advice; 10) portfolio management and advice; or 11) acting as a financial clearinghouse. Financial services is used as an example only; other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security.	0-2	Complete answer demonstrates: (1) detailed description of processes and solutions deployed to manage logical security across infrastructure and systems, monitoring and detecting threats and security vulnerabilities and taking appropriate steps to resolve them; (2) security capabilities are consistent with the overall business approach and planned size of the registry; (3) a technical plan adequately resourced in the planned costs detailed in the financial section; (4) security measures are consistent with any commitments made to registrants regarding security levels; and (5) security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security).	2 - exceeds requirements: Response meets all attributes for a score of 1 and includes: (1) Evidence of highly developed and detailed security capabilities, with various baseline security levels, independent benchmarking of security metrics, robust periodic security monitoring, and continuous enforcement; and (2) an independent assessment report is provided demonstrating effective security controls are either in place or have been designed, and are commensurate with the applied-for gTLD string. (This could be ISO 27001 certification or other well-established and recognized industry certifications for the registry operation. If new independent standards for demonstration of effective security controls are established, such as the High Security Top Level Domain (HSTLD) designation, this could also be included. An illustrative example of an independent standard is the proposed set of requirements described in http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf.) 1 - meets requirements: Response includes:

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
							(1) Adequate description of security policies and procedures that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of adequate security capabilities, including enforcement of logical access control, threat analysis, incident response and auditing. Ad-hoc oversight and governance and leading practices being followed; (3) Security capabilities consistent with the technical, operational, and financial approach as described in the application, and any commitments made to registrants; (4) Demonstrates that an adequate level of resources are on hand, committed or readily available to carry out this function; and (5) Proposed security measures are commensurate with the nature of the applied-for gTLD string. **0 - fails requirements**: Does not meet all the requirements to score 1.
Demonstration of Technical & Operational Capability (Internal)	30	(b) Security Policy: provide the complete security policy and procedures for the proposed registry, including but not limited to: • system (data, server, application / services) and network access control, ensuring systems are maintained in a secure fashion, including details of how they are monitored, logged and backed up; • resources to secure integrity of updates between registry systems and nameservers, and between nameservers, if any; • independent assessment reports demonstrating security capabilities (submitted as attachments), if any; • provisioning and other measures that mitigate risks posed by denial of service attacks; • computer and network incident response	N	Questions 30(b) – 44 are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry. To allow the applicant to provide full details and safeguard proprietary information, responses to these questions will not be published.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		policies, plans, and processes; • plans to minimize the risk of unauthorized access to its systems or tampering with registry data; • intrusion detection mechanisms, a threat analysis for the proposed registry, the defenses that will be deployed against those threats, and provision for periodic threat analysis updates; • details for auditing capability on all network access; • physical security approach; • identification of department or group responsible for the registry's security organization; • background checks conducted on security personnel; • description of the main security threats to the registry operation that have been identified; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).					
	31	Technical Overview of Proposed Registry: provide a technical overview of the proposed registry. The technical plan must be adequately resourced, with appropriate expertise and allocation of costs. The applicant will provide financial descriptions of resources in the next section and those resources must be reasonably related to these technical requirements. The overview should include information on the estimated scale of the registry's technical operation, for example, estimates for the number of registration transactions and DNS queries per month should be provided for the first two years of operation. In addition, the overview should account for geographic dispersion of incoming network traffic such as DNS, Whois, and registrar transactions.	N	To the extent this answer is affected by the applicant's intent to outsource various registry operations, the applicant should describe these plans (e.g., taking advantage of economies of scale or existing facilities). However, the response must include specifying the technical plans, estimated scale, and geographic dispersion as required by the question.	0-1	Complete answer demonstrates: (1) complete knowledge and understanding of technical aspects of registry requirements; (2) an adequate level of resiliency for the registry's technical operations; (3) consistency with planned or currently deployed technical/operational solutions; (4) consistency with the overall business approach and planned size of the registry; (5) adequate resourcing for technical plan in the	**1 - meets requirements**: Response includes: (1) A description that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Technical plans consistent with the technical, operational, and financial approach as described in the application; (3) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		If the registry serves a highly localized registrant base, then traffic might be expected to come mainly from one area. This high-level summary should not repeat answers to questions below. Answers should include a visual diagram(s) to highlight dataflows, to provide context for the overall technical infrastructure. Detailed diagrams for subsequent questions should be able to map back to this high-level diagram(s). The visual diagram(s) can be supplemented with documentation, or a narrative, to explain how all of the Technical & Operational components conform. A complete answer is expected to be no more than 10 pages.				planned costs detailed in the financial section; and (6) consistency with subsequent technical questions.	
	32	Architecture: provide documentation for the system and network architecture that will support registry operations for the proposed scale of the registry. System and network architecture documentation must clearly demonstrate the applicant's ability to operate, manage, and monitor registry systems. Documentation should include multiple diagrams or other components including but not limited to: • Detailed network diagram(s) showing the full interplay of registry elements, including but not limited to SRS, DNS, Whois, data escrow, and registry database functions; • Network and associated systems necessary to support registry operations, including: ▪ Anticipated TCP / IP addressing scheme, ▪ Hardware (i.e., servers, routers, networking components, virtual machines and key characteristics (CPU and RAM, Disk space, internal network connectivity, and make and model)), ▪ Operating system and versions, and ▪ Software and applications (with version information) necessary to support registry operations, management, and monitoring • General overview of capacity planning, including bandwidth allocation plans; • List of providers / carriers; and • Resourcing plans for the initial	N		0-2	Complete answer demonstrates: (1) detailed and coherent network architecture; (2) architecture providing resiliency for registry systems; (3) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; and (4) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	2 - exceeds requirements: Response meets all attributes for a score of 1 and includes (1) Evidence of highly developed and detailed network architecture that is able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for initial registry startup; and (2) Evidence of a highly available, robust, and secure infrastructure. 1 - meets requirements: Response includes (1) An adequate description of the architecture that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans for network architecture describe all necessary elements; (3) Descriptions demonstrate adequate network architecture providing robustness and security of the

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include evidence of a network architecture design that greatly reduces the risk profile of the proposed registry by providing a level of scalability and adaptability (e.g., protection against DDoS attacks) that far exceeds the minimum configuration necessary for the expected volume. A complete answer is expected to be no more than 10 pages.					registry; (4) Bandwidth and SLA are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.
	33	Database Capabilities: provide details of database capabilities including but not limited to: • database software; • storage capacity (both in raw terms [e.g., MB, GB] and in number of registrations / registration transactions); • maximum transaction throughput (in total and by type of transaction); • scalability; • procedures for object creation, editing, and deletion, and user and credential management; • high availability; • change management procedures; • reporting capabilities; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A registry database data model can be included to provide additional clarity to this response. Note: Database capabilities described should be in reference to registry services and not necessarily related support functions such as Personnel or Accounting, unless such services are inherently intertwined with the delivery of registry services. To be eligible for a score of 2, answers must also	N		0-2	Complete answer demonstrates: (1) complete knowledge and understanding of database capabilities to meet the registry technical requirements; (2) database capabilities consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes (1) Highly developed and detailed description of database capabilities that are able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for registry startup; and (2) Evidence of comprehensive database capabilities, including high scalability and redundant database infrastructure, regularly reviewed operational and reporting procedures following leading practices. **1 - meets requirements**: Response includes (1) An adequate description of database capabilities that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans for database capabilities

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		include evidence of database capabilities that greatly reduce the risk profile of the proposed registry by providing a level of scalability and adaptability that far exceeds the minimum configuration necessary for the expected volume. A complete answer is expected to be no more than 5 pages.					describe all necessary elements; (3) Descriptions demonstrate adequate database capabilities, with database throughput, scalability, and database operations with limited operational governance; (4) Database capabilities are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates that an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	34	Geographic Diversity: provide a description of plans for geographic diversity of: a. name servers, and b. operations centers. Answers should include, but are not limited to: • the intended physical locations of systems, primary and back-up operations centers (including security attributes), and other infrastructure; • any registry plans to use Anycast or other topological and geographical diversity measures, in which case, the configuration of the relevant service must be included; • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include evidence of a geographic diversity plan that greatly reduces the risk profile of the proposed registry by ensuring the continuance of all vital business functions (as identified in the applicant's continuity plan in Question 39) in the event of a natural or other disaster) at the principal place of business or point of presence.	N		0-2	Complete answer demonstrates: (1) geographic diversity of nameservers and operations centers; (2) proposed geo-diversity measures are consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes (1) Evidence of highly developed measures for geo-diversity of operations, with locations and functions to continue all vital business functions in the event of a natural or other disaster at the principal place of business or point of presence; and (2) A high level of availability, security, and bandwidth. **1 - meets requirements**: Response includes (1) An adequate description of Geographic Diversity that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans provide adequate geo-diversity of name servers and operations to continue critical registry functions in the event of a temporary outage at the principal place of business or point of presence; (3) Geo-diversity plans are consistent

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		A complete answer is expected to be no more than 5 pages.					with technical, operational, and financial approach as described in the application; and (4) Demonstrates adequate resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.
	35	DNS Service: describe the configuration and operation of nameservers, including how the applicant will comply with relevant RFCs. All name servers used for the new gTLD must be operated in compliance with the DNS protocol specifications defined in the relevant RFCs, including but not limited to: 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 3901, 4343, and 4472. • Provide details of the intended DNS Service including, but not limited to: A description of the DNS services to be provided, such as query rates to be supported at initial operation, and reserve capacity of the system. Describe how your nameserver update methods will change at various scales. Describe how DNS performance will change at various scales. • RFCs that will be followed – describe how services are compliant with RFCs and if these are dedicated or shared with any other functions (capacity/performance) or DNS zones. • The resources used to implement the services - describe complete server hardware and software, including network bandwidth and addressing plans for servers. Also include resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). • Demonstrate how the system will	N	Note that the use of DNS wildcard resource records as described in RFC 4592 or any other method or technology for synthesizing DNS resource records or using redirection within the DNS by the registry is prohibited in the Registry Agreement. Also note that name servers for the new gTLD must comply with IANA Technical requirements for authoritative name servers: http://www.iana.org/procedures/nameserver-requirements.html.	0-1	Complete answer demonstrates: (1) adequate description of configurations of nameservers and compliance with respective DNS protocol-related RFCs; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (4) evidence of compliance with Specification 6 to the Registry Agreement; and (5) evidence of complete knowledge and understanding of requirements for DNS service, one of the five critical registry functions.	**1 - meets requirements**: Response includes: (1) Adequate description of DNS service that that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Plans are sufficient to result in compliance with DNS protocols (Specification 6, section 1.1) and required performance specifications Specification 10, Service Level Matrix; (3) Plans are consistent with technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		function - describe how the proposed infrastructure will be able to deliver the performance described in Specification 10 (section 2) attached to the Registry Agreement. Examples of evidence include: • Server configuration standard (i.e., planned configuration). • Network addressing and bandwidth for query load and update propagation. • Headroom to meet surges. A complete answer is expected to be no more than 10 pages.					
	36	IPv6 Reachability: provide a description of plans for providing IPv6 transport including, but not limited to: • How the registry will support IPv6 access to Whois, Web-based Whois and any other Registration Data Publication Service as described in Specification 6 (section 1.5) to the Registry Agreement. • How the registry will comply with the requirement in Specification 6 for having at least two nameservers reachable over IPv6. • List all services that will be provided over IPv6, and describe the IPv6 connectivity and provider diversity that will be used. • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages.	N	IANA nameserver requirements are available at http://www.iana.org/procedures/nameserver-requirements.html.	0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement.	**1 - meets requirements**: Response includes (1) Adequate description of IPv6 reachability that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate implementation plan addressing requirements for IPv6 reachability, indicating IPv6 reachability allowing IPv6 transport in the network over two independent IPv6 capable networks in compliance to IPv4 IANA specifications, and Specification 10; (3) IPv6 plans consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	37	Data Backup Policies & Procedures: provide • details of frequency and procedures for backup of data, • hardware, and systems used for backup, • data format, • data backup features, • backup testing procedures, • procedures for retrieval of data/rebuild of database, • storage controls and procedures, and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages.	N		0-1	Complete answer demonstrates: (1) detailed backup and retrieval processes deployed; (2) backup and retrieval process and frequency are consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	1 - meets requirements: Response includes (1) Adequate description of backup policies and procedures that substantially demonstrate the applicant's capabilities and knowledge required to meet this element; (2) A description of leading practices being or to be followed; (3) Backup procedures consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score a 1.
	38	Data Escrow: describe • how the applicant will comply with the data escrow requirements documented in the Registry Data Escrow Specification (Specification 2 of the Registry Agreement); and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of data escrow, one of the five critical registry functions; (2) compliance with Specification 2 of the Registry Agreement; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) the escrow arrangement is consistent with the overall business approach and size/scope of the registry.	1 – meets requirements: Response includes (1) Adequate description of a Data Escrow process that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Data escrow plans are sufficient to result in compliance with the Data Escrow Specification (Specification 2 to the Registry Agreement); (3) Escrow capabilities are consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. 0 – fails requirements: Does not meet all the requirements to score a 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	39	Registry Continuity: describe how the applicant will comply with registry continuity obligations as described in Specification 6 (section 3) to the registry agreement. This includes conducting registry operations using diverse, redundant servers to ensure continued operation of critical functions in the case of technical failure. Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). The response should include, but is not limited to, the following elements of the business continuity plan: • Identification of risks and threats to compliance with registry continuity obligations; • Identification and definitions of vital business functions (which may include registry services beyond the five critical registry functions) versus other registry functions and supporting operations and technology; • Definitions of Recovery Point Objectives and Recovery Time Objective; and • Descriptions of testing plans to promote compliance with relevant obligations. To be eligible for a score of 2, answers must also include: • A highly detailed plan that provides for leading practice levels of availability; and • Evidence of concrete steps such as a contract with a backup provider (in addition to any currently designated service operator) or a maintained hot site. A complete answer is expected to be no more than 15 pages.	N	For reference, applicants should review the ICANN gTLD Registry Continuity Plan at http://www.icann.org/en/registries/continuity/gtld-registry-continuity-plan-25apr09-en.pdf. A Recovery Point Objective (RPO) refers to the point in time to which data should be recovered following a business disruption or disaster. The RPO allows an organization to define a window of time before a disruption or disaster during which data may be lost and is independent of the time it takes to get a system back on-line.If the RPO of a company is two hours, then when a system is brought back on-line after a disruption/disaster, all data must be restored to a point within two hours before the disaster. A Recovery Time Objective (RTO) is the duration of time within which a process must be restored after a business disruption or disaster to avoid what the entity may deem as unacceptable consequences. For example, pursuant to the draft Registry Agreement DNS service must not be down for longer than 4 hours. At 4 hours ICANN may invoke the use of an Emergency Back End Registry Operator to take over this function. The entity may deem this to be an unacceptable consequence therefore they may set their RTO to be something less than 4 hours and would build continuity plans accordingly. Vital business functions are functions that are critical to the success of the operation. For example, if a registry operator provides an additional service beyond the five critical registry functions, that it deems as central to its TLD, or supports an operation that is central to the TLD, this might be identified as a vital business function.	0-2	Complete answer demonstrates: (1) detailed description showing plans for compliance with registry continuity obligations; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes: (1) Highly developed and detailed processes for maintaining registry continuity; and (2) Evidence of concrete steps, such as a contract with a backup service provider or a maintained hot site. **1 - meets requirements:** Response includes: (1) Adequate description of a Registry Continuity plan that substantially demonstrates capability and knowledge required to meet this element; (2) Continuity plans are sufficient to result in compliance with requirements (Specification 6); (3) Continuity plans are consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score a 1.
	40	Registry Transition: provide a Service Migration plan (as described in the Registry Transition Processes) that could be followed in the event	N		0-1	Complete answer demonstrates: (1) complete knowledge and	**1 - meets requirements**: Response includes (1) Adequate description of a registry

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		that it becomes necessary to permanently transition the proposed gTLD to a new operator. The plan must take into account, and be consistent with the vital business functions identified in the previous question. Elements of the plan may include, but are not limited to: • Preparatory steps needed for the transition of critical registry functions; • Monitoring during registry transition and efforts to minimize any interruption to critical registry functions during this time; and • Contingency plans in the event that any part of the registry transition is unable to move forward according to the plan. A complete answer is expected to be no more than 10 pages.				understanding of the Registry Transition Processes; and (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry.	transition plan that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate registry transition plan with appropriate monitoring during registry transition; and (3) Transition plan is consistent with the technical, operational, and financial approach as described in the application. **0 - fails requirements**: Does not meet all the requirements to score a 1.
	41	Failover Testing: provide • a description of the failover testing plan, including mandatory annual testing of the plan. Examples may include a description of plans to test failover of data centers or operations to alternate sites, from a hot to a cold facility, registry data escrow testing, or other mechanisms. The plan must take into account and be consistent with the vital business functions identified in Question 39; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). The failover testing plan should include, but is not limited to, the following elements: • Types of testing (e.g., walkthroughs, takedown of sites) and the frequency of testing; • How results are captured, what is done	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**1 - meets requirements**: Response includes (1) An adequate description of a failover testing plan that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate failover testing plan with an appropriate level of review and analysis of failover testing results; (3) Failover testing plan is consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function. **0 – fails requirements** Does not meet all the requirements to score a 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		with the results, and with whom results are shared; • How test plans are updated (e.g., what triggers an update, change management processes for making updates); • Length of time to restore critical registry functions; • Length of time to restore all operations, inclusive of critical registry functions; and • Length of time to migrate from one site to another. A complete answer is expected to be no more than10 pages.					
	42	Monitoring and Fault Escalation Processes: provide • a description of the proposed (or actual) arrangements for monitoring critical registry systems (including SRS, database systems, DNS servers, Whois service, network connectivity, routers and firewalls). This description should explain how these systems are monitored and the mechanisms that will be used for fault escalation and reporting, and should provide details of the proposed support arrangements for these registry systems. • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include: • Meeting the fault tolerance / monitoring guidelines described • Evidence of commitment to provide a 24x7 fault response team. A complete answer is expected to be no more than 10 pages.	N		0-2	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) consistency with the commitments made to registrants and registrars regarding system maintenance.	2 - exceeds requirements: Response meets all attributes for a score of 1 and includes (1) Evidence showing highly developed and detailed fault tolerance/monitoring and redundant systems deployed with real-time monitoring tools / dashboard (metrics) deployed and reviewed regularly; (2) A high level of availability that allows for the ability to respond to faults through a 24x7 response team. 1 - meets requirements: Response includes (1) Adequate description of monitoring and fault escalation processes that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence showing adequate fault tolerance/monitoring systems planned with an appropriate level of monitoring and limited periodic review being performed; (3) Plans are consistent with the technical, operational, and financial approach described in the application; and (4) Demonstrates an adequate level of resources that are on hand,

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							committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	43	DNSSEC: Provide • The registry's DNSSEC policy statement (DPS), which should include the policies and procedures the proposed registry will follow, for example, for signing the zone file, for verifying and accepting DS records from child domains, and for generating, exchanging, and storing keying material; • Describe how the DNSSEC implementation will comply with relevant RFCs, including but not limited to: RFCs 4033, 4034, 4035, 5910, 4509, 4641, and 5155 (the latter will only be required if Hashed Authenticated Denial of Existence will be offered); and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages. Note, the DPS is required to be submitted as part of the application	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements, one of the five critical registry functions; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) an ability to comply with relevant RFCs.	**1 - meets requirements**: Response includes (1) An adequate description of DNSSEC that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence that TLD zone files will be signed at time of launch, in compliance with required RFCs, and registry offers provisioning capabilities to accept public key material from registrants through the SRS ; (3) An adequate description of key management procedures in the proposed TLD, including providing secure encryption key management (generation, exchange, and storage); (4) Technical plan is consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are already on hand, committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	44	OPTIONAL. IDNs: • State whether the proposed registry will support the registration of IDN labels in the TLD, and if so, how. For example, explain which characters will be supported, and provide the associated IDN Tables with variant characters identified, along with a corresponding registration policy. This includes public interfaces to the databases such as Whois and EPP. • Describe how the IDN implementation will comply with RFCs 5809-5893 as well as the ICANN IDN Guidelines at http://www.icann.org/en/topics/idn/implementation-guidelines.htm. • Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 10 pages plus attachments.	N	IDNs are an optional service at time of launch. Absence of IDN implementation or plans will not detract from an applicant's score. Applicants who respond to this question with plans for implementation of IDNs at time of launch will be scored according to the criteria indicated here. IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.	0-1	IDNs are an optional service. Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (3) consistency with the commitments made to registrants and the technical, operational, and financial approach described in the application; (4) issues regarding use of scripts are settled and IDN tables are complete and publicly available; and (5) ability to comply with relevant RFCs.	1 - meets requirements for this optional element: Response includes (1) Adequate description of IDN implementation that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) An adequate description of the IDN procedures, including complete IDN tables, compliance with IDNA/IDN guidelines and RFCs, and periodic monitoring of IDN operations; (3) Evidence of ability to resolve rendering and known IDN issues or spoofing attacks; (4) IDN plans are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score a 1.
Demonstration of Financial Capability	45	Financial Statements: provide • audited or independently certified financial statements for the most recently completed fiscal year for the applicant, and • audited or unaudited financial statements for the most recently ended interim financial period for the applicant for which this information may be released. For newly-formed applicants, or where financial statements are not audited, provide: • the latest available unaudited financial statements; and • an explanation as to why audited or independently certified financial statements are not available. At a minimum, the financial statements should be provided for the legal entity listed as the applicant.	N	The questions in this section (45-50) are intended to give applicants an opportunity to demonstrate their financial capabilities to run a registry. Supporting documentation for this question should be submitted in the original language.	0-1	Audited or independently certified financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Board (IASB) or nationally recognized accounting standards (e.g., GAAP). This will include a balance sheet and income statement reflecting the applicant's financial position and results of operations, a statement of shareholders equity/partner capital, and a cash flow statement. In the event the applicant is an entity newly formed for the purpose of applying for a gTLD and with little to no operating history	1 - meets requirements: Complete audited or independently certified financial statements are provided, at the highest level available in the applicant's jurisdiction. Where such audited or independently certified financial statements are not available, such as for newly-formed entities, the applicant has provided an explanation and has provided, at a minimum, unaudited financial statements. 0 - fails requirements: Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Financial statements are used in the analysis of projections and costs. A complete answer should include: • balance sheet; • income statement; • statement of shareholders equity/partner capital; • cash flow statement, and • letter of auditor or independent certification, if applicable.				(less than one year), the applicant must submit, at a minimum, pro forma financial statements including all components listed in the question. Where audited or independently certified financial statements are not available, applicant has provided an adequate explanation as to the accounting practices in its jurisdiction and has provided, at a minimum, unaudited financial statements.	
	46	Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario (attached). Note, if certain services are outsourced, reflect this in the relevant cost section of the template. The template is intended to provide commonality among TLD applications and thereby facilitate the evaluation process. A complete answer is expected to be no more than 10 pages in addition to the template.	N		0-1	Applicant has provided a thorough model that demonstrates a sustainable business (even if break-even is not achieved through the first three years of operation). Applicant's description of projections development is sufficient to show due diligence.	**1 - meets requirements**: (1) Financial projections adequately describe the cost, funding and risks for the application (2) Demonstrates resources and plan for sustainable operations; and (3) Financial assumptions about the registry operations, funding and market are identified, explained, and supported. **0 - fails requirements**: Does not meet all of the requirements to score a 1.
	47	Costs and capital expenditures: in conjunction with the financial projections template, describe and explain: • the expected operating costs and capital expenditures of setting up and operating the proposed registry; • any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing; • any significant variances between years in any category of expected costs; and • a description of the basis / key assumptions including rationale for the costs provided in the projections template. This may include an	N	This question is based on the template submitted in question 46.	0-2	Costs identified are consistent with the proposed registry services, adequately fund technical requirements, and are consistent with proposed mission/purpose of the registry. Costs projected are reasonable for a registry of size and scope described in the application. Costs identified include the funding costs (interest expenses and fees) related to the continued operations instrument described in Question 50 below.	**2 - exceeds requirements**: Response meets all of the attributes for a score of 1 and: (1) Estimated costs and assumptions are conservative and consistent with an operation of the registry volume/scope/size as described by the applicant; (2) Estimates are derived from actual examples of previous or existing registry operations or equivalent; and (3) Conservative estimates are based on those experiences and describe a range of anticipated costs and use the high end of those estimates.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made. As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to: 1) maintain registry operations, 2) provide registry services described above, and 3) satisfy the technical requirements described in the Demonstration of Technical & Operational Capability section. Costs should include both fixed and variable costs. To be eligible for a score of two points, answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples. A complete answer is expected to be no more than 10 pages.				Key assumptions and their rationale are clearly described and may include, but are not limited to: • Key components of capital expenditures; • Key components of operating costs, unit operating costs, headcount, number of technical/operating/ equipment units, marketing, and other costs; and • Costs of outsourcing, if any.	**1 - meets requirements**: (1) Cost elements are reasonable and complete (i.e., cover all of the aspects of registry operations: registry services, technical requirements and other aspects as described by the applicant); (2) Estimated costs and assumptions are consistent and defensible with an operation of the registry volume/scope/size as described by the applicant; and (3) Projections are reasonably aligned with the historical financial statements provided in Question 45. **0 - fails requirements**: Does not meet all the requirements to score a 1.
		(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges. A complete answer is expected to be no more than 10 pages.	N				
	48	(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry). Describe: I) How existing funds will provide resources for both: a) start-up of operations, and b) ongoing operations; II) the revenue model including projections for transaction volumes and price (if the applicant does not intend to rely on registration revenue in order to cover the costs of the registry's	N	Supporting documentation for this question should be submitted in the original language.	0-2	Funding resources are clearly identified and adequately provide for registry cost projections. Sources of capital funding are clearly identified, held apart from other potential uses of those funds and available. The plan for transition of funding sources from available capital to revenue from operations (if applicable) is described.	**2 - exceeds requirements**: Response meets all the attributes for a score of 1 and (1) Existing funds (specifically all funds required for start-up) are quantified, on hand, segregated in an account available only to the applicant for purposes of the application only, ; (2) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is segregated and

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		operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner); III) outside sources of funding (the applicant must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for each type of funding; IV) Any significant variances between years in any category of funding and revenue; and V) A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and VI) Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. To be eligible for a score of 2 points, answers must demonstrate: I) A conservative estimate of funding and revenue; and II) Ongoing operations that are not dependent on projected revenue. A complete answer is expected to be no more than 10 pages.				Outside sources of funding are documented and verified. Examples of evidence for funding sources include, but are not limited to: • Executed funding agreements; • A letter of credit; • A commitment letter; or • A bank statement. Funding commitments may be conditional on the approval of the application. Sources of capital funding required to sustain registry operations on an on-going basis are identified. The projected revenues are consistent with the size and projected penetration of the target markets. Key assumptions and their rationale are clearly described and address, at a minimum: • Key components of the funding plan and their key terms; and • Price and number of registrations.	earmarked for this purpose only in an amount adequate for three years operation; (3) If ongoing operations are to be at least partially resourced from revenues, assumptions made are conservative and take into consideration studies, reference data, or other steps taken to develop the response and validate any assumptions made; and (4) Cash flow models are prepared which link funding and revenue assumptions to projected actual business activity. 1 - meets requirements: (1) Assurances provided that materials provided to investors and/or lenders are consistent with the projections and assumptions included in the projections templates; (2) Existing funds (specifically all funds required for start-up) are quantified, committed, identified as available to the applicant; (3) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is quantified and its sources identified in an amount adequate for three years operation; (4) If ongoing operations are to be at least partially resourced from revenues, assumptions made are reasonable and are directly related to projected business volumes, market size and penetration; and (5) Projections are reasonably aligned with the historical financial statements provided in Question 45. 0 - fails requirements: Does not meet all the requirements to score a 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges. A complete answer is expected to be no more than 10 pages.	N				
	49	(a) Contingency Planning: describe your contingency planning: • Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning; • Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and • Describe the measures to mitigate the key risks as described in this question. A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario). To be eligible for a score of 2 points, answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur. A complete answer is expected to be no more than10 pages.	N		0-2	Contingencies and risks are identified, quantified, and included in the cost, revenue, and funding analyses. Action plans are identified in the event contingencies occur. The model is resilient in the event those contingencies occur. Responses address the probability and resource impact of the contingencies identified.	2 - exceeds requirements: Response meets all attributes for a score of 1 and: (1) Action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur. 1 - meets requirements: (1) Model adequately identifies the key risks (including operational, business, legal, jurisdictional, financial, and other relevant risks); (2) Response gives consideration to probability and resource impact of contingencies identified; and (3) If resources are not available to fund contingencies in the existing plan, funding sources and a plan for obtaining them are identified. 0 - fails requirements: Does not meet all the requirements to score a 1.
		(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe: • how on-going technical requirements will be met; and • what alternative funding can be reasonably raised at a later time. Provide an explanation if you do not believe there is any chance of reduced funding.	N				

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		Complete a financial projections template (Template 2, Worst Case Scenario) A complete answer is expected to be no more than 10 pages, in addition to the template.					
		(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met? A complete answer is expected to be no more than 10 pages.	N				
	50	(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application. The critical functions of a registry which must be supported even if an applicant's business and/or funding fails are: (1) DNS resolution for registered domain names Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics. (2) Operation of the Shared Registration System Applicants should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with	N	Registrant protection is critical and thus new gTLD applicants are requested to provide evidence indicating that the critical functions will continue to be performed even if the registry fails. Registrant needs are best protected by a clear demonstration that the basic registry functions are sustained for an extended period even in the face of registry failure. Therefore, this section is weighted heavily as a clear, objective measure to protect and serve registrants. The applicant has two tasks associated with adequately making this demonstration of continuity for critical registry functions. First, costs for maintaining critical registrant protection functions are to be estimated (Part a). In evaluating the application, the evaluators will adjudge whether the estimate is reasonable given the systems architecture and overall business approach described elsewhere in the application. The Continuing Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years. Thus, the cost estimates are tied to the cost for a third party to provide the functions, not	0-3	Figures provided are based on an accurate estimate of costs. Documented evidence or detailed plan for ability to fund on-going critical registry functions for registrants for a period of three years in the event of registry failure, default or until a successor operator can be designated. Evidence of financial wherewithal to fund this requirement prior to delegation. This requirement must be met prior to or concurrent with the execution of the Registry Agreement.	**3 - exceeds requirements**: Response meets all the attributes for a score of 1 and: (1) Financial instrument is secured and in place to provide for on-going operations for at least three years in the event of failure. **1 - meets requirements**: (1) Costs are commensurate with technical, operational, and financial approach as described in the application; and (2) Funding is identified and instrument is described to provide for on-going operations of at least three years in the event of failure. **0 - fails requirements**: Does not meet all the requirements to score a 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		increasing levels of such queries, and the ability to meet SLA performance metrics. (3) Provision of Whois service Applicants should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100k-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services. (4) Registry data escrow deposits Applicants should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database). (5) Maintenance of a properly signed zone in accordance with DNSSEC requirements. Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics. List the estimated annual cost for each of these functions (specify currency used). A complete answer is expected to be no more than 10 pages.		to the applicant's actual in-house or subcontracting costs for provision of these functions. Refer to guidelines at http://www.icann.org/en/announcements/announcement-3-23dec11-en.htm regarding estimation of costs. However, the applicant must provide its own estimates and explanation in response to this question.			
		(b) Applicants must provide evidence as to how the funds required for performing these critical registry functions will be available and guaranteed to fund registry operations (for the protection of registrants in the new gTLD) for a	N	Second (Part b), methods of securing the funds required to perform those functions for at least three years are to be described by the applicant in accordance with the criteria below. Two types of instruments will fulfill			

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		minimum of three years following the termination of the Registry Agreement. ICANN has identified two methods to fulfill this requirement: (i) Irrevocable standby letter of credit (LOC) issued by a reputable financial institution. • The amount of the LOC must be equal to or greater than the amount required to fund the registry operations specified above for at least three years. In the event of a draw upon the letter of credit, the actual payout would be tied to the cost of running those functions. • The LOC must name ICANN or its designee as the beneficiary. Any funds paid out would be provided to the designee who is operating the required registry functions. • The LOC must have a term of at least five years from the delegation of the TLD. The LOC may be structured with an annual expiration date if it contains an evergreen provision providing for annual extensions, without amendment, for an indefinite number of periods until the issuing bank informs the beneficiary of its final expiration or until the beneficiary releases the LOC as evidenced in writing. If the expiration date occurs prior to the fifth anniversary of the delegation of the TLD, applicant will be required to obtain a replacement instrument. • The LOC must be issued by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The LOC will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • Applicant should attach an original copy of the executed letter of credit or a draft of the letter of credit containing the full terms and conditions. If not yet executed, the Applicant will be required to provide ICANN with an original copy of the executed LOC prior to or concurrent with the execution of the Registry Agreement. • The LOC must contain at least the following required elements: o Issuing bank and date of issue. o Beneficiary: ICANN / 4676 Admiralty		this requirement. The applicant must identify which of the two methods is being described. The instrument is required to be in place at the time of the execution of the Registry Agreement. Financial Institution Ratings: The instrument must be issued or held by a financial institution with a rating beginning with “A” (or the equivalent) by any of the following rating agencies: A.M. Best, Dominion Bond Rating Service, Egan-Jones, Fitch Ratings, Kroll Bond Rating Agency, Moody’s, Morningstar, Standard & Poor’s, and Japan Credit Rating Agency. If an applicant cannot access a financial institution with a rating beginning with “A,” but a branch or subsidiary of such an institution exists in the jurisdiction of the applying entity, then the instrument may be issued by the branch or subsidiary or by a local financial institution with an equivalent or higher rating to the branch or subsidiary. If an applicant cannot access any such financial institutions, the instrument may be issued by the highest-rated financial institution in the national jurisdiction of the applying entity, if accepted by ICANN. Execution by ICANN: For any financial instruments that contemplate ICANN being a party, upon the written request of the applicant, ICANN may (but is not obligated to) execute such agreement prior to submission of the applicant's application if the agreement is on terms acceptable to ICANN. ICANN encourages applicants to deliver a written copy of any such agreement (only if it requires ICANN's signature) to ICANN as soon as possible to facilitate ICANN's review. If the financial instrument requires ICANN's signature, then the applicant will receive 3 points for question 50 (for the instrument being "secured and in place") only if ICANN executes the agreement prior to submission of the application. ICANN will determine, in			

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		Way, Suite 330 / Marina del Rey, CA 90292 / US, or its designee. o Applicant's complete name and address. o LOC identifying number. o Exact amount in USD. o Expiry date. o Address, procedure, and required forms whereby presentation for payment is to be made. o Conditions: ▪ Partial drawings from the letter of credit may be made provided that such payment shall reduce the amount under the standby letter of credit. ▪ All payments must be marked with the issuing bank name and the bank's standby letter of credit number. ▪ LOC may not be modified, amended, or amplified by reference to any other document, agreement, or instrument. ▪ The LOC is subject to the International Standby Practices (ISP 98) International Chamber of Commerce (Publication No. 590), or to an alternative standard that has been demonstrated to be reasonably equivalent. (ii) A <u>deposit into an irrevocable cash escrow account</u> held by a reputable financial institution. • The amount of the deposit must be equal to or greater than the amount required to fund registry operations for at least three years. • Cash is to be held by a third party financial institution which will not allow the funds to be commingled with the Applicant's operating funds or other funds and may only be accessed by ICANN or its designee if certain conditions are met. • The account must be held by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The escrow agreement relating to the escrow account will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • The escrow agreement must have a term		its sole discretion, whether to execute and become a party to a financial instrument. The financial instrument should be submitted in the original language.			

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		of five years from the delegation of the TLD. • The funds in the deposit escrow account are not considered to be an asset of ICANN. • Any interest earnings less bank fees are to accrue to the deposit, and will be paid back to the applicant upon liquidation of the account to the extent not used to pay the costs and expenses of maintaining the escrow. • The deposit plus accrued interest, less any bank fees in respect of the escrow, is to be returned to the applicant if the funds are not used to fund registry functions due to a triggering event or after five years, whichever is greater. • The Applicant will be required to provide ICANN an explanation as to the amount of the deposit, the institution that will hold the deposit, and the escrow agreement for the account at the time of submitting an application. • Applicant should attach evidence of deposited funds in the escrow account, or evidence of provisional arrangement for deposit of funds. Evidence of deposited funds and terms of escrow agreement must be provided to ICANN prior to or concurrent with the execution of the Registry Agreement.					

Instructions: TLD Applicant – Financial Projections

The application process requires the applicant to submit two cash basis Financial Projections.

The first projection (Template 1) should show the Financial Projections associated with the Most Likely scenario expected. This projection should include the forecasted registration volume, registration fee, and all costs and capital expenditures expected during the start-up period and during the first three years of operations. Template 1 relates to Question 46 (Projections Template) in the application.

We also ask that applicants show as a separate projection (Template 2) the Financial Projections associated with a realistic Worst Case scenario. Template 2 relates to Question 49 (Contingency Planning) in the application.

For each Projection prepared, please include Comments and Notes on the bottom of the projection (in the area provided) to provide those reviewing these projections with information regarding:

1. Assumptions used, significant variances in Operating Cash Flows and Capital Expenditures from year-to-year;
2. How you plan to fund operations;
3. Contingency planning

As you complete Template 1 and Template 2, please reference data points and/or formulas used in your calculations (where appropriate).

Section I – Projected Cash inflows and outflows

Projected Cash Inflows

Lines A and B. Provide the number of forecasted registrations and the registration fee for years 1, 2, and 3. Leave the *Start-up* column blank. The start-up period is for cash costs and capital expenditures only; there should be no cash projections input to this column.

Line C. Multiply lines A and B to arrive at the *Registration Cash Inflow* for line C.

Line D. Provide projected cash inflows from any other revenue source for years 1, 2, and 3. For any figures provided on line *D*, please disclose the source in the *Comments/Notes* box of Section I. Note, do not include funding in Line *D as that is covered in Section VI*.

Line E. Add lines *C* and *D* to arrive at the total cash inflow.

Projected Operating Cash Outflows

Start up costs - For all line items (F thru L) Please describe the total period of time this start-up cost is expected to cover in the *Comments/Notes* box.

Line F. Provide the projected labor costs for marketing, customer support, and technical support for start-up, year 1, year 2, and year 3. Note, other labor costs should be put in line *L* (*Other Costs*) and specify the type of labor and associated projected costs in the *Comments/Notes* box of this section.

Line G. *Marketing Costs* represent the amount spent on advertising, promotions, and other marketing activities. This amount should not include labor costs included in Marketing Labor (line *F)*.

Lines H through K. Provide projected costs for facilities, G&A, interests and taxes, and Outsourcing for start-up as well as for years 1, 2, and 3. Be sure to list the type of activities that are being outsourced. You may combine certain activities from the same provider as long as an appropriate description of the services being combined is listed in the *Comments/Notes* box.

Line L. Provide any other projected operating costs for start-up, year 1, year 2, year 3. Be sure to specify the type of cost in the *Comments/Notes* box.

Line M. Add lines *F* through *L* to arrive at the total costs for line *M*.

Line N. Subtract line *E* from line *M* to arrive at the projected net operation number for line *N*.

Section IIa – Breakout of Fixed and Variable Operating Cash Outflows

Line A. Provide the projected variable operating cash outflows including labor and other costs that are not fixed in nature. Variable operating cash outflows are expenditures that fluctuate in relationship with increases or decreases in production or level of operations.

Line B. Provide the projected fixed operating cash outflows. Fixed operating cash outflows are expenditures that do not generally fluctuate in relationship with increases or decreases in production or level of operations. Such costs are generally necessary to be incurred in order to operate the base line operations of the organization or are expected to be incurred based on contractual commitments.

Line C – Add lines *A* and *B* to arrive at total Fixed and Variable Operating Cash Outflows for line *C*. This must equal Total Operating Cash Outflows from Section I, Line *M*.

Section IIb – Breakout of Critical Registry Function Operating Cash Outflows

Lines A – E. Provide the projected cash outflows for the five critical registry functions. If these functions are outsourced, the component of the outsourcing fee representing these functions must be separately identified and provided. These costs are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50.

Line F. If there are other critical registry functions based on the applicant's registry business model then the projected cash outflow for this function must be provided with a description added to the *Comment/Notes* box. This projected cash outflow may also be included in the 3-year reserve.

Line G. Add lines *A* through *F* to arrive at the Total Critical Registry Function Cash Outflows.

Section III – Projected Capital Expenditures

Lines A through C. Provide projected hardware, software, and furniture & equipment capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Provide any projected capital expenditures as a result of outsourcing. This should be included for start-up and years 1, 2, and 3. Specify the type of expenditure and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section III.

Line E – Please describe "other" capital expenditures in the *Comments/Notes* box.

Line F. Add lines *A* through *E* to arrive at the Total Capital Expenditures.

Section IV – Projected Assets & Liabilities

Lines A through C. Provide projected cash, account receivables, and other current assets for start-up as well as for years 1, 2, and 3. For *Other Current Assets*, specify the type of asset and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Add lines *A*, *B*, *C* to arrive at the Total Current Assets.

Lines E through G. Provide projected accounts payable, short-term debt, and other current liabilities for start-up as well as for years 1, 2, and 3. For *Other Current Liabilities*, specify the type of liability and describe the total period of time the start-up up cost is expected to cover in the *Comments/Notes* box.

Line H. Ad lines *E* through *G* to arrive at the total current liabilities.

Lines I through K. Provide the projected fixed assets (PP&E), the 3-year reserve, and long-term assets for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line L. Ad lines *I* through *K* to arrive at the total long-term assets.

Line M. Provide the projected long-term debt for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box

Section V – Projected Cash Flow

Cash flow is driven by *Projected Net Operations* (Section I), *Projected Capital Expenditures* (Section III), and *Projected Assets & Liabilities* (Section IV).

Line A. Provide the projected net operating cash flows for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line B. Provide the projected capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section V.

Lines C through F. Provide the projected change in non-cash current assets, total current liabilities, debt adjustments, and other adjustments for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line G. Add lines *A* through *F* to arrive at the projected net cash flow for line *H*.

Section VI – Sources of Funds

Lines A & B. Provide projected funds from debt and equity at start-up. Describe the sources of debt and equity funding as well as the total period of time the start-up is expected to cover in the *Comments/Notes* box. Please also provide evidence the funding (e.g., letter of commitment).

Line C. Add lines *A* and *B* to arrive at the total sources of funds for line *C*.

General Comments – Regarding Assumptions Used, Significant Variances Between Years, etc.

Provide explanations for any significant variances between years (or expected in years beyond the timeframe of the template) in any category of costing or funding.

General Comments – Regarding how the Applicant Plans to Fund Operations

Provide general comments explaining how you will fund operations. Funding should be explained in detail in response to question 48.

General Comments – Regarding Contingencies

Provide general comments to describe your contingency planning. Contingency planning should be explained in detail in response to question 49.

TLD Applicant -- Financial Projections : **Sample**

In local currency (unless noted otherwise)

Sec.	Reference / Formula	Start-up Costs	Live / Operational			Comments / Notes
			Year 1	Year 2	Year 3	Provide name of local currency used.
I) Projected Cash Inflows and Outflows						
A) Forecasted registration volume		-	62 000	81 600	105 180	Registration was forecasted based on recent market surveys which we have attached and disccused below.
B) Registration fee		$ -	$ 5.00	$ 5.50	$ 6.05	We do not anticipate significant increases in Registration Fees subsequent to year 3.
C) Registration cash inflows	**A * B**	-	310 000	448 800	636 339	
D) Other cash inflows		-	35 000	48 000	62 000	Other cash inflows represent advertising monies expected from display ads on our website.
E) Total Cash Inflows		-	345 000	496 800	698 339	
Projected Operating Cash Outflows						
F) Labor:						
i) Marketing Labor		25 000	66 000	72 000	81 000	Costs are further detailed and explained in response to question 47.
ii) Customer Support Labor		5 000	68 000	71 000	74 000	
iii) Technical Labor		32 000	45 000	47 000	49 000	
G) Marketing		40 000	44 000	26 400	31 680	
H) Facilities		7 000	10 000	12 000	14 400	
I) General & Administrative		14 000	112 000	122 500	136 000	
J) Interest and Taxes		27 500	29 000	29 800	30 760	
K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						Provide a list and associated cost for each outsourced function.
i) Hot site maintenance		5 000	7 500	7 500	7 500	Outsourcing hot site to ABC Company cost based on number of servers hosted and customer support
ii) Partial Registry Functions		32 000	37 500	41 000	43 000	Outsourced certain registry and other functions to ABC registry {*applicant should list outsourced functions*}. Costs for each year are based on expected domains under management
iii) {list type of activities being outsourced}		-	-	-	-	
iv) {list type of activities being outsourced}		-	-	-	-	
v) {list type of activities being outsourced}		-	-	-	-	
vi) {list type of activities being outsourced}		-	-	-	-	
L) Other Operating Costs		12 200	18 000	21 600	25 920	
M) Total Operating Cash Outflows		199 700	437 000	450 800	493 260	
N) Projected Net Operating Cash flow	**E - M**	(199 700)	(92 000)	46 000	205 079	
IIa) Break out of Fixed and Variable Operating Cash Outflows						
A) Total Variable Operating Costs		92 000	195 250	198 930	217 416	Variable Costs: -Start Up equals all labor plus 75% of marketing. -Years 1 through 3 equal 75% of all labor plus 50% of Marketing and 30% of G&A and Other Operating Costs
B) Total Fixed Operating Costs		107 700	241 750	251 870	275 844	Fixed Costs: equals Total Costs less Variable Costs
C) Total Operating Cash Outflows	**= Sec. I) M**	199 700	437 000	450 800	493 260	
	CHECK	-	-	-	-	Check that II) C equals I) N.
IIb) Break out of Critical Registry Function Operating Cash Outflows						Note: these are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50
A) Operation of SRS			5 000	5 500	6 050	Commensurate with Question 24
B) Provision of Whois			6 000	6 600	7 260	Commensurate with Question 26
C) DNS Resolution for Registered Domain Names			7 000	7 700	8 470	Commensurate with Question 35
D) Registry Data Escrow			8 000	8 800	9 680	Commensurate with Question 38
E) Maintenance of Zone in accordance with DNSSEC			9 000	9 900	10 890	Commensurate with Question 43
F) Other						
G) Total Critical Function Cash Outflows		-	35 000	38 500	42 350	
	-	-				
III) Projected Capital Expenditures						
A) Hardware		98 000	21 000	16 000	58 000	-Hardware & Software have a useful life of 3 years
B) Software		32 000	18 000	24 000	11 000	
C) Furniture & Other Equipment		43 000	22 000	14 000	16 000	-Furniture & other equipment have a useful life of 5 years
D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
i)		-	-	-	-	List and describe each identifiable type of outsourcing.
ii)		-	-	-	-	List and describe each identifiable type of outsourcing.
iii)		-	-	-	-	List and describe each identifiable type of outsourcing.
iv)		-	-	-	-	List and describe each identifiable type of outsourcing.
v)		-	-	-	-	List and describe each identifiable type of outsourcing.
vi)		-	-	-	-	List and describe each identifiable type of outsourcing.
E) Other Capital Expenditures						
F) Total Capital Expenditures		173 000	61 000	54 000	85 000	
IV) Projected Assets & Liabilities						
A) Cash		668 300	474 300	413 00	471 679	
B) Accounts receivable			70 000	106 000	160 000	
C) Other current assets			40 000	60 000	80 000	
D) Total Current Assets		668 300	584 300	579 00	711 679	
E) Accounts payable		41 000	110 000	113 000	125 300	
F) Short-term Debt						
G) Other Current Liabilities						
H) Total Current Liabilities		41 000	110 000	113 000	125 300	
I) Total Property, Plant & Equipment (PP&E)	**= Sec III) F: cumulative Prior Years Cur Yr**	173 000	234 000	288 000	373 000	
J) 3-year Reserve		186 000	186 000	186 000	186 000	Should equal amount calculated for Question 50
K) Other Long-term Assets						
L) Total Long-term Assets		359 000	420 000	474 000	559 000	
M) Total Long-term Debt		1 000 000	1 000 000	1 000 000	1 000 000	Principal payments on the line of credit with XYZ Bank will not be incurred until Year 5. Interest will be paid as incurred and is reflected in Sec I) J.
V) Projected Cash flow (excl. 3-year Reserve)						
A) Net operating cash flows	**= Sec. I) N**	(199 700)	(92 000)	46 000	205 079	
B) Capital expenditures	**= Sec. III) FE**	(173 000)	(61 000)	(54 000)	(85 000)	
C) Change in Non Cash Current Assets	**= Sec. IV) (B C): Prior Yr - Cur Yr**	n/a	(110 000)	(56 000)	(74 000)	
D) Change in Total Current Liabilities	**= Sec. IV) H: Cur Yr - Prior Yr**	41 000	69 000	3 000	12 300	The $41k in Start Up Costs represents an offset of the Accounts Payable reflected in the Projected balance sheet. Subsequent years are based on changes in Current Liabilities where Prior Year is subtracted from the Current year
E) Debt Adjustments	**= Sec IV) F and M: Cur Yr - Prior Yr**	n/a	-	-	-	
F) Other Adjustments						
G) Projected Net Cash flow		**(331,700)**	**(194,000)**	**(61,000)**	**58,379**	
VI) Sources of funds						
A) Debt:						
i) On-hand at time of application		1 000 000				See below for comments on funding. Revenues are further detailed and explained in response to question 48.
ii) Contingent and/or committed but not yet on-hand						
B) Equity:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand		-				
C) Total Sources of funds		1 000 000				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

We expect the number of registrations to grow at approximately 30% per year with an increase in the registration fee of $1 per year for the first three years. These volume assumptions are based on the attached (i) market data and (ii) published benchmark regsitry growth. Fee assumptions are aligned with the growth plan and anticipated demand based on the regsitration curve. We anticipate our costs will increase at a controlled pace over the first three years except for marketing costs which will be higher in the start-up and first year as we establish our brand name and work to increase registrations. Operating costs are supported by the attached (i) benchmark report for a basket of similar registries and (ii) a build-up of costs based on our current operations. Our capital expenditures will be greatest in the start-up phase and then our need to invest in computer hardware and software will level off after the start-up period. Capital expenses are based on contract drafts and discussions held with vendors. We have included and referenced the hardware costs to support the estimates. Our investment in Furniture and Equipment will be greatest in the start-up period as we build our infrastructure and then decrease in the following periods.

Start-up: Our start-up phase is anticpated to comprise [X] months in line with benchmark growth curves indicated by prior start-ups and published market data. Our assumptions were derived from the attached support.

Comments regarding how the Applicant plans to Fund operations:

We have recently negotiated a line of credit with XYZ Bank (a copy of the fully executed line of credit agreement has been included with our application) and this funding will allow us to purchase necessary equipment and pay for employees and other Operating Costs during our start-up period and the first few years of operations. We expect that our business operation will be self funded (i.e. revenue from operations will cover all anticipated costs and capital expenditures) by the second half of our second year in operation; we also expect to become profitable with positive cash flow in year three.

General Comments regarding contingencies:

Although we expect to be cash flow positive by the end of year 2 the recently negotiated line of credit will cover our operating costs for the first 4 years of operation if necessary. We have also entered into an agreement with XYZ Co. to assume our registrants should our business model not have the ability to sustain itself in future years. Agreement with XYZ Co. has been included with our application. A full description of risks and a range of potential outcomes and impacts are included in our responses to Question 49. These responses have quantified the impacts of certain probabilites and our negotiated funding and action plans as shown are adequate to fund our our Worst Case Scenerio

Template 1 - Financial Projections: **Most Likely**

In local currency (unless noted otherwise)

Sec.		Reference / Formula	Start-up Costs	Live / Operational Year 1	Year 2	Year 3	Comments / Notes
							Provide name of local currency used.
I) Projected Cash inflows and outflows							
	A) Forecasted registration volume						
	B) Registration fee						
	C) Registration cash inflows			-	-	-	
	D) Other cash inflows						
	E) Total Cash Inflows		-	-	-	-	
Projected Operating Cash Outflows							
	F) Labor:						
	i) Marketing Labor						
	ii) Customer Support Labor						
	iii) Technical Labor						
	G) Marketing						
	H) Facilities						
	I) General & Administrative						
	J) Interest and Taxes						
	K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						
	i) {list type of activities being outsourced}						
	ii) {list type of activities being outsourced}						
	iii) {list type of activities being outsourced}						
	iv) {list type of activities being outsourced}						
	v) {list type of activities being outsourced}						
	vi) {list type of activities being outsourced}						
	L) Other Operating costs						
	M) Total Operating Cash Outflows		-	-	-	-	
	N) Projected Net Operating Cash flow		-	-	-	-	
IIa) Break out of Fixed and Variable Operating Cash Outflows							
	A) Total Variable Operating Costs						
	B) Total Fixed Operating Costs						
	C) Total Operating Cash Outflows		-	-	-	-	
		CHECK	-	-	-	-	
IIb) Break out of Critical Function Operating Cash Outflows							
	A) Operation of SRS						
	B) Provision of Whois						
	C) DNS Resolution for Registered Domain Names						
	D) Registry Data Escrow						
	E) Maintenance of Zone in accordance with DNSSEC						
	G) Total Critical Registry Function Cash Outflows		-	-	-	-	
	H) 3-year Total		-				
III) Projected Capital Expenditures							
	A) Hardware						
	B) Software						
	C) Furniture & Other Equipment						
	D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
	i)						
	ii)						
	iii)						
	iv)						
	v)						
	vi)						
	E) Other Capital Expenditures						
	F) Total Capital Expenditures		-	-	-	-	
IV) Projected Assets & Liabilities							
	A) Cash						
	B) Accounts receivable						
	C) Other current assets						
	D) Total Current Assets		-	-	-	-	
	E) Accounts payable						
	F) Short-term Debt						
	G) Other Current Liabilities						
	H) Total Current Liabilities		-	-	-	-	
	I) Total Property, Plant & Equipment (PP&E)		-	-	-	-	
	J) 3-year Reserve			-	-	-	
	K) Other Long-term Assets						
	L) Total Long-term Assets		-	-	-	-	
	M) Total Long-term Debt						
V) Projected Cash flow (excl. 3-year Reserve)							
	A) Net operating cash flows		-	-	-	-	
	C) Capital expenditures		-	-	-	-	
	D) Change in Non Cash Current Assets		n/a	-	-	-	
	E) Change in Total Current Liabilities		-	-	-	-	
	F) Debt Adjustments		n/a	-	-	-	
	G) Other Adjustments						
	H) Projected Net Cash flow		-	-	-	-	
VI) Sources of funds							
	A) Debt:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	B) Equity:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	C) Total Sources of funds		-				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

Comments regarding how the Applicant plans to Fund operations:

General Comments regarding contingencies:

Template 2 - Financial Projections: **Worst Case**

In local currency (unless noted otherwise)

Sec.	Reference / Formula	Start-up Costs	Live / Operational Year 1	Year 2	Year 3	Comments / Notes
						Provide name of local currency used.
I) Projected Cash inflows and outflows						
A) Forecasted registration volume						
B) Registration fee						
C) Registration cash inflows			-	-	-	
D) Other cash inflows						
E) Total Cash Inflows		-	-	-	-	
Projected Operating Cash Outflows						
F) Labor:						
i) Marketing Labor						
ii) Customer Support Labor						
iii) Technical Labor						
G) Marketing						
H) Facilities						
I) General & Administrative						
J) Interest and Taxes						
K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						
i) {list type of activities being outsourced}						
ii) {list type of activities being outsourced}						
iii) {list type of activities being outsourced}						
iv) {list type of activities being outsourced}						
v) {list type of activities being outsourced}						
vi) {list type of activities being outsourced}						
L) Other Operating costs						
M) Total Operating Cash Outflows		-	-	-	-	
N) Projected Net Operating Cash flow		-	-	-	-	
IIa) Break out of Fixed and Variable Operating Cash Outflows						
A) Total Variable Operating Costs						
B) Total Fixed Operating Costs						
C) Total Operating Cash Outflows		-	-	-	-	
	CHECK	-	-	-	-	
IIb) Break out of Critical Function Operating Cash Outflows						
A) Operation of SRS						
B) Provision of Whois						
C) DNS Resolution for Registered Domain Names						
D) Registry Data Escrow						
E) Maintenance of Zone in accordance with DNSSEC						
G) Total Critical Registry Function Cash Outflows		-	-	-	-	
H) 3-year Total		-				
III) Projected Capital Expenditures						
A) Hardware						
B) Software						
C) Furniture & Other Equipment						
D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
i)						
ii)						
iii)						
iv)						
v)						
vi)						
E) Other Capital Expenditures						
F) Total Capital Expenditures		-	-	-	-	
IV) Projected Assets & Liabilities						
A) Cash						
B) Accounts receivable						
C) Other current assets						
D) Total Current Assets		-	-	-	-	
E) Accounts payable						
F) Short-term Debt						
G) Other Current Liabilities						
H) Total Current Liabilities		-	-	-	-	
I) Total Property, Plant & Equipment (PP&E)		-	-	-	-	
J) 3-year Reserve			-	-	-	
K) Other Long-term Assets						
L) Total Long-term Assets		-	-	-	-	
M) Total Long-term Debt						
V) Projected Cash flow (excl. 3-year Reserve)						
A) Net operating cash flows		-	-	-	-	
C) Capital expenditures		-	-	-	-	
D) Change in Non Cash Current Assets		n/a	-	-	-	
E) Change in Total Current Liabilities		-	-	-	-	
F) Debt Adjustments		n/a	-	-	-	
G) Other Adjustments						
H) Projected Net Cash flow		-	-	-	-	
VI) Sources of funds						
A) Debt:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand						
B) Equity:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand						
C) Total Sources of funds		-				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

Comments regarding how the Applicant plans to Fund operations:

General Comments regarding contingencies:

ICANN

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 3

4 June 2012

Module 3

Objection Procedures

This module describes two types of mechanisms that may affect an application:

I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.

II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

    This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

    All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

3.1 GAC Advice on New gTLDs

ICANN's Governmental Advisory Committee was formed 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.

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.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. 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 (see Module 1).

GAC Advice may take one of the following forms:

I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

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).

3.2 Public Objection and Dispute Resolution Process

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

3.2.1 Grounds for Objection

A formal objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these objection grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.
Legal rights	Rightsholders
Limited public interest	No limitations on who may file – however, subject to a "quick look" designed for early conclusion of frivolous and/or abusive objections
Community	Established institution associated with a clearly delineated community

3.2.2.1 String Confusion Objection

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.

3.2.2.2 Legal Rights Objection

A rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD must be included in the filing.

An intergovernmental organization (IGO) is eligible to file a legal rights objection if it meets the criteria for registration of a .INT domain name[1]:

a) An international treaty between or among national governments must have established the organization; and

b) The organization that is established must be widely considered to have independent international legal personality and must be the subject of and governed by international law.

The specialized agencies of the UN and the organizations having observer status at the UN General Assembly are also recognized as meeting the criteria.

3.2.2.3 Limited Public Interest Objection

Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the

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[1] See also http://www.iana.org/domains/int/policy/.

accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.[2]

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e).

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

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[2] The jurisprudence of the European Court of Human Rights offers specific examples of how the term "manifestly ill-founded" has been interpreted in disputes relating to human rights. Article 35(3) of the European Convention on Human Rights provides: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." The ECHR renders reasoned decisions on admissibility, pursuant to Article 35 of the Convention. (Its decisions are published on the Court's website http://www.echr.coe.int.) In some cases, the Court briefly states the facts and the law and then announces its decision, without discussion or analysis. E.g., Decision as to the Admissibility of Application No. 34328/96 by Egbert Peree against the Netherlands (1998). In other cases, the Court reviews the facts and the relevant legal rules in detail, providing an analysis to support its conclusion on the admissibility of an application. Examples of such decisions regarding applications alleging violations of Article 10 of the Convention (freedom of expression) include: Décision sur la recevabilité de la requête no 65831/01 présentée par Roger Garaudy contre la France (2003); Décision sur la recevabilité de la requête no 65297/01 présentée par Eduardo Fernando Alves Costa contre le Portugal (2004).

The jurisprudence of the European Court of Human Rights also provides examples of the abuse of the right of application being sanctioned, in accordance with ECHR Article 35(3). See, for example, Décision partielle sur la recevabilité de la requête no 61164/00 présentée par Gérard Duringer et autres contre la France et de la requête no 18589/02 contre la France (2003).

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.2.3 Dispute Resolution Service Providers

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

- The International Centre for Dispute Resolution has agreed to administer disputes brought pursuant to string confusion objections.
- The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed to administer disputes brought pursuant to legal rights objections.

- The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest[3] followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.

3.2.4 Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;

The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2.5 Independent Objector

A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

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[3] *See* http://www.icann.org/en/announcements/announcement-21dec07.htm.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

Mandate and Scope - The IO may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to application comments received during the comment period.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

Selection – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

Budget and Funding – The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. Those payments will be refunded by the DRSP in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

3.3 Filing Procedures

The information included in this section provides a summary of procedures for filing:

- Objections; and
- Responses to objections.

For a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail.

Note that the rules and procedures of each DRSP specific to each objection ground must also be followed. See http://newgtlds.icann.org/en/program-status/objection-dispute-resolution.

3.3.1 Objection Filing Procedures

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. Should an applicant wish to file a formal objection to another gTLD application, it would follow these same procedures.

- All objections must be filed electronically with the appropriate DRSP by the posted deadline date.

Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. An objector wishing to object to several applications must file a separate objection and pay the accompanying filing fees for each application that is the subject of an objection. If an objector wishes to object to an application on more than one ground, the objector must file separate objections and pay the accompanying filing fees for each objection ground.

Each objection filed by an objector must include:

- The name and contact information of the objector.
- A statement of the objector's basis for standing; that is, why the objector believes it meets the standing requirements to object.
- A description of the basis for the objection, including:
    - A statement giving the specific ground upon which the objection is being filed.
    - A detailed explanation of the validity of the objection and why it should be upheld.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.

The DRSP will publish, and regularly update a list on its website identifying all objections as they are filed. ICANN will post on its website a notice of all objections filed once the objection filing period has closed.

3.3.2 Objection Filing Fees

At the time an objection is filed, the objector is required to pay a filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

Funding from ICANN for objection filing fees, as well as for advance payment of costs (see subsection 3.4.7 below) is available to the At-Large Advisory Committee (ALAC). Funding for ALAC objection filing and dispute resolution fees is contingent on publication by ALAC of its approved process for considering and making objections. At a minimum, the process for objecting to a gTLD application will require: bottom-up development of potential objections, discussion and approval of objections at the Regional At-Large Organization (RALO) level, and a process for consideration and approval of the objection by the At-Large Advisory Committee.

Funding from ICANN for objection filing fees, as well as for advance payment of costs, is available to individual national governments in the amount of USD 50,000 with the guarantee that a minimum of one objection per government will be fully funded by ICANN where requested. ICANN will develop a procedure for application and disbursement of funds.

Funding available from ICANN is to cover costs payable to the dispute resolution service provider and made directly to the dispute resolution service provider; it does not cover other costs such as fees for legal advice.

3.3.3 Response Filing Procedures

Upon notification that ICANN has published the list of all objections filed (refer to subsection 3.3.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, an applicant responding to several objections must file a separate response and pay the accompanying filing fee to respond to each objection.
- Responses must be filed electronically.

Each response filed by an applicant must include:

- The name and contact information of the applicant.

- A point-by-point response to the claims made by the objector.
- Any copies of documents that it considers to be a basis for the response.

Responses are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.

3.3.4 Response Filing Fees

At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.

3.4 Objection Processing Overview

The information below provides an overview of the process by which DRSPs administer dispute proceedings that have been initiated. For comprehensive information, please refer to the New gTLD Dispute Resolution Procedure (included as an attachment to this module).

3.4.1 Administrative Review

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's right to submit a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for filing an objection.

3.4.2 Consolidation of Objections

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.

3.4.3 Mediation

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in mediation aimed at settling the dispute. Each DRSP has experts who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel constituted to issue an expert determination in the related dispute.

There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.

The parties are free to negotiate without mediation at any time, or to engage a mutually acceptable mediator of their own accord.

3.4.4 Selection of Expert Panels

A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.

There will be one expert in proceedings involving a string confusion objection.

There will be one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.

There will be three experts recognized as eminent jurists of international reputation, with expertise in relevant fields as appropriate, in proceedings involving a Limited Public Interest objection.

There will be one expert in proceedings involving a community objection.

Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5 Adjudication

The panel may decide whether the parties shall submit any written statements in addition to the filed objection and response, and may specify time limits for such submissions.

In order to achieve the goal of resolving disputes rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the panel may require a party to produce additional evidence.

Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances.

3.4.6 Expert Determination

The DRSPs' final expert determinations will be in writing and will include:

- A summary of the dispute and findings;

- An identification of the prevailing party; and
- The reasoning upon which the expert determination is based.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.

3.4.7 Dispute Resolution Costs

Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.

Within ten (10) calendar days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant. Each party must make its advance payment within ten (10) calendar days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DSRP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs to the prevailing party.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a 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.

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO 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"), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ("mark") or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector's mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark or IGO name or acronym.

In the case where the objection is based on trademark rights, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector's existing mark.
2. Whether the objector's acquisition and use of rights in the mark has been bona fide.
3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.
4. Applicant's intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.
5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.
7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.
8. Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

In the case where a legal rights objection has been filed by an IGO, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound or meaning, to the name or acronym of the objecting IGO;
2. Historical coexistence of the IGO and the applicant's use of a similar name or acronym. Factors considered may include:
    a. Level of global recognition of both entities;
    b. Length of time the entities have been in existence;
    c. Public historical evidence of their existence, which may include whether the objecting IGO has communicated its name or abbreviation under Article 6*ter* of the Paris Convention for the Protection of Industrial Property.
3. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise of the objecting IGO's name or acronym;
4. Whether and to what extent the applicant has been commonly known by the sign corresponding to the applied-for gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide; and
5. Whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objecting IGO's name or acronym as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3 Limited Public Interest Objection

An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

Note that these are included to serve as examples, rather than an exhaustive list. It should be noted that these instruments vary in their ratification status. Additionally, states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions. National laws not based on principles of international law are not a valid ground for a Limited Public Interest objection.

Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of

discrimination that violate generally accepted legal norms recognized under principles of international law;

- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;

- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

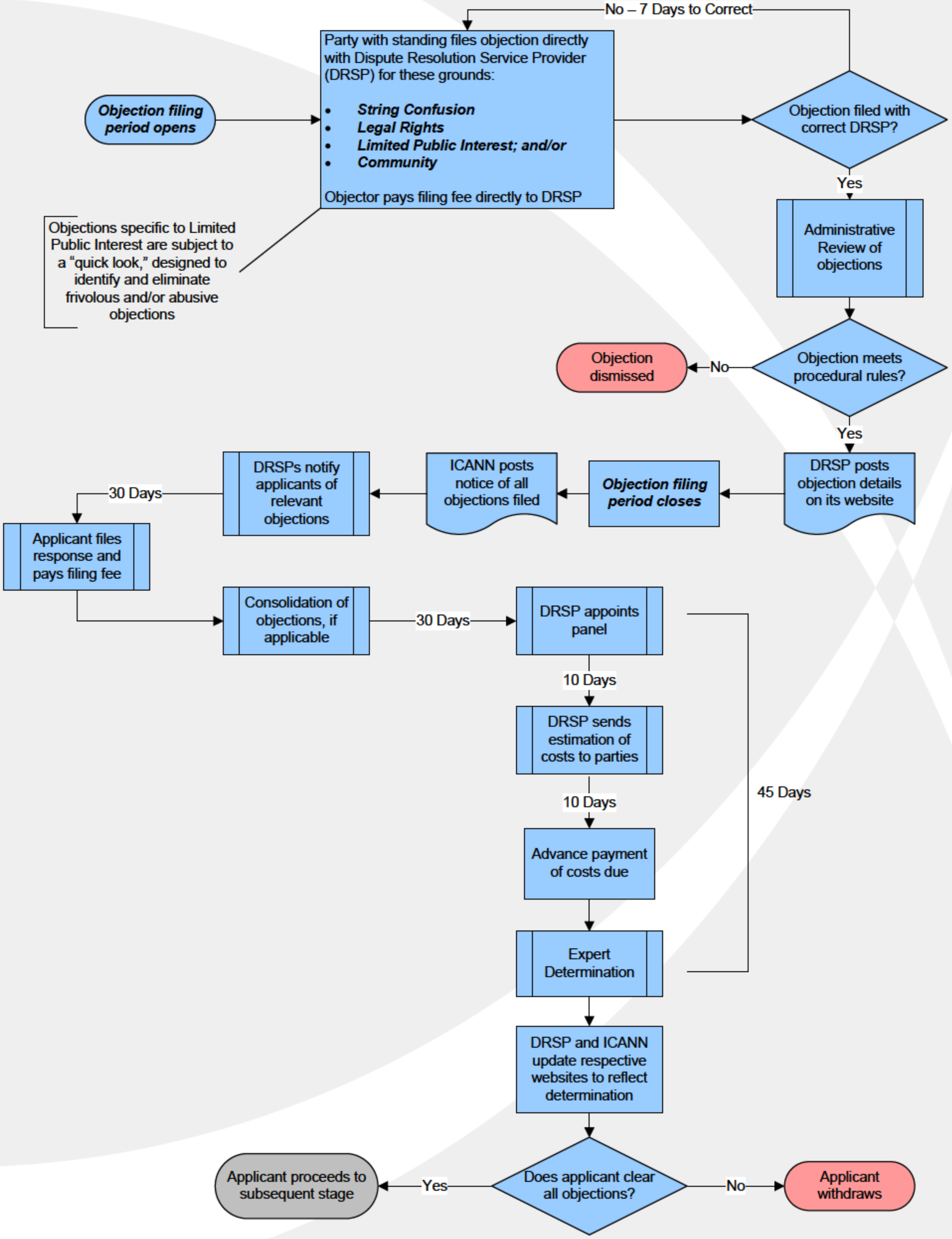
Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

DRAFT - New gTLD Program – Objection and Dispute Resolution



Attachment to Module 3

New gTLD Dispute Resolution Procedure

These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.

NEW GTLD DISPUTE RESOLUTION PROCEDURE

Article 1. ICANN's New gTLD Program

(a) The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a program for the introduction of new generic Top-Level Domain Names ("gTLDs") in the internet. There will be a succession of rounds, during which applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN.

(b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the "Procedure").

(c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

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

Article 2. Definitions

(a) The "Applicant" or "Respondent" is an entity that has applied to ICANN for a new gTLD and that will be the party responding to the Objection.

(b) The "Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted.

(c) The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(d) The "Expert Determination" is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(e) The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:

   (i) "String Confusion Objection" refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.

   (ii) "Existing Legal Rights Objection" refers to the objection that the string comprising the potential new gTLD infringes the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.

(iii) "Limited Public Interest Objection" refers to the objection that the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.

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

(f) "DRSP Rules" are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.

Article 3. Dispute Resolution Service Providers

The various categories of disputes shall be administered by the following DRSPs:

(a) String Confusion Objections shall be administered by the International Centre for Dispute Resolution.

(b) Existing Legal Rights Objections shall be administered by the Arbitration and Mediation Center of the World Intellectual Property Organization.

(c) Limited Public Interest Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

(d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

Article 4. Applicable Rules

(a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.

(b) The applicable DRSP Rules are the following:

(i) For a String Confusion Objection, the applicable DRSP Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.

(ii) For an Existing Legal Rights Objection, the applicable DRSP Rules are the WIPO Rules for New gTLD Dispute Resolution.

(iii) For a Limited Public Interest Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.

(iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.

(c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.

(d) The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.

(e) In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

Article 5. Language

(a) The language of all submissions and proceedings under this Procedure shall be English.

(b) Parties may submit supporting evidence in its original language, provided and subject to the authority of the Panel to determine otherwise, that such evidence is accompanied by a certified or otherwise official English translation of all relevant text.

Article 6. Communications and Time Limits

(a) All communications by the Parties with the DRSPs and Panels must be submitted electronically. A Party that wishes to make a submission that is not available in electronic form (e.g., evidentiary models) shall request leave from the Panel to do so, and the Panel, in its sole discretion, shall determine whether to accept the non-electronic submission.

(b) The DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between the Panel and the DRSP and among the Panel) regarding the proceedings.

(c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day that it is transmitted in accordance with paragraphs (a) and (b) of this Article.

(d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched in accordance with paragraphs (a) and (b) of this Article prior to or on the day of the expiration of the time limit.

(e) For the purpose of calculating a period of time under this Procedure, such period shall begin to run on the day following the day when a notice or other communication is received.

(f) Unless otherwise stated, all time periods provided in the Procedure are calculated on the basis of calendar days

Article 7. Filing of the Objection

(a) A person wishing to object to a new gTLD for which an application has been submitted may file an objection ("Objection"). Any Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.

(b) The Objection must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Applicant.

(c) The electronic addresses for filing Objections (the specific addresses shall be made available once they are created by providers):

  (i) A String Confusion Objection must be filed at: [●].

(ii) An Existing Legal Rights Objection must be filed at: [●].

(iii) A Limited Public Interest Objection must be filed at: [●].

(iv) A Community Objection must be filed at: [●].

(d) All Objections must be filed separately:

(i) An Objector who wishes to object to an application on more than one ground must file separate objections with the appropriate DRSP(s).

(ii) An Objector who wishes to object to more than one gTLD must file separate objections to each gTLD with the appropriate DRSP(s).

(e) If an Objection is filed with the wrong DRSP, that DRSP shall promptly notify the Objector of the error and that DRSP shall not process the incorrectly filed Objection. The Objector may then cure the error by filing its Objection with the correct DRSP within seven (7) days of receipt of the error notice, failing which the Objection shall be disregarded. If the Objection is filed with the correct DRSP within seven (7) days of receipt of the error notice but after the lapse of the time for submitting an Objection stipulation by Article 7(a) of this Procedure, it shall be deemed to be within this time limit.

Article 8. Content of the Objection

(a) The Objection shall contain, *inter alia*, the following information:

(i) The names and contact information (address, telephone number, email address, etc.) of the Objector;

(ii) A statement of the Objector's basis for standing; and

(iii) A description of the basis for the Objection, including:

(aa) A statement of the ground upon which the Objection is being filed, as stated in Article 2(e) of this Procedure;

(bb) An explanation of the validity of the Objection and why the objection should be upheld.

(b) The substantive portion of the Objection shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Objector shall also describe and provide copies of any supporting or official documents upon which the Objection is based.

(c) At the same time as the Objection is filed, the Objector shall pay a filing fee in the amount set in accordance with the applicable DRSP Rules and include evidence of such payment in the Objection. In the event that the filing fee is not paid within ten (10) days of the receipt of the Objection by the DRSP, the Objection shall be dismissed without prejudice.

Article 9. Administrative Review of the Objection

(a) The DRSP shall conduct an administrative review of the Objection for the purpose of verifying compliance with Articles 5-8 of this Procedure and the applicable DRSP Rules, and inform the Objector, the Applicant and ICANN of the result of its review within fourteen (14) days of its receipt of the Objection. The DRSP may extend this time limit for reasons explained in the notification of such extension.

(b) If the DRSP finds that the Objection complies with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall confirm that the Objection shall be registered for processing.

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

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

(e) Immediately upon registering an Objection for processing, pursuant to Article 9(b), the DRSP shall post the following information about the Objection on its website: (i) the proposed string to which the Objection is directed; (ii) the names of the Objector and the Applicant; (ii) the grounds for the Objection; and (iv) the dates of the DRSP's receipt of the Objection.

Article 10. ICANN's Dispute Announcement

(a) Within thirty (30) days of the deadline for filing Objections in relation to gTLD applications in a given round, ICANN shall publish a document on its website identifying all of the admissible Objections that have been filed (the "Dispute Announcement"). ICANN shall also directly inform each DRSP of the posting of the Dispute Announcement.

(b) ICANN shall monitor the progress of all proceedings under this Procedure and shall take steps, where appropriate, to coordinate with any DRSP in relation to individual applications for which objections are pending before more than one DRSP.

Article 11. Response to the Objection

(a) Upon receipt of the Dispute Announcement, each DRSP shall promptly send a notice to: (i) each Applicant for a new gTLD to which one or more admissible Objections have been filed with that DRSP; and (ii) the respective Objector(s).

(b) The Applicant shall file a response to each Objection (the "Response"). The Response shall be filed within thirty (30) days of the transmission of the notice by the DRSP pursuant to Article 11(a).

(c) The Response must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Objector.

(d) The Response shall contain, inter alia, the following information:

(i) The names and contact information (address, telephone number, email address, etc.) of the Applicant; and

(ii) A point-by-point response to the statements made in the Objection.

(e) The substantive portion of the Response shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Applicant shall also describe and provide copies of any supporting or official documents upon which the Response is based.

(f) At the same time as the Response is filed, the Applicant shall pay a filing fee in the amount set and published by the relevant DRSP (which shall be the same as the filing fee paid by the Objector) and include evidence of such payment in the Response. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the DRSP, the Applicant shall be deemed to be in default, any Response disregarded and the Objection shall be deemed successful.

(g) If the DRSP finds that the Response does not comply with Articles 11(c) and (d)(1) of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Response be corrected within five (5) days. If the administrative deficiencies in the Response are cured within the specified period but after the lapse of the time limit for submitting a Response pursuant to this Procedure, the Response shall be deemed to be within this time limit.

(g) If the Applicant fails to file a Response to the Objection within the 30-day time limit, the Applicant shall be deemed to be in default and the Objection shall be deemed successful. No fees paid by the Applicant will be refunded in case of default.

Article 12. Consolidation of Objections

(a) The DRSP is encouraged, whenever possible and practicable, and as may be further stipulated in the applicable DRSP Rules, to consolidate Objections, for example, when more than one Objector has filed an Objection to the same gTLD on the same grounds. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice pursuant to Article 11(a) and, where appropriate, shall inform the parties of the consolidation in that notice.

(b) If the DRSP itself has not decided to consolidate two or more Objections, any Applicant or Objector may propose the consolidation of Objections within seven (7) days of the notice given by the DRSP pursuant to Article 11(a). If, following such a proposal, the DRSP decides to consolidate certain Objections, which decision must be made within 14 days of the notice given by the DRSP pursuant to Article 11(a), the deadline for the Applicant's Response in the consolidated proceeding shall be thirty (30) days from the Applicant's receipt of the DRSP's notice of consolidation.

(c) In deciding whether to consolidate Objections, the DRSP shall weigh the benefits (in terms of time, cost, consistency of decisions, etc.) that may result from the consolidation against the possible prejudice or inconvenience that the consolidation may cause. The DRSP's determination on consolidation shall be final and not subject to appeal.

(d) Objections based upon different grounds, as summarized in Article 2(e), shall not be consolidated.

Article 13. The Panel

(a) The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response.

(b) Number and specific qualifications of Expert(s):

- (i) There shall be one Expert in proceedings involving a String Confusion Objection.
- (ii) There shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection.
- (iii) There shall be three Experts recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector, in proceedings involving a Limited Public Interest Objection.
- (iv) There shall be one Expert in proceedings involving a Community Objection.

(c) All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.

(d) The applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.

(e) Unless required by a court of law or authorized in writing by the parties, an Expert shall not act in any capacity whatsoever, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the matter referred to expert determination under this Procedure.

Article 14. Costs

(a) Each DRSP shall determine the costs for the proceedings that it administers under this Procedure in accordance with the applicable DRSP Rules. Such costs shall cover the fees and expenses of the members of the Panel, as well as the administrative fees of the DRSP (the “Costs”).

(b) Within ten (10) days of constituting the Panel, the DRSP shall estimate the total Costs and request the Objector and the Applicant/Respondent each to pay in advance the full amount of the Costs to the DRSP. Each party shall make its advance payment of Costs within ten (10) days of receiving the DRSP’s request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the Parties shall be credited against the amounts due for this advance payment of Costs.

(c) The DRSP may revise its estimate of the total Costs and request additional advance payments from the parties during the proceedings.

(d) Failure to make an advance payment of Costs:

- (i) If the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that it has paid shall be refunded.

(ii) If the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded.

(e) Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.

Article 15. Representation and Assistance

(a) The parties may be represented or assisted by persons of their choice.

(b) Each party or party representative shall communicate the name, contact information and function of such persons to the DRSP and the other party (or parties in case of consolidation).

Article 16. Negotiation and Mediation

(a) The parties are encouraged, but not required, to participate in negotiations and/or mediation at any time throughout the dispute resolution process aimed at settling their dispute amicably.

(b) Each DRSP shall be able to propose, if requested by the parties, a person who could assist the parties as mediator.

(c) A person who acts as mediator for the parties shall not serve as an Expert in a dispute between the parties under this Procedure or any other proceeding under this Procedure involving the same gTLD.

(d) The conduct of negotiations or mediation shall not, *ipso facto*, be the basis for a suspension of the dispute resolution proceedings or the extension of any deadline under this Procedure. Upon the joint request of the parties, the DRSP or (after it has been constituted) the Panel may grant the extension of a deadline or the suspension of the proceedings. Absent exceptional circumstances, such extension or suspension shall not exceed thirty (30) days and shall not delay the administration of any other Objection.

(e) If, during negotiations and/or mediation, the parties agree on a settlement of the matter referred to the DRSP under this Procedure, the parties shall inform the DRSP, which shall terminate the proceedings, subject to the parties' payment obligation under this Procedure having been satisfied, and inform ICANN and the parties accordingly.

Article 17. Additional Written Submissions

(a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.

(b) The time limits fixed by the Panel for additional written submissions shall not exceed thirty (30) days, unless the Panel, having consulted the DRSP, determines that exceptional circumstances justify a longer time limit.

Article 18. Evidence

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

Article 19. Hearings

(a) Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.

(b) The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.

(c) In the event that the Panel decides to hold a hearing:

  (i) The Panel shall decide how and where the hearing shall be conducted.

  (ii) In order to expedite the proceedings and minimize costs, the hearing shall be conducted by videoconference if possible.

  (iii) The hearing shall be limited to one day, unless the Panel decides, in exceptional circumstances, that more than one day is required for the hearing.

  (iv) The Panel shall decide whether the hearing will be open to the public or conducted in private.

Article 20. Standards

(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

Article 21. The Expert Determination

(a) The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.

(b) The Panel shall submit its Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP Rules. The modifications proposed by the DRSP to the Panel, if any, shall address only the form of the Expert Determination. The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.

(c) When the Panel comprises three Experts, the Expert Determination shall be made by a majority of the Experts.

(d) The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.

(e) The Expert Determination shall state the date when it is made, and it shall be signed by the Expert(s). If any Expert fails to sign the Expert Determination, it shall be accompanied by a statement of the reason for the absence of such signature.

(f) In addition to providing electronic copies of its Expert Determination, the Panel shall provide a signed hard copy of the Expert Determination to the DRSP, unless the DRSP Rules provide for otherwise.

(g) Unless the Panel decides otherwise, the Expert Determination shall be published in full on the DRSP's website.

Article 22. Exclusion of Liability

In addition to any exclusion of liability stipulated by the applicable DRSP Rules, neither the Expert(s), nor the DRSP and its employees, nor ICANN and its Board members, employees and consultants shall be liable to any person for any act or omission in connection with any proceeding conducted under this Procedure.

Article 23. Modification of the Procedure

(a) ICANN may from time to time, in accordance with its Bylaws, modify this Procedure.

(b) The version of this Procedure that is applicable to a dispute resolution proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.

ICANN

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 4

4 June 2012

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. That is, two or more applicants whose applied-for strings or designated variants are variant strings according to an IDN table submitted to ICANN would be considered in direct contention with one another. For example, if one applicant applies for string A and another applies for string B, and strings A and B are variant TLD strings as defined in Module 1, then the two applications are in direct contention.

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or similar to one another. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. The example that follows explains direct and indirect contention in greater detail.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

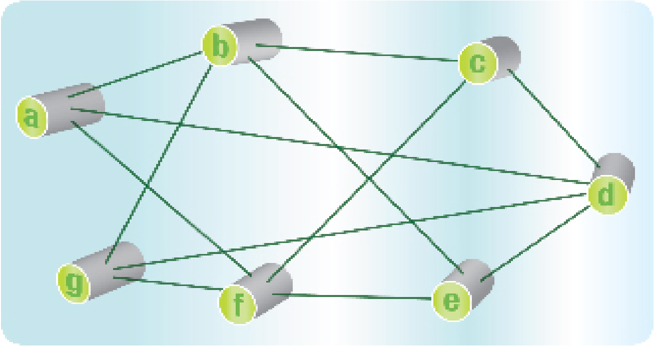


Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While preliminary contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process stages have concluded. This is because any application excluded through those processes might modify a contention set identified earlier.

A contention set may be augmented, split into two sets, or eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding. The composition of a contention set may also be modified as some applications may be voluntarily withdrawn throughout the process.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

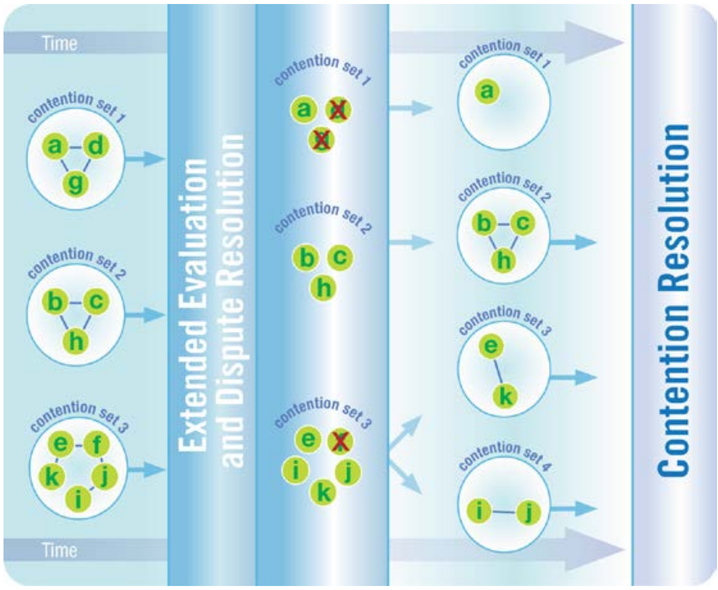


Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through community priority evaluation or by other means, depending on the circumstances. In the string contention resolution stage, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

4.1.2 Impact of String Confusion Dispute Resolution Proceedings on Contention Sets

If an applicant files a string confusion objection against another application (refer to Module 3), and the panel finds that user confusion is probable (that is, finds in favor of the objector), the two applications will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would be a new contention set structure for the relevant applications, augmenting the original contention set.

If an applicant files a string confusion objection against another application, and the panel finds that string confusion does not exist (that is, finds in favor of the responding applicant), the two applications will not be considered in direct contention with one another.

A dispute resolution outcome in the case of a string confusion objection filed by another applicant will not result in removal of an application from a previously established contention set.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.

4.1.4 Possible Contention Resolution Outcomes

An application that has successfully completed all previous stages and is no longer part of a contention set due to changes in the composition of the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.

In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not in contention with A. If A wins the contention resolution procedure, B is eliminated but C can proceed since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Community Priority Evaluation

Community priority evaluation will only occur if a community-based applicant selects this option. Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.

The community priority evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the community priority evaluation. Each application participating in the community priority evaluation begins with a score of zero.

4.2.1 Eligibility for Community Priority Evaluation

As described in subsection 1.2.3 of Module 1, all applicants are required to identify whether their application type is:

- Community-based; or
- Standard.

Applicants designating their applications as community-based are also asked to respond to a set of questions in the application form to provide relevant information if a community priority evaluation occurs.

Only community-based applicants are eligible to participate in a community priority evaluation.

At the start of the contention resolution stage, all community-based applicants within remaining contention sets will be notified of the opportunity to opt for a community priority evaluation via submission of a deposit by a specified date. Only those applications for which a deposit has been received by the deadline will be scored in the community priority evaluation. Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.

Before the community priority evaluation begins, the applicants who have elected to participate may be asked to provide additional information relevant to the community priority evaluation.

4.2.2 Community Priority Evaluation Procedure

Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications. The panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard applicants within the contention set, if any, will not participate in the community priority evaluation.

If a single community-based application is found to meet the community priority criteria (see subsection 4.2.3 below), that applicant will be declared to prevail in the community priority evaluation and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as follows:

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.

If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

4.2.3 Community Priority Evaluation Criteria

The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring 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 get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

It should be noted that a qualified community application 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 below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.

The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any "double-counting" - any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

Criterion #1: Community Establishment (0-4 points)

A maximum of 4 points is possible on the Community Establishment criterion:

4	3	2	1	0
Community Establishment				

High ←——————→ Low

As measured by:

A. Delineation (2)

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. Extension (2)

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Criterion 1 Definitions

- "Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.
- "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.
- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.
- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.
- "Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

Criterion 1 Guidelines

With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

Criterion #2: Nexus between Proposed String and Community (0-4 points)

A maximum of 4 points is possible on the Nexus criterion:

4	3	2	1	0
Nexus between String & Community				

High ←→ Low

As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0
name.		

B. Uniqueness (1)

1	0
String has no other significant meaning beyond identifying the community described in the application.	String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

Criterion 2 Definitions

- "Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.
- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

Criterion 2 Guidelines

With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.

With respect to "Uniqueness," "significant meaning" relates to the public in general, with consideration of the community language context added.

"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:

<table>
<tr><th>4</th><th>3</th><th>2</th><th>1</th><th>0</th></tr>
<tr><td colspan="5">Registration Policies</td></tr>
</table>

High ←——→ Low

As measured by:

A. Eligibility (1)

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.

B. Name selection (1)

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. Content and use (1)

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. Enforcement (1)

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Criterion 3 Definitions

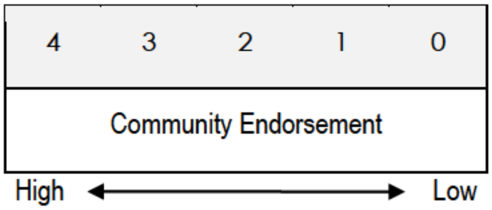
- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.
- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

Criterion 3 Guidelines

With respect to “Eligibility,” the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to “Name selection,” “Content and use,” and “Enforcement,” scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Criterion #4: Community Endorsement (0-4 points)



As measured by:

A. Support (2)

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

B. Opposition (2)

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

Criterion 4 Definitions

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

Criterion 4 Guidelines

With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.[1]

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[1] The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

4.3.1 Auction Procedures

An auction of two or more applications within a contention set is conducted as follows. The auctioneer successively increases the prices associated with applications within the contention set, and the respective applicants indicate their willingness to pay these prices. As the prices rise, applicants will successively choose to exit from the auction. When a sufficient number of applications have been eliminated so that no direct contentions remain (i.e., the remaining applications are no longer in contention with one another and all the relevant strings can be delegated as TLDs), the auction will be deemed to conclude. At the auction's conclusion, the applicants with remaining applications will pay the resulting prices and proceed toward delegation. This procedure is referred to as an "ascending-clock auction."

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. The detailed set of Auction Rules will be available prior to the commencement of any auction proceedings. If any conflict arises between this module and the auction rules, the auction rules will prevail.

For simplicity, this section will describe the situation where a contention set consists of two or more applications for identical strings.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described

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The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.

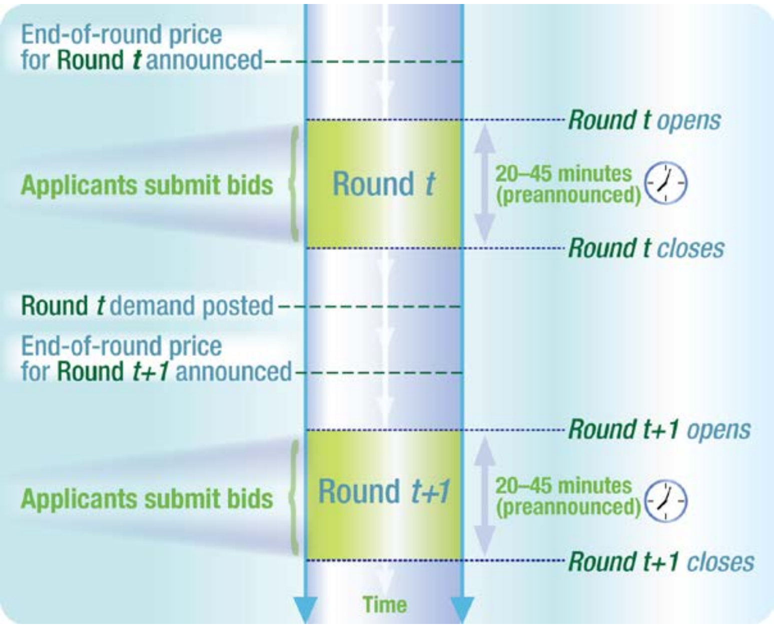

Figure 4-3 – Sequence of events during an ascending-clock auction.

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.

3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.

5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.

6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.

7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.

    - Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.

    - If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.

    - If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.

    - To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.

- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round. That is, once an application has exited the auction, it may not return.

- If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.

8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.

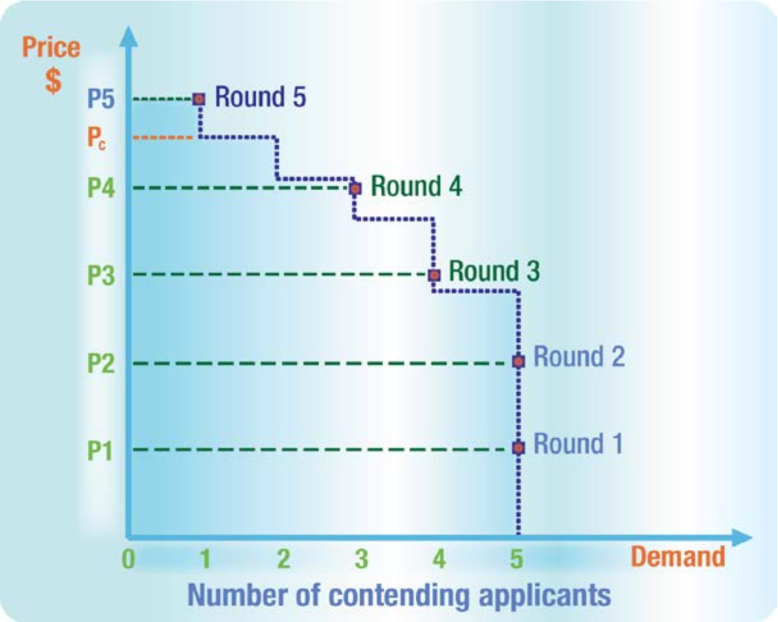

Figure 4-4 – Example of an auction for five mutually-contending applications.

- Before the first auction round, the auctioneer announces the end-of-round price P_1.
- During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_1. Since the aggregate demand exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at P_1 and announces the end-of-round price P_2.
- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_2. The auctioneer discloses that five contending applications remained at P_2 and announces the end-of-round price P_3.
- During Auction round 3, one of the bidders submits an exit bid at slightly below P_3, while the other four bidders submit bids of at least P_3. The auctioneer discloses that four contending applications remained at P_3 and announces the end-of-round price P_4.
- During Auction round 4, one of the bidders submits an exit bid midway between P_3 and P_4, while the other three remaining bidders submit bids of at least P_4. The auctioneer discloses that three contending applications remained at P_4 and announces the end-of-auction round price P_5.
- During Auction round 5, one of the bidders submits an exit bid at slightly above P_4, and one of the bidders submits an exit bid at P_c midway between P_4 and P_5. The final bidder submits a bid greater than P_c. Since the aggregate demand at P_5 does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is P_c, as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations will be conducted simultaneously.

4.3.1.1 Currency

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

4.3.1.2 Fees

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined. The bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank, to be received in advance of the auction date. The amount of the deposit will determine a bidding limit for each bidder: the bidding deposit will equal 10% of the bidding limit; and the bidder will not be permitted to submit any bid in excess of its bidding limit.

In order to avoid the need for bidders to pre-commit to a particular bidding limit, bidders may be given the option of making a specified deposit that will provide them with unlimited bidding authority for a given application. The amount of the deposit required for unlimited bidding authority will depend on the particular contention set and will be based on an assessment of the possible final prices within the auction.

All deposits from non-defaulting losing bidders will be returned following the close of the auction.

4.3.2 Winning Bid Payments

Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN—together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement.

The winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

In the event that a bidder anticipates that it would require a longer payment period than 20 business days due to verifiable government-imposed currency restrictions, the bidder may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all bidders within the same contention set.

Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

4.3.3 Post-Default Procedures

Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price. The same default procedures and penalties are in place for any runner-up bidder receiving such an offer.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 20 business days to submit its full payment. A bidder who declines such an offer cannot revert on that statement, has no further obligations in this context and will not be considered in default.

The penalty for defaulting on a winning bid will equal 10% of the defaulting bid.[2] Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned.

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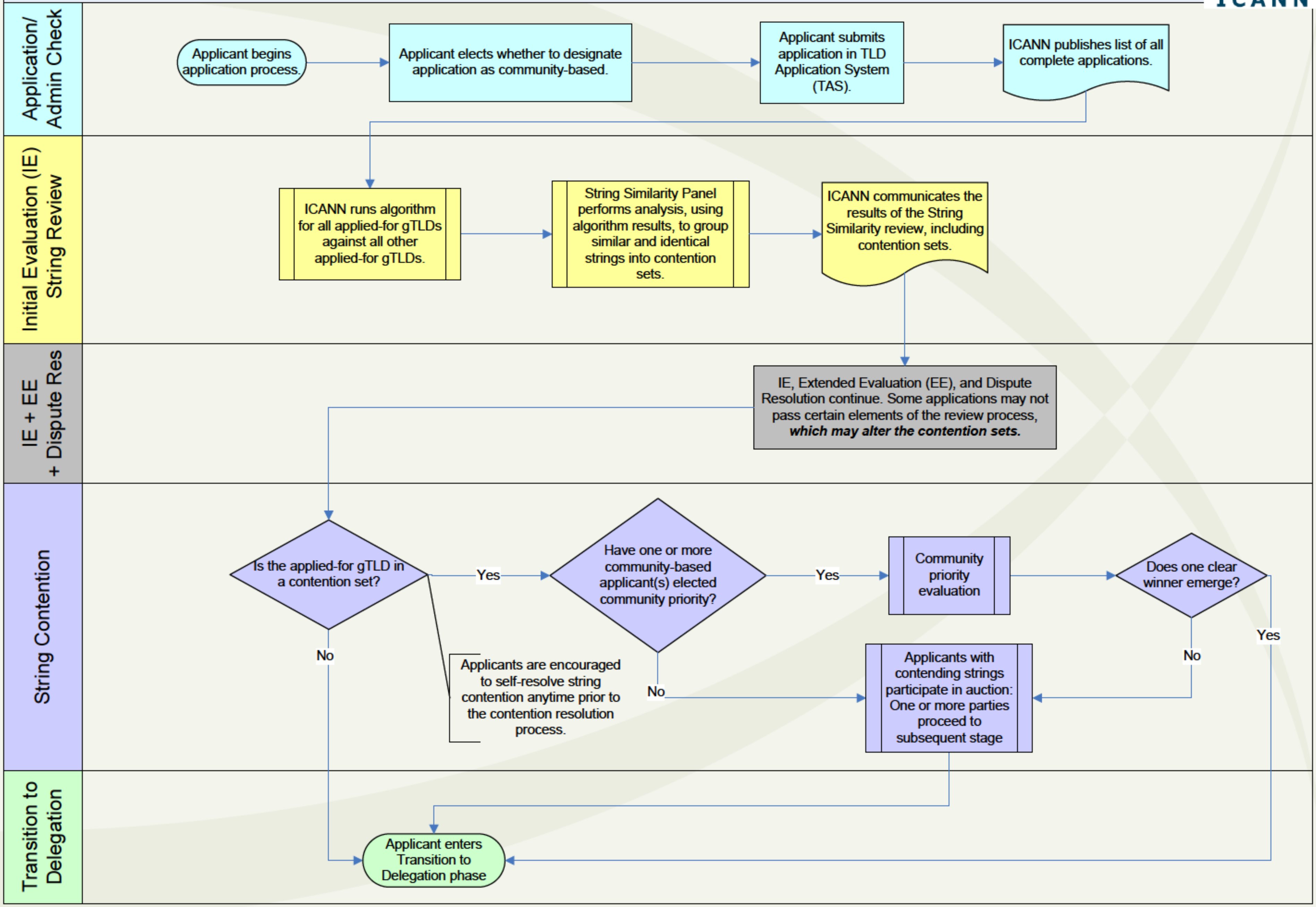
[2] If bidders were given the option of making a specified deposit that provided them with unlimited bidding authority for a given application and if the winning bidder utilized this option, then the penalty for defaulting on a winning bid will be the lesser of the following: (1) 10% of the defaulting bid, or (2) the specified deposit amount that provided the bidder with unlimited bidding authority.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step. (Refer to section 5.1 of Module 5.)

If a winner of the contention resolution procedure has not executed a contract within 90 calendar days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time. If the winning applicant can demonstrate that it is working diligently and in good faith toward successful completion of the steps necessary for entry into the registry agreement, ICANN may extend the 90-day period at its discretion. Runner-up applicants have no claim of priority over the winning application, even after what might be an extended period of negotiation.

DRAFT - New gTLD Program - String Contention



Application/ Admin Check

Applicant begins application process.

Applicant elects whether to designate application as community-based.

Applicant submits application in TLD Application System (TAS).

ICANN publishes list of all complete applications.

Initial Evaluation (IE) String Review

ICANN runs algorithm for all applied-for gTLDs against all other applied-for gTLDs.

String Similarity Panel performs analysis, using algorithm results, to group similar and identical strings into contention sets.

ICANN communicates the results of the String Similarity review, including contention sets.

IE + EE + Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, ***which may alter the contention sets.***

String Contention

Is the applied-for gTLD in a contention set?

Yes

Have one or more community-based applicant(s) elected community priority?

Yes

Community priority evaluation

Does one clear winner emerge?

Yes

No

No

No

Applicants are encouraged to self-resolve string contention anytime prior to the contention resolution process.

Applicants with contending strings participate in auction: One or more parties proceed to subsequent stage

Transition to Delegation

Applicant enters Transition to Delegation phase

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 5

4 June 2012

Module 5

Transition to Delegation

This module describes the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.

5.1 Registry Agreement

All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN before proceeding to delegation.

After the close of each stage in the process, ICANN will send a notification to those successful applicants that are eligible for execution of a registry agreement at that time.

To proceed, applicants will be asked to provide specified information for purposes of executing the registry agreement:

1. Documentation of the applicant's continued operations instrument (see Specification 8 to the agreement).

2. Confirmation of contact information and signatory to the agreement.

3. Notice of any material changes requested to the terms of the agreement.

4. The applicant must report: (i) any ownership interest it holds in any registrar or reseller of registered names, (ii) if known, any ownership interest that a registrar or reseller of registered names holds in the applicant, and (iii) if the applicant controls, is controlled by, or is under common control with any registrar or reseller of registered names. ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership

> arrangements might raise competition issues. For this purpose "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit additional updated documentation and information before entering into the registry agreement.

ICANN will begin processing registry agreements one month after the date of the notification to successful applicants. Requests will be handled in the order the complete information is received.

Generally, the process will include formal approval of the agreement without requiring additional Board review, so long as: the application passed all evaluation criteria; there are no material changes in circumstances; and there are no material changes to the base agreement. There may be other cases where the Board requests review of an application.

Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion. An applicant may request an extension of this time period for up to an additional nine (9) months if it can demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement.

The registry agreement can be reviewed in the attachment to this module. Certain provisions in the agreement are labeled as applicable to governmental and intergovernmental entities only. Private entities, even if supported by a government or IGO, would not ordinarily be eligible for these special provisions.

All successful applicants are expected to enter into the agreement substantially as written. Applicants may request and negotiate terms by exception; however, this extends the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement.

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

5.2 Pre-Delegation Testing

Each applicant will be required to complete pre-delegation technical testing as a prerequisite to delegation into the root zone. This pre-delegation test must be completed within the time period specified in the registry agreement.

The purpose of the pre-delegation technical test is to verify that the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described in Module 2.

The test is also intended to indicate that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the requirements that follow.

The test elements cover both the DNS server operational infrastructure and registry system operations. In many cases the applicant will perform the test elements as instructed and provide documentation of the results to ICANN to demonstrate satisfactory performance. At ICANN's discretion, aspects of the applicant's self-certification documentation can be audited either on-site at the services delivery point of the registry or elsewhere as determined by ICANN.

5.2.1 Testing Procedures

The applicant may initiate the pre-delegation test by submitting to ICANN the Pre-Delegation form and accompanying documents containing all of the following information:

- All name server names and IPv4/IPv6 addresses to be used in serving the new TLD data;
- If using anycast, the list of names and IPv4/IPv6 unicast addresses allowing the identification of each individual server in the anycast sets;
- If IDN is supported, the complete IDN tables used in the registry system;
- A test zone for the new TLD must be signed at test time and the valid key-set to be used at the time of testing must be provided to ICANN in the documentation, as well as the TLD DNSSEC Policy Statement (DPS);
- The executed agreement between the selected escrow agent and the applicant; and
- Self-certification documentation as described below for each test item.

ICANN will review the material submitted and in some cases perform tests in addition to those conducted by the applicant. After testing, ICANN will assemble a report with the outcome of the tests and provide that report to the applicant.

Any clarification request, additional information request, or other request generated in the process will be highlighted and listed in the report sent to the applicant.

ICANN may request the applicant to complete load tests considering an aggregated load where a single entity is performing registry services for multiple TLDs.

Once an applicant has met all of the pre-delegation testing requirements, it is eligible to request delegation of its applied-for gTLD.

If an applicant does not complete the pre-delegation steps within the time period specified in the registry agreement, ICANN reserves the right to terminate the registry agreement.

5.2.2 Test Elements: DNS Infrastructure

The first set of test elements concerns the DNS infrastructure of the new gTLD. In all tests of the DNS infrastructure, all requirements are independent of whether IPv4 or IPv6 is used. All tests shall be done both over IPv4 and IPv6, with reports providing results according to both protocols.

UDP Support -- The DNS infrastructure to which these tests apply comprises the complete set of servers and network infrastructure to be used by the chosen providers to deliver DNS service for the new gTLD to the Internet. The documentation provided by the applicant must include the results from a system performance test indicating available network and server capacity and an estimate of expected capacity during normal operation to ensure stable service as well as to adequately address Distributed Denial of Service (DDoS) attacks.

Self-certification documentation shall include data on load capacity, latency and network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries responded against an increasing number of queries per second generated from local (to the servers) traffic generators. The table shall include at least 20 data points and loads of UDP-based queries that will cause up to 10% query loss against a randomly selected subset of servers within the applicant's DNS infrastructure. Responses must either contain zone data or be NXDOMAIN or NODATA responses to be considered valid.

Query latency shall be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing information on the transit and peering arrangements for the DNS server locations, listing the AS numbers of the transit providers or peers at each point of presence and available bandwidth at those points of presence.

TCP support -- TCP transport service for DNS queries and responses must be enabled and provisioned for expected load. ICANN will review the capacity self-certification documentation provided by the applicant and will perform TCP reachability and transaction capability tests across a randomly selected subset of the name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Self-certification documentation shall include data on load capacity, latency and external network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries that generated a valid (zone data, NODATA, or NXDOMAIN) response against an increasing number of queries per second generated from local (to the name servers) traffic generators. The table shall include at least 20 data points and loads that will cause up to 10% query loss (either due to connection timeout or connection reset) against a randomly selected subset of servers within the applicant's DNS infrastructure.

Query latency will be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing records of TCP-based DNS queries from nodes external to the network hosting the servers. These locations may be the same as those used for measuring latency above.

DNSSEC support -- Applicant must demonstrate support for EDNS(0) in its server infrastructure, the ability to return correct DNSSEC-related resource records such as DNSKEY, RRSIG, and NSEC/NSEC3 for the signed zone, and the ability to accept and publish DS resource records from second-level domain administrators. In particular, the applicant must demonstrate its ability to support the full life cycle of KSK and ZSK keys. ICANN will review the self-certification materials as well as test the reachability, response sizes, and DNS transaction capacity for DNS queries using the EDNS(0) protocol extension with the "DNSSEC OK" bit set for a randomly selected subset of all name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Load capacity, query latency, and reachability shall be documented as for UDP and TCP above.

5.2.3 Test Elements: Registry Systems

As documented in the registry agreement, registries must provide support for EPP within their Shared Registration System, and provide Whois service both via port 43 and a web interface, in addition to support for the DNS. This section details the requirements for testing these registry systems.

System performance -- The registry system must scale to meet the performance requirements described in Specification 10 of the registry agreement and ICANN will require self-certification of compliance. ICANN will review the self-certification documentation provided by the applicant to verify adherence to these minimum requirements.

Whois support -- Applicant must provision Whois services for the anticipated load. ICANN will verify that Whois data is accessible over IPv4 and IPv6 via both TCP port 43 and via a web interface and review self-certification documentation regarding Whois transaction capacity. Response format according to Specification 4 of the registry agreement and access to Whois (both port 43 and via web) will be tested by ICANN remotely from various points on the Internet over both IPv4 and IPv6.

Self-certification documents shall describe the maximum number of queries per second successfully handled by both the port 43 servers as well as the web interface, together with an applicant-provided load expectation.

Additionally, a description of deployed control functions to detect and mitigate data mining of the Whois database shall be documented.

EPP Support -- As part of a shared registration service, applicant must provision EPP services for the anticipated load. ICANN will verify conformance to appropriate RFCs (including EPP extensions for DNSSEC). ICANN will also review self-certification documentation regarding EPP transaction capacity.

Documentation shall provide a maximum Transaction per Second rate for the EPP interface with 10 data points corresponding to registry database sizes from 0 (empty) to the expected size after one year of operation, as determined by applicant.

Documentation shall also describe measures taken to handle load during initial registry operations, such as a land-rush period.

IPv6 support -- The ability of the registry to support registrars adding, changing, and removing IPv6 DNS records supplied by registrants will be tested by ICANN. If the registry supports EPP access via IPv6, this will be tested by ICANN remotely from various points on the Internet.

DNSSEC support -- ICANN will review the ability of the registry to support registrars adding, changing, and removing DNSSEC-related resource records as well as the registry's overall key management procedures. In particular, the applicant must demonstrate its ability to support the full life cycle of key changes for child domains. Inter-operation of the applicant's secure communication channels with the IANA for trust anchor material exchange will be verified.

The practice and policy document (also known as the DNSSEC Policy Statement or DPS), describing key material storage, access and usage for its own keys is also reviewed as part of this step.

IDN support -- ICANN will verify the complete IDN table(s) used in the registry system. The table(s) must comply with the guidelines in http://iana.org/procedures/idn-repository.html.

Requirements related to IDN for Whois are being developed. After these requirements are developed, prospective registries will be expected to comply with published IDN-related Whois requirements as part of pre-delegation testing.

Escrow deposit -- The applicant-provided samples of data deposit that include both a full and an incremental deposit showing correct type and formatting of content will be reviewed. Special attention will be given to the agreement with the escrow provider to ensure that escrowed data can be released within 24 hours should it be necessary. ICANN may, at its option, ask an independent third party to demonstrate the reconstitutability of the registry from escrowed data. ICANN may elect to test the data release process with the escrow agent.

5.3 Delegation Process

Upon notice of successful completion of the ICANN pre-delegation testing, applicants may initiate the process for delegation of the new gTLD into the root zone database.

This will include provision of additional information and completion of additional technical steps required for delegation. Information about the delegation process is available at http://iana.org/domains/root/.

5.4 Ongoing Operations

An applicant that is successfully delegated a gTLD will become a "Registry Operator." In being delegated the role of operating part of the Internet's domain name system, the applicant will be assuming a number of significant responsibilities. ICANN will hold all new gTLD operators accountable for the performance of their obligations under the registry agreement, and it is important that all applicants understand these responsibilities.

5.4.1 What is Expected of a Registry Operator

The registry agreement defines the obligations of gTLD registry operators. A breach of the registry operator's obligations may result in ICANN compliance actions up to and including termination of the registry agreement. Prospective applicants are encouraged to review the following brief description of some of these responsibilities.

Note that this is a non-exhaustive list provided to potential applicants as an introduction to the responsibilities of a registry operator. For the complete and authoritative text, please refer to the registry agreement.

A registry operator is obligated to:

Operate the TLD in a stable and secure manner. The registry operator is responsible for the entire technical operation of the TLD. As noted in RFC 1591[1]:

"The designated manager must do a satisfactory job of operating the DNS service for the domain. That is, the actual management of the assigning of domain names, delegating subdomains and operating nameservers must be done with technical competence. This includes keeping

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[1] See http://www.rfc-editor.org/rfc/rfc1591.txt

the central IR[2] (in the case of top-level domains) or other higher-level domain manager advised of the status of the domain, responding to requests in a timely manner, and operating the database with accuracy, robustness, and resilience."

The registry operator is required to comply with relevant technical standards in the form of RFCs and other guidelines. Additionally, the registry operator must meet performance specifications in areas such as system downtime and system response times (see Specifications 6 and 10 of the registry agreement).

***Comply with consensus policies and temporary policies*.** gTLD registry operators are required to comply with consensus policies. Consensus policies may relate to a range of topics such as issues affecting interoperability of the DNS, registry functional and performance specifications, database security and stability, or resolution of disputes over registration of domain names.

To be adopted as a consensus policy, a policy must be developed by the Generic Names Supporting Organization (GNSO)[3] following the process in Annex A of the ICANN Bylaws.[4] The policy development process involves deliberation and collaboration by the various stakeholder groups participating in the process, with multiple opportunities for input and comment by the public, and can take significant time.

Examples of existing consensus policies are the Inter-Registrar Transfer Policy (governing transfers of domain names between registrars), and the Registry Services Evaluation Policy (establishing a review of proposed new registry services for security and stability or competition concerns), although there are several more, as found at http://www.icann.org/en/general/consensus-policies.htm.

gTLD registry operators are obligated to comply with both existing consensus policies and those that are developed in the future. Once a consensus policy has been formally adopted, ICANN will provide gTLD registry operators with notice of the requirement to implement the new policy and the effective date.

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[2] IR is a historical reference to "Internet Registry," a function now performed by ICANN.

[3] http://gnso.icann.org

[4] http://www.icann.org/en/general/bylaws.htm#AnnexA

In addition, the ICANN Board may, when required by circumstances, establish a temporary policy necessary to maintain the stability or security of registry services or the DNS. In such a case, all gTLD registry operators will be required to comply with the temporary policy for the designated period of time.

For more information, see Specification 1 of the registry agreement.

Implement start-up rights protection measures. The registry operator must implement, at a minimum, a Sunrise period and a Trademark Claims service during the start-up phases for registration in the TLD, as provided in the registry agreement. These mechanisms will be supported by the established Trademark Clearinghouse as indicated by ICANN.

The Sunrise period allows eligible rightsholders an early opportunity to register names in the TLD.

The Trademark Claims service provides notice to potential registrants of existing trademark rights, as well as notice to rightsholders of relevant names registered. Registry operators may continue offering the Trademark Claims service after the relevant start-up phases have concluded.

For more information, see Specification 7 of the registry agreement and the Trademark Clearinghouse model accompanying this module.

Implement post-launch rights protection measures. The registry operator is required to implement decisions made under the Uniform Rapid Suspension (URS) procedure, including suspension of specific domain names within the registry. The registry operator is also required to comply with and implement decisions made according to the Trademark Post-Delegation Dispute Resolution Policy (PDDRP).

The required measures are described fully in the URS and PDDRP procedures accompanying this module. Registry operators may introduce additional rights protection measures relevant to the particular gTLD.

Implement measures for protection of country and territory names in the new gTLD. All new gTLD registry operators are required to provide certain minimum protections for country and territory names, including an initial reservation requirement and establishment of applicable rules and procedures for release of these names. The rules for release can be developed or agreed to by governments, the GAC, and/or approved by ICANN after a community discussion. Registry operators are encouraged to implement measures for protection of geographical names in addition to those required by the agreement, according to the needs and interests of each gTLD's particular circumstances. (See Specification 5 of the registry agreement).

Pay recurring fees to ICANN. In addition to supporting expenditures made to accomplish the objectives set out in ICANN's mission statement, these funds enable the support required for new gTLDs, including: contractual compliance, registry liaison, increased registrar accreditations, and other registry support activities. The fees include both a fixed component (USD 25,000 annually) and, where the TLD exceeds a transaction volume, a variable fee based on transaction volume. See Article 6 of the registry agreement.

Regularly deposit data into escrow. This serves an important role in registrant protection and continuity for certain instances where the registry or one aspect of the registry operations experiences a system failure or loss of data. (See Specification 2 of the registry agreement.)

Deliver monthly reports in a timely manner. A registry operator must submit a report to ICANN on a monthly basis. The report includes registrar transactions for the month and is used by ICANN for calculation of registrar fees. (See Specification 3 of the registry agreement.)

Provide Whois service. A registry operator must provide a publicly available Whois service for registered domain names in the TLD. (See Specification 4 of the registry agreement.)

Maintain partnerships with ICANN-accredited registrars. A registry operator creates a Registry-Registrar Agreement (RRA) to define requirements for its registrars. This must include certain terms that are specified in the Registry Agreement, and may include additional terms specific to the TLD. A registry operator must provide non-discriminatory access to its registry services to all ICANN-accredited registrars with whom it has entered into an RRA, and who are in compliance with the requirements. This includes providing advance notice of pricing changes to all registrars, in compliance with the time frames specified in the agreement. (See Article 2 of the registry agreement.)

Maintain an abuse point of contact*.* A registry operator must maintain and publish on its website a single point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller. A registry operator must also take reasonable steps to investigate and respond to any reports from law enforcement, governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. (See Article 2 and Specification 6 of the registry agreement.)

Cooperate with contractual compliance audits*.* To maintain a level playing field and a consistent operating environment, ICANN staff performs periodic audits to assess contractual compliance and address any resulting problems. A registry operator must provide documents and information requested by ICANN that are necessary to perform such audits. (See Article 2 of the registry agreement.)

Maintain a Continued Operations Instrument. A registry operator must, at the time of the agreement, have in place a continued operations instrument sufficient to fund basic registry operations for a period of three (3) years. This requirement remains in place for five (5) years after delegation of the TLD, after which time the registry operator is no longer required to maintain the continued operations instrument. (See Specification 8 to the registry agreement.)

Maintain community-based policies and procedures*.* If the registry operator designated its application as community-based at the time of the application, the registry operator has requirements in its registry agreement to maintain the community-based policies and procedures it specified in its application. The registry operator is bound by the Registry Restrictions Dispute Resolution Procedure with respect to disputes regarding execution of its community-based policies and procedures. (See Article 2 to the registry agreement.)

Have continuity and transition plans in place. This includes performing failover testing on a regular basis. In the event that a transition to a new registry operator becomes necessary, the registry operator is expected to cooperate by consulting with ICANN on the appropriate successor, providing the data required to enable a smooth transition, and complying with the applicable registry transition procedures. (See Articles 2 and 4 of the registry agreement.)

Make TLD zone files available via a standardized process. This includes provision of access to the registry's zone file to credentialed users, according to established access, file, and format standards. The registry operator will enter into a standardized form of agreement with zone file users and will accept credential information for users via a clearinghouse. (See Specification 4 of the registry agreement.)

Implement DNSSEC. The registry operator is required to sign the TLD zone files implementing Domain Name System Security Extensions (DNSSEC) in accordance with the relevant technical standards. The registry must accept public key material from registrars for domain names registered in the TLD, and publish a DNSSEC Policy Statement describing key material storage, access, and usage for the registry's keys. (See Specification 6 of the registry agreement.)

5.4.2 What is Expected of ICANN

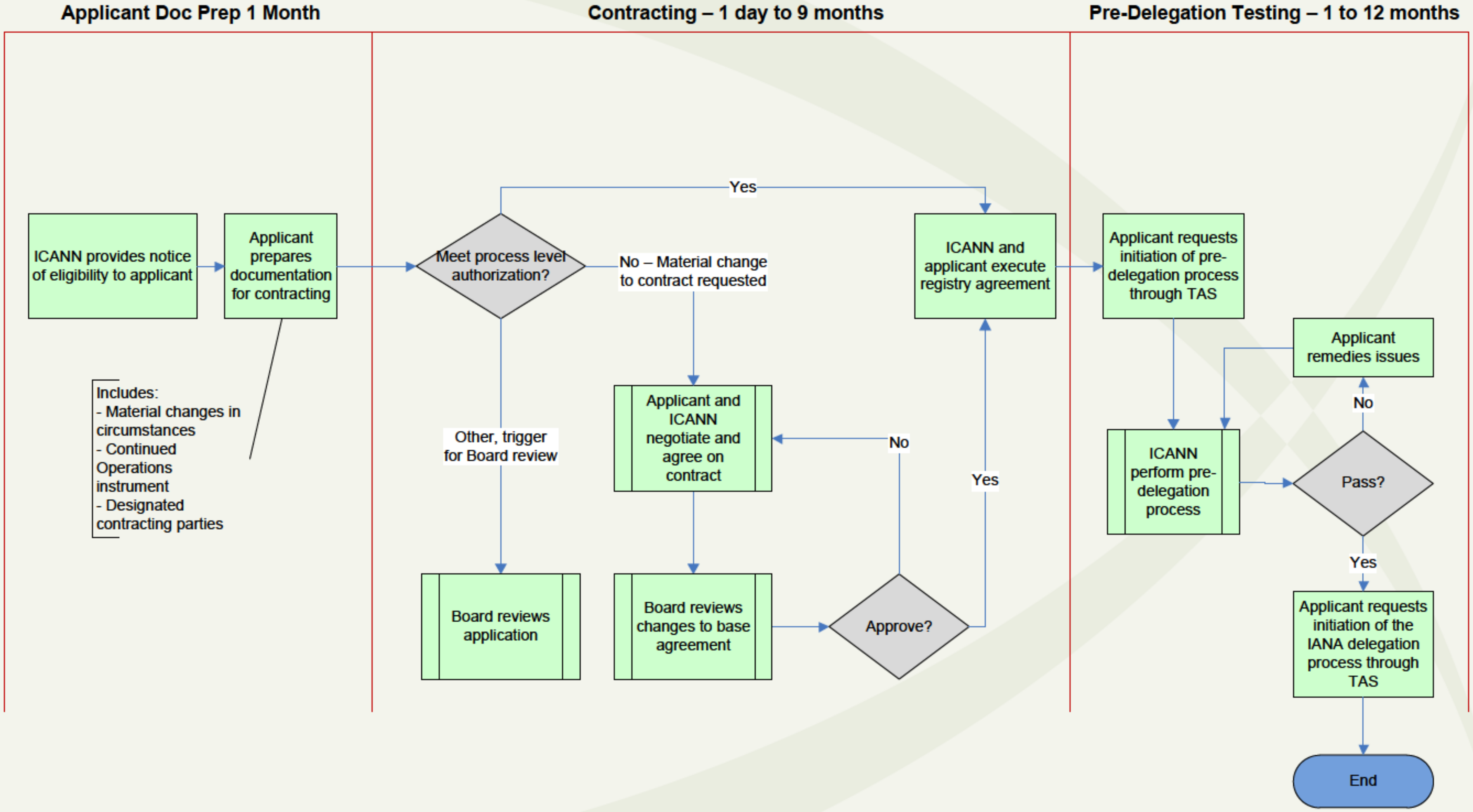
ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

ICANN's contractual compliance function will perform audits on a regular basis to ensure that gTLD registry operators remain in compliance with agreement obligations, as well as investigate any complaints from the community regarding the registry operator's adherence to its contractual obligations. See http://www.icann.org/en/compliance/ for more information on current contractual compliance activities.

ICANN's Bylaws require ICANN to act in an open and transparent manner, and to provide equitable treatment among registry operators. ICANN is responsible for maintaining the security and stability of the global Internet, and looks forward to a constructive and cooperative relationship with future gTLD registry operators in furtherance of this goal.

Draft – New gTLD Program - Transition to Delegation

(Timeframes are estimates only)



New gTLD Agreement

This document contains the registry agreement associated with the Applicant Guidebook for New gTLDs.

Successful gTLD applicants would enter into this form of registry agreement with ICANN prior to delegation of the new gTLD. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process).

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this “Agreement”) is entered into as of ___________ (the “Effective Date”) between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“ICANN”), and __________, a _____________ (“Registry Operator”).

ARTICLE 1.

DELEGATION AND OPERATION OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.1 Domain and Designation. The Top-Level Domain to which this Agreement applies is ____ (the “TLD”). Upon the Effective Date and until the end of the Term (as defined in Section 4.1), ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

1.2 Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

1.3 Representations and Warranties.

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the “Continued Operations Instrument”), and such instrument is a binding obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1 Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the specification at [*see specification 6*] ("Specification 6") and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

2.2 Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]* ("Specification 1").

2.3 Data Escrow. Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]*.

2.4 Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted in the specification at [*see specification 3*]*.

2.5 Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]* ("Specification 4").

2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth at [*see specification 5*]* ("Specification 5"). Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7 Registry Interoperability and Continuity. Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6.

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

2.8 Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

2.9 Registrars.

(a) Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided, that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD. Such agreement may be revised by Registry Operator from time to time; provided, however, that any such revisions must be approved in advance by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will not disclose such contracts to any third party other than relevant competition authorities. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.

(c) For the purposes of this Agreement: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

2.10 Pricing for Registry Services.

(a) With respect to initial domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited

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duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations (“Renewal Pricing”). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a “Qualified Marketing Program” is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator’s obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

2.11 Contractual and Operational Compliance Audits.

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(a) ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five (5) business days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement.

(b) Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c) Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d) Registry Operator will give ICANN immediate notice of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

2.12 Continued Operations Instrument. Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in the specification at [*see specification 8*].

2.13 Emergency Transition. Registry Operator agrees that in the event that any of the registry functions set forth in Section 6 of Specification 10 fails for a period longer than the emergency threshold for such function set forth in Section 6 of Specification 10, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at ____________) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process, provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

2.14 Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in the specification at [*see specification 9*].

2.15 Cooperation with Economic Studies. If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold any internal analyses or evaluations prepared by Registry Operator with respect to such data. Any data delivered to ICANN or its designee pursuant to this Section 2.15 shall be fully aggregated and anonymized by ICANN or its designee prior to any disclosure of such data to any third party.

2.16 Registry Performance Specifications. Registry Performance Specifications for operation of the TLD will be as set forth in the specification at [*see specification 10*]*. Registry Operator shall comply with such Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

2.17 Personal Data. Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the registry-registrar agreement for the TLD of the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

2.18 ***[Note: For Community-Based TLDs Only]*** **Obligations of Registry Operator to TLD Community.** Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration

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policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.18.]

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 Open and Transparent. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 TLD Nameservers. ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at http://www.iana.org/domains/root/ will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

3.4 Root-zone Information Publication. ICANN's publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

3.5 Authoritative Root Database. To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

ARTICLE 4.

TERM AND TERMINATION

4.1 Term. The term of this Agreement will be ten years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

4.2 Renewal.

(a) This Agreement will be renewed for successive periods of ten years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

(i) Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court; or

(ii) During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) on at least three (3) separate occasions to have been in fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement.

(b) Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then current Term.

4.3 Termination by ICANN.

(a) ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within thirty (30) days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer that is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g) [*Applicable to intergovernmental organizations or governmental entities only*.] ICANN may terminate this Agreement pursuant to Section 7.14.

4.4 Termination by Registry Operator.

(a) Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

4.5 Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.

[*Alternative* ***Section 4.5 Transition of Registry upon Termination of Agreement*** *text for intergovernmental organizations or governmental entities or other special circumstances*:

"**Transition of Registry upon Termination of Agreement.** Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement."]

4.6 Effect of Termination. Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this

Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

ARTICLE 5.

DISPUTE RESOLUTION

5.1 Cooperative Engagement. Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

5.2 Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

"**Arbitration.** Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless an another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."]

5.3 Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

5.4 Specific Performance. Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

ARTICLE 6.

FEES

6.1 Registry-Level Fees. Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25; provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any four calendar quarter period (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator shall pay the Registry-

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

Level Fees on a quarterly basis by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

6.2 Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a registry-registrar agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator’s ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

6.4 Adjustments to Fees. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then current fees set forth in Section 6.1 and Section 6.3 may be adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.4 shall be effective as of the first day of the year in which the above calculation is made.

6.5 Additional Fee on Late Payments. For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

ARTICLE 7.

MISCELLANEOUS

7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.”]

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator’s aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN’s total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator’s liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN’s reasonable satisfaction, such other registry operators’ culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [***Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.***]

7.2 Indemnification Procedures. If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator’s sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN’s policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator’s cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [***Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities.***]

7.3 Defined Terms. For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on “Security” shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

(b) For purposes of this Agreement, an effect on “Stability” shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments (“RFCs”) sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

7.4 No Offset. All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

7.5 Change in Control; Assignment and Subcontracting. Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized in the same legal jurisdiction in which ICANN is currently organized for the same or substantially the same purposes. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any material subcontracting arrangement with respect to the operation of the registry for the TLD shall be deemed an assignment. ICANN shall be deemed to have reasonably withheld its consent to any such a direct or indirect change of control or subcontracting arrangement in the event that ICANN reasonably determines that the person or entity acquiring control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. In addition, without limiting the foregoing, Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Without limiting the foregoing, Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator. Such change of control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days. If ICANN fails to expressly provide or withhold its consent to any direct or indirect change of control of Registry Operator or any material subcontracting arrangement within thirty (30) (or, if ICANN has requested additional information from Registry Operator as set forth above, sixty (60)) calendar days of the receipt of written notice of such transaction from Registry Operator, ICANN shall be deemed to have consented to such transaction. In connection with any such transaction, Registry Operator shall comply with the Registry Transition Process.

7.6 Amendments and Waivers.

(a) If ICANN determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable

Registry Operators (the "Applicable Registry Agreements") is desirable (each, a "Special Amendment"), ICANN may submit a Special Amendment for approval by the Applicable Registry Operators pursuant to the process set forth in this Section 7.6, provided that a Special Amendment is not a Restricted Amendment (as defined below). Prior to submitting a Special Amendment for such approval, ICANN shall first consult in good faith with the Working Group (as defined below) regarding the form and substance of a Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the "Posting Period") and providing notice of such amendment by ICANN to the Applicable Registry Operators in accordance with Section 7.8. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(b) If, within two (2) calendar years of the expiration of the Posting Period (the "Approval Period"), (i) the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment) and (ii) such Special Amendment receives Registry Operator Approval (as defined below), such Special Amendment shall be deemed approved (an "Approved Amendment") by the Applicable Registry Operators (the last date on which such approvals are obtained is herein referred to as the "Amendment Approval Date") and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator (the "Amendment Effective Date"). In the event that a Special Amendment is not approved by the ICANN Board of Directors or does not receive Registry Operator Approval within the Approval Period, the Special Amendment will have no effect. The procedure used by ICANN to obtain Registry Operator Approval shall be designed to document the written approval of the Applicable Registry Operators, which may be in electronic form.

(c) During the thirty (30) calendar day period following the Amendment Approval Date, Registry Operator (so long as it did not vote in favor of the Approved Amendment) may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an "Exemption Request"). Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN's receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement; provided, that any such conditions, alternatives or variations shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN's determination, appeal ICANN's decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved

Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(c) or through an arbitration decision pursuant to Article 5 shall exempt Registry Operator from any Approved Amendment, and no exemption request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(d) Except as set forth in this Section 7.6, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Section 7.6 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(e) For purposes of this Section 7.6, the following terms shall have the following meanings:

(i) "Applicable Registry Operators" means, collectively, the registry operators of the top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii) "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii) "Restricted Amendment" means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (iv) an amendment to the length of the Term.

(iv) "Working Group" means representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(d)).

7.7 No Third-Party Beneficiaries. This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

7.8 General Notices. Except for notices pursuant to Section 7.6, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. All notices under Section 7.6 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Other than notices under Section 7.6, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within two (2) business days. Any notice required by Section 7.6 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

If to ICANN, addressed to:
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina Del Rey, California 90292
Telephone: 1-310-823-9358
Facsimile: 1-310-823-8649
Attention: President and CEO

With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:
[________________]
[________________]
[________________]
Telephone:
Facsimile:
Attention:

With a Required Copy to:
Email: (As specified from time to time.)

7.9 Entire Agreement. This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

7.10 English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

7.11 Ownership Rights. Nothing contained in this Agreement shall be construed as establishing or granting to Registry Operator any property ownership rights or interests in the TLD or the letters, words, symbols or other characters making up the TLD string.

7.12 Severability. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible.

7.13 Court Orders. ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement.

[Note: The following section is applicable to intergovernmental organizations or governmental entities only.]

7.14 Special Provision Relating to Intergovernmental Organizations or Governmental Entities.

(a) ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the “Applicable Laws”). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator’s compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b) In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, “ICANN Requirements”), may conflict with or violate Applicable Law (hereinafter, a “Potential Conflict”), Registry Operator shall provide detailed notice (a “Notice”) of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c) As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by cooperative engagement pursuant to the procedures set forth in Section 5.1. In

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such cooperative engagement, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such non-compliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an "ICANN Determination"). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN's complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d) If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator's compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e) Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f) Notwithstanding any other provision of this Section 7.14, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.14(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.14(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

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* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: ______________________________
[_____________]
President and CEO
Date:

[Registry Operator]

By: ______________________________
[____________]
[____________]
Date:

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

EXHIBIT A

<u>Approved Services</u>

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. **Consensus Policies.**

1.1. "***Consensus Policies***" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.

1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:

1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");

1.2.2. functional and performance specifications for the provision of Registry Services;

1.2.3. Security and Stability of the registry database for the TLD;

1.2.4. registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;

1.2.5. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or

1.2.6. restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:

1.3.1. principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);

1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;

1.3.3. reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and

1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

1.4. In addition to the other limitations on Consensus Policies, they shall not:

1.4.1. prescribe or limit the price of Registry Services;

1.4.2. modify the terms or conditions for the renewal or termination of the Registry Agreement;

1.4.3. modify the limitations on Temporary Policies (defined below) or Consensus Policies;

1.4.4. modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

1.4.5. modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

2. **Temporary Policies.** Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("***Temporary Policies***").

2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.

2.1.1. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.

2.1.2. If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

3. **Notice and Conflicts.** Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Polices or Temporary Policy shall control, but only with respect to subject matter in conflict.

SPECIFICATION 2
DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent ("***Escrow Agent***") for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits**. There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.
   1.1 "**Full Deposit**" will consist of data that reflects the state of the registry as of 00:00:00 UTC on each Sunday.
   1.2 "**Differential Deposit**" means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., newly added or modified domain names).

2. **Schedule for Deposits**. Registry Operator will submit a set of escrow files on a daily basis as follows:
   2.1 Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.
   2.2 The other six days of the week, the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.

3. **Escrow Format Specification.**
   3.1 **Deposit's Format.** Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see [1]. The aforementioned document describes some elements as optional; Registry Operator will include those elements in the Deposits if they are available. Registry Operator will use the draft version available at the time of signing the Agreement, if not already an RFC. Once the specification is published as an RFC, Registry Operator will implement that specification, no later than 180 days after. UTF-8 character encoding will be used.

   3.2 **Extensions.** If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional "extension schemas" shall be defined in a case by case base to represent that data. These "extension schemas" will be specified as described in [1]. Data related to the "extensions schemas" will be included in the deposit file described in section 3.1. ICANN and the respective Registry shall work together to agree on such new objects' data escrow specifications.

4. **<u>Processing of Deposit files</u>.** The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see [2]. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see [3], that are also royalty-free. The process to follow for a data file in original text format is:
   (1) The file should be compressed. The suggested algorithm for compression is ZIP as per RFC 4880.
   (2) The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.
   (3) The file may be split as necessary if, once compressed and encrypted is larger than the file size limit agreed with the escrow agent. Every part of a split file, or the whole file if split is not used, will be called a processed file in this section.
   (4) A digital signature file will be generated for every processed file using the Registry's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 [2], and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.
   (5) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.
   (6) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in section 8.

5. **<u>File Naming Conventions</u>.** Files will be named according to the following convention: {gTLD}_{YYYY-MM-DD}_{type}_S{#}_R{rev}.{ext} where:
   5.1 {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;
   5.2 {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be “2009-08-02”;
   5.3 {type} is replaced by:
      (1) “full”, if the data represents a Full Deposit;
      (2) “diff”, if the data represents a Differential Deposit;
      (3) “thin”, if the data represents a Bulk Registration Data Access file, as specified in section 3 of Specification 4;
   5.4 {#} is replaced by the position of the file in a series of files, beginning with “1”; in case of a lone file, this must be replaced by “1”.
   5.5 {rev} is replaced by the number of revision (or resend) of the file beginning with “0”:
   5.6 {ext} is replaced by “sig” if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by “ryde”.

6. **Distribution of Public Keys.** Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry and ICANN will exchange keys by the same procedure.

7. **Notification of Deposits**. Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN a written statement (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in [1].

8. **Verification Procedure**.
   (1) The signature file of each processed file is validated.
   (2) If processed files are pieces of a bigger file, the latter is put together.
   (3) Each file obtained in the previous step is then decrypted and uncompressed.
   (4) Each data file contained in the previous step is then validated against the format defined in [1].
   (5) If [1] includes a verification process, that will be applied at this step.
   If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.

9. **References**.

[1] Domain Name Data Escrow Specification (work in progress), http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow
[2] OpenPGP Message Format, http://www.rfc-editor.org/rfc/rfc4880.txt
[3] OpenPGP parameters, http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml

PART B – LEGAL REQUIREMENTS

1. **Escrow Agent**. Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendment thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.

2. **Fees**. Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within ten business days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.

3. **Ownership**. Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.

4. **Integrity and Confidentiality**. Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent’s compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

   If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party’s expense. Any party requesting additional assistance shall pay Escrow Agent’s standard charges or as quoted upon submission of a detailed request.

5. **Copies**. Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.

6. **Release of Deposits**. Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:
   6.1 the Registry Agreement has expired without renewal, or been terminated; or
   6.2 ICANN failed, with respect to (a) any Full Deposit or (b) five Differential Deposits within any calendar month, to receive, within five calendar days after the Deposit's scheduled delivery date, notification of receipt from Escrow Agent; (x) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (y) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent that the Deposit has been received; or
   6.3 ICANN has received notification from Escrow Agent of failed verification of a Full Deposit or of failed verification of five Differential Deposits within any calendar month and (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent of verification of a remediated version of such Full Deposit or Differential Deposit; or
   6.4 Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or
   6.5 Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Registry Agreement; or
   6.6 a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN.

   Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits**.
   7.1 Within twenty-four hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a copy of the verification report generated for each Deposit. Reports will be delivered electronically, as specified from time to time by ICANN.
   7.2 If Escrow Agent discovers that any Deposit fails the verification procedures, Escrow Agent must notify, either by email, fax or phone, Registry Operator and ICANN of such nonconformity within twenty-four hours after receiving the non-conformant Deposit. Upon notification of such verification failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.

8. **Amendments.** Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.

9. **Indemnity.** Registry Operator shall indemnify and hold harmless Escrow Agent and each of its directors, officers, agents, employees, members, and stockholders ("Escrow Agent Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Escrow Agent Indemnitees in connection with the Escrow Agreement or the performance of Escrow Agent or any Escrow Agent Indemnitees thereunder (with the exception of any claims based on the misrepresentation, negligence, or misconduct of Escrow Agent, its directors, officers, agents, employees, contractors, members, and stockholders). Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD to ____________ with the following content. ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three months after the end of the month to which the reports relate.

1. Per-Registrar Transactions Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named “gTLD-transactions-yyyymm.csv”, where “gTLD” is the gTLD name; in case of an IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field Name	Description
01	registrar-name	registrar's full corporate name as registered with IANA
02	iana-id	http://www.iana.org/assignments/registrar-ids
03	total-domains	total domains under sponsorship
04	total-nameservers	total name servers registered for TLD
05	net-adds-1-yr	number of domains successfully registered with an initial term of one year (and not deleted within the add grace period)
06	net-adds-2-yr	number of domains successfully registered with an initial term of two years (and not deleted within the add grace period)
07	net-adds-3-yr	number of domains successfully registered with an initial term of three years (and not deleted within the add grace period)
08	net-adds-4-yr	number of domains successfully registered with an initial term of four years (and not deleted within the add grace period)
09	net-adds-5-yr	number of domains successfully registered with an initial term of five years (and not deleted within the add grace period)
10	net-adds-6-yr	number of domains successfully registered with an initial term of six years (and not deleted within the add grace period)
11	net-adds-7-yr	number of domains successfully registered with an initial term of seven years (and not deleted within the add grace period)

12	net-adds-8-yr	number of domains successfully registered with an initial term of eight years (and not deleted within the add grace period)
13	net-adds-9-yr	number of domains successfully registered with an initial term of nine years (and not deleted within the add grace period)
14	net-adds-10-yr	number of domains successfully registered with an initial term of ten years (and not deleted within the add grace period)
15	net-renews-1-yr	number of domains successfully renewed either automatically or by command with a new renewal period of one year (and not deleted within the renew grace period)
16	net-renews-2-yr	number of domains successfully renewed either automatically or by command with a new renewal period of two years (and not deleted within the renew grace period)
17	net-renews-3-yr	number of domains successfully renewed either automatically or by command with a new renewal period of three years (and not deleted within the renew grace period)
18	net-renews-4-yr	number of domains successfully renewed either automatically or by command with a new renewal period of four years (and not deleted within the renew grace period)
19	net-renews-5-yr	number of domains successfully renewed either automatically or by command with a new renewal period of five years (and not deleted within the renew grace period)
20	net-renews-6-yr	number of domains successfully renewed either automatically or by command with a new renewal period of six years (and not deleted within the renew grace period)
21	net-renews-7-yr	number of domains successfully renewed either automatically or by command with a new renewal period of seven years (and not deleted within the renew grace period)
22	net-renews-8-yr	number of domains successfully renewed either automatically or by command with a new renewal period of eight years (and not deleted within the renew grace period)
23	net-renews-9-yr	number of domains successfully renewed either

		automatically or by command with a new renewal period of nine years (and not deleted within the renew grace period)
24	net-renews-10-yr	number of domains successfully renewed either automatically or by command with a new renewal period of ten years (and not deleted within the renew grace period)
25	transfer-gaining-successful	transfers initiated by this registrar that were ack'd by the other registrar – either by command or automatically
26	transfer-gaining-nacked	transfers initiated by this registrar that were n'acked by the other registrar
27	transfer-losing-successful	transfers initiated by another registrar that this registrar ack'd – either by command or automatically
28	transfer-losing-nacked	transfers initiated by another registrar that this registrar n'acked
29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed
30	transfer-disputed-lost	number of transfer disputes this registrar lost
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision
32	deleted-domains-grace	domains deleted within the add grace period
33	deleted-domains-nograce	domains deleted outside the add grace period
34	restored-domains	domain names restored from redemption period
35	restored-noreport	total number of restored names for which the registrar failed to submit a restore report
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read “Totals” while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

2. Registry Functions Activity Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-activity-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars at the end of the reporting period
02	ramp-up-registrars	number of registrars that have received a password for access to OT&E at the end of the reporting period
03	pre-ramp-up-registrars	number of registrars that have requested access, but have not yet entered the ramp-up period at the end of the reporting period
04	zfa-passwords	number of active zone file access passwords at the end of the reporting period
05	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
06	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
07	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
08	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
09	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
10	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
11	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
12	srs-dom-check	number of SRS (EPP and any other interface) domain name "check" requests responded during the reporting period
13	srs-dom-create	number of SRS (EPP and any other interface) domain name "create" requests responded during the reporting period
14	srs-dom-delete	number of SRS (EPP and any other interface) domain name "delete" requests responded during the reporting period
15	srs-dom-info	number of SRS (EPP and any other interface) domain name "info" requests responded during the reporting period
16	srs-dom-renew	number of SRS (EPP and any other interface) domain name

		“renew” requests responded during the reporting period
17	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP “restore” requests responded during the reporting period
18	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP “restore” requests delivering a restore report responded during the reporting period
19	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name “transfer” requests to approve transfers responded during the reporting period
20	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name “transfer” requests to cancel transfers responded during the reporting period
21	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name “transfer” requests to query about a transfer responded during the reporting period
22	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name “transfer” requests to reject transfers responded during the reporting period
23	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name “transfer” requests to request transfers responded during the reporting period
24	srs-dom-update	number of SRS (EPP and any other interface) domain name “update” requests (not including RGP restore requests) responded during the reporting period
25	srs-host-check	number of SRS (EPP and any other interface) host “check” requests responded during the reporting period
26	srs-host-create	number of SRS (EPP and any other interface) host “create” requests responded during the reporting period
27	srs-host-delete	number of SRS (EPP and any other interface) host “delete” requests responded during the reporting period
28	srs-host-info	number of SRS (EPP and any other interface) host “info” requests responded during the reporting period
29	srs-host-update	number of SRS (EPP and any other interface) host “update” requests responded during the reporting period
30	srs-cont-check	number of SRS (EPP and any other interface) contact “check” requests responded during the reporting period
31	srs-cont-create	number of SRS (EPP and any other interface) contact “create” requests responded during the reporting period

32	srs-cont-delete	number of SRS (EPP and any other interface) contact “delete” requests responded during the reporting period
33	srs-cont-info	number of SRS (EPP and any other interface) contact “info” requests responded during the reporting period
34	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact “transfer” requests to approve transfers responded during the reporting period
35	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact “transfer” requests to cancel transfers responded during the reporting period
36	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact “transfer” requests to query about a transfer responded during the reporting period
37	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact “transfer” requests to reject transfers responded during the reporting period
38	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact “transfer” requests to request transfers responded during the reporting period
39	srs-cont-update	number of SRS (EPP and any other interface) contact “update” requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

SPECIFICATION 4

SPECIFICATION FOR REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services.** Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

1.4. **Domain Name Data:**

1.4.1. **Query format:** whois EXAMPLE.TLD

1.4.2. **Response format:**

Domain Name: EXAMPLE.TLD
Domain ID: D1234567-TLD
WHOIS Server: whois.example.tld
Referral URL: http://www.example.tld
Updated Date: 2009-05-29T20:13:00Z
Creation Date: 2000-10-08T00:45:00Z
Registry Expiry Date: 2010-10-08T00:44:59Z
Sponsoring Registrar: EXAMPLE REGISTRAR LLC
Sponsoring Registrar IANA ID: 5555555
Domain Status: clientDeleteProhibited
Domain Status: clientRenewProhibited
Domain Status: clientTransferProhibited
Domain Status: serverUpdateProhibited
Registrant ID: 5372808-ERL
Registrant Name: EXAMPLE REGISTRANT
Registrant Organization: EXAMPLE ORGANIZATION
Registrant Street: 123 EXAMPLE STREET
Registrant City: ANYTOWN
Registrant State/Province: AP
Registrant Postal Code: A1A1A1
Registrant Country: EX

```
Registrant Phone: +1.5555551212
Registrant Phone Ext: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: EX
Admin Phone: +1.5555551212
Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext:
Admin Email: EMAIL@EXAMPLE.TLD
Tech ID: 5372811-ERL
Tech Name: EXAMPLE REGISTRAR TECHNICAL
Tech Organization: EXAMPLE REGISTRAR LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: EX
Tech Phone: +1.1235551234
Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE.TLD
Name Server: NS01.EXAMPLEREGISTRAR.TLD
Name Server: NS02.EXAMPLEREGISTRAR.TLD
DNSSEC: signedDelegation
DNSSEC: unsigned
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<
```

1.5. **Registrar Data:**

1.5.1. **Query format:** whois "registrar Example Registrar, Inc."

1.5.2. **Response format:**

```
Registrar Name: Example Registrar, Inc.
Street: 1234 Admiralty Way
City: Marina del Rey
State/Province: CA
Postal Code: 90292
Country: US
Phone Number: +1.3105551212
Fax Number: +1.3105551213
```

```
Email: registrar@example.tld
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www. example-registrar.tld
Admin Contact: Joe Registrar
Phone Number: +1.3105551213
Fax Number: +1.3105551213
Email: joeregistrar@example-registrar.tld
Admin Contact: Jane Registrar
Phone Number: +1.3105551214
Fax Number: +1.3105551213
Email: janeregistrar@example-registrar.tld
Technical Contact: John Geek
Phone Number: +1.3105551215
Fax Number: +1.3105551216
Email: johngeek@example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<
```

1.6. **Nameserver Data:**

1.6.1. **Query format:** whois "NS1.EXAMPLE.TLD" or whois "nameserver (IP Address)"

1.6.2. **Response format:**

```
Server Name: NS1.EXAMPLE.TLD
IP Address: 192.0.2.123
IP Address: 2001:0DB8::1
Registrar: Example Registrar, Inc.
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www. example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<
```

1.7. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers, email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.8. **Searchability**. Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.8.1. Registry Operator will offer searchability on the web-based Directory Service.

1.8.2. Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.8.3. Registry Operator will offer exact-match capabilities, at least, on the following fields: registrar id, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).

1.8.4. Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.8.5. Search results will include domain names matching the search criteria.

1.8.6. Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

2. **Zone File Access**

2.1. **Third-Party Access**

2.1.1. **Zone File Access Agreement.** Registry Operator will enter into an agreement with any Internet user that will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider (the "CZDA Provider"). Registry Operator will provide access to zone file data per Section 2.1.3 and do so using the file format described in Section 2.1.4. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1. 2 or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5.

2.1.2. **Credentialing Requirements.** Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address, and the Internet host machine name and IP address.

2.1.3. **Grant of Access.** Each Registry Operator will provide the Zone File FTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry's zone data archives. Registry Operator will grant the user a non-exclusive, non-transferable, limited right to access Registry Operator's Zone File FTP server, and to transfer a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using FTP, or other data transport and access protocols that may be prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4. **File Format Standard**. Registry Operator will provide zone files using a sub-format of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.
2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.
4. Use of /X and /DDD inside domain names is allowed.
5. All domain names must be in lower case.
6. Must use exactly one tab as separator of fields inside a record.
7. All domain names must be fully qualified.
8. No $ORIGIN directives.
9. No use of "@" to denote current origin.
10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.
11. No $INCLUDE directives.
12. No $TTL directives.
13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.
14. No use of comments.
15. No blank lines.
16. The SOA record should be present at the top and (duplicated at) the end of the zone file.
17. With the exception of the SOA record, all the records in a file must be in alphabetical order.
18. One zone per file. If a TLD divides its DNS data into multiple zones, each goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5. **Use of Data by User.** Registry Operator will permit user to use the zone file for lawful purposes; provided that, (a) user takes all reasonable steps to protect against unauthorized access to and use and disclosure of the data, and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to, (i) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than user's own existing customers, or (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar.

2.1.6. **Term of Use.** Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7. **No Fee for Access.** Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

2.2 Co-operation

2.2.1. **Assistance**. Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

2.3 ICANN Access. Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time.

2.4 Emergency Operator Access. Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

3. **Bulk Registration Data Access to ICANN**

3.1. **Periodic Access to Thin Registration Data.** In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

3.1.1. **Contents**. Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), registrar id (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar repository object id (roid), hostname of registrar Whois server, and URL of registrar.

3.1.2. **Format**. The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

3.1.3, **Access**. Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

3.2. **Exceptional Access to Thick Registration Data.** In case of a registrar failure, de-accreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data within 2 business days. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for download by ICANN in the same manner as the data specified in Section 3.1. of this Specification.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve (i.e., Registry Operator shall not register, delegate, use or otherwise make available such labels to any third party, but may register such labels in its own name in order to withhold them from delegation or use) names formed with the following labels from initial (i.e. other than renewal) registration within the TLD:

1. **Example. The label "EXAMPLE**" shall be reserved at the second level and at all other levels within the TLD at which Registry Operator makes registrations.

2. **Two-character labels**. All two-character labels shall be initially reserved. The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager. The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes.

3. **Tagged Domain Names.** Labels may only include hyphens in the third and fourth position if they represent valid internationalized domain names in their ASCII encoding (for example "xn--ndk061n").

4. **Second-Level Reservations for Registry Operations.** The following names are reserved for use in connection with the operation of the registry for the TLD. Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the TLD they shall be transferred as specified by ICANN: NIC, WWW, IRIS and WHOIS.

5. **Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:

   5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union <http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU>;

   5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

   5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

   provided, that the reservation of specific country and territory names may be released to the extent that Registry Operator reaches agreement with the applicable government(s), provided, further, that

Registry Operator may also propose release of these reservations, subject to review by ICANN’s Governmental Advisory Committee and approval by ICANN.

SPECIFICATION 6

REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

1. Standards Compliance

1.1. **DNS.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 4343, and 5966.

1.2. **EPP**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732, 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC**. Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions (“DNSSEC”). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants’ public-key material. Registry Operator shall publish its DPS following the format described in “DPS-framework” (currently in draft format, see http://tools.ietf.org/html/draft-ietf-dnsop-dnssec-dps-framework) within 180 days after the “DPS-framework” becomes an RFC.

1.4. **IDN**. If the Registry Operator offers Internationalized Domain Names (“IDNs”), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

1.5. **IPv6**. Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry’s name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow “DNS IPv6 Transport Operational Guidelines” as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g. Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

2. Registry Services

2.1. **Registry Services**. "Registry Services" are, for purposes of the Registry Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition**. For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a "Name Error" response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

3. Registry Continuity

3.1. **High Availability**. Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

3.2. **Extraordinary Event**. Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within 24 hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of 48 hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity**. Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

4. Abuse Mitigation

4.1. **Abuse Contact**. Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquires related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records**. Registry Operators shall take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.

5. Supported Initial and Renewal Registration Periods

5.1. **Initial Registration Periods**. Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods**. Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms.** Registry Operator shall implement and adhere to any rights protection mechanisms ("RPMs") that may be mandated from time to time by ICANN. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party's legal rights. Registry Operator will include all ICANN mandated and independently developed RPMs in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements established by ICANN each of the mandatory RPMs set forth in the Trademark Clearinghouse (posted at [url to be inserted when final Trademark Clearinghouse is adopted]), which may be revised by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse.

2. **Dispute Resolution Mechanisms.** Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

   a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at [urls to be inserted when final procedure is adopted]). Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Registry Agreement) following a determination by any PDDRP or RRDRP panel and to be bound by any such determination; and

   b. the Uniform Rapid Suspension system ("URS") adopted by ICANN (posted at [url to be inserted]), including the implementation of determinations issued by URS examiners.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8) for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6th) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld). The Continued Operations Instrument shall expressly state that ICANN may access the financial resources of the Continued Operations Instrument pursuant to Section 2.13 or Section 4.5 [*insert for government entity*: or Section 7.14] of the Registry Agreement.

2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an “Alternative Instrument”). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.

3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an alternative

instrument that (i) provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operation replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such replacement instrument(s).

SPECIFICATION 9

Registry Operator Code of Conduct

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a “Registry Related Party”), to:

   a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;

   b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement;

   c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running");

   d. allow any Affiliated registrar to disclose user data to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions; or

   e. disclose confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.

2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.

3. Registry Operator will conduct internal reviews at least once per calendar year to

ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification.

4. Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.

5. Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.

6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

SPECIFICATION 10

REGISTRY PERFORMANCE SPECIFICATIONS

1. **Definitions**

1.1. **DNS.** Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.

1.2. **DNSSEC proper resolution.** There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.

1.3. **EPP.** Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.

1.4. **IP address.** Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.

1.5. **Probes.** Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.

1.6. **RDDS.** Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.

1.7. **RTT.** Round-Trip Time or **RTT** refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.

1.8. **SLR.** Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

2. **Service Level Agreement Matrix**

	Parameter	**SLR (monthly basis)**
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 432 min of downtime (≈ 99%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	≤ 500 ms, for at least 95% of the queries
	DNS update time	≤ 60 min, for at least 95% of the probes
RDDS	RDDS availability	≤ 864 min of downtime (≈ 98%)
	RDDS query RTT	≤ 2000 ms, for at least 95% of the queries
	RDDS update time	≤ 60 min, for at least 95% of the probes
EPP	EPP service availability	≤ 864 min of downtime (≈ 98%)
	EPP session-command RTT	≤ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	≤ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	≤ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

3. DNS

3.1. **DNS service availability**. Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from "**DNS tests**" to each of their public-DNS registered "**IP addresses**" to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.

3.2. **DNS name server availability.** Refers to the ability of a public-DNS registered "**IP address**" of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered "**IP address**" of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from "**DNS tests**" to a name server "**IP address**" during a given time, the name server "**IP address**" will be considered unavailable.

3.3. **UDP DNS resolution RTT.** Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.4. **TCP DNS resolution RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.5. **DNS resolution RTT.** Refers to either "**UDP DNS resolution RTT**" or "**TCP DNS resolution RTT**".

3.6. **DNS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer "**DNS queries**" with data consistent with the change made. This only applies for changes to DNS information.

3.7. **DNS test.** Means one non-recursive DNS query sent to a particular "**IP address**" (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a "**DNS resolution RTT**" 5 times higher than the corresponding SLR, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the "**DNS resolution RTT**" or, undefined/unanswered.

3.8. **Measuring DNS parameters.** Every minute, every DNS probe will make an UDP or TCP "**DNS test**" to each of the public-DNS registered "**IP addresses**" of the name servers of the domain name being monitored. If a "**DNS test**" result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

3.9. **Collating the results from DNS probes.** The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

3.10. **Distribution of UDP and TCP queries.** DNS probes will send UDP or TCP "**DNS test**" approximating the distribution of these queries.

3.11. **Placement of DNS probes.** Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

4. <u>RDDS</u>

4.1. **RDDS availability.** Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.

4.2. **WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.3. **Web-based-WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.4. **RDDS query RTT.** Refers to the collective of "**WHOIS query RTT**" and "**Web-based-WHOIS query RTT**".

4.5. **RDDS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.

4.6. **RDDS test.** Means one query sent to a particular "**IP address**" of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

4.7. **Measuring RDDS parameters.** Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered "**IP addresses**" of the servers for each RDDS service of the TLD being monitored and make an "**RDDS test**" to each one. If an "**RDDS test**" result is undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes.** The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes.** Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

5. EPP

5.1. **EPP service availability.** Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with "**EPP command RTT**" 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT.** Refers to "**EPP session-command RTT**", "**EPP query-command RTT**" or "**EPP transform-command RTT**".

5.6. **EPP test.** Means one EPP command sent to a particular "**IP address**" for one of the EPP servers. Query and transform commands, with the exception of "create", shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the "**EPP command RTT**" or undefined/unanswered.

5.7. **Measuring EPP parameters.** Every 5 minutes, EPP probes will select one "**IP address**" of the EPP servers of the TLD being monitored and make an "**EPP test**"; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an "**EPP test**" result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.

5.8. **Collating the results from EPP probes.** The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

5.9. **Placement of EPP probes.** Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

6. Emergency Thresholds

The following matrix presents the Emergency Thresholds that, if reached by any of the services mentioned above for a TLD, would cause the Emergency Transition of the Critical Functions as specified in Section 2.13. of this Agreement.

Critical Function	Emergency Threshold
DNS service (all servers)	4-hour downtime / week
DNSSEC proper resolution	4-hour downtime / week
EPP	24-hour downtime / week
RDDS (WHOIS/Web-based WHOIS)	24-hour downtime / week
Data Escrow	Breach of the Registry Agreement caused by missing escrow deposits as described in Specification 2, Part B, Section 6.

7. Emergency Escalation

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between ICANN and Registry Operators and published to Registrars, where relevant to their role in escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

7.1. Emergency Escalation initiated by ICANN

Upon reaching 10% of the Emergency thresholds as described in Section 6, ICANN's emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator's emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

7.2. Emergency Escalation initiated by Registrars

Registry Operator will maintain an emergency operations departments prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the Registry because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an Emergency Escalation to the emergency operations department of ICANN. ICANN then may initiate an Emergency Escalation with the Registry Operator as explained above.

7.3. Notifications of Outages and Maintenance

In the event that a Registry Operator plans maintenance, they will provide related notice to the ICANN emergency operations department, at least, 24 hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per their contractual obligations with ICANN, on services under SLA and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend Emergency Escalation services for the monitored services involved.

8. Covenants of Performance Measurement

8.1. **No interference.** Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement tests described in this Specification as it would do with any other request from Internet users (for DNS and RDDS) or registrars (for EPP).

8.2. **ICANN testing registrar.** Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLR**s described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement.

TRADEMARK CLEARINGHOUSE
4 JUNE 2012

1. PURPOSE OF CLEARINGHOUSE

1.1 The Trademark Clearinghouse is a central repository for information to be authenticated, stored, and disseminated, pertaining to the rights of trademark holders. ICANN will enter into an arms-length contract with service provider or providers, awarding the right to serve as a Trademark Clearinghouse Service Provider, i.e., to accept, authenticate, validate and facilitate the transmission of information related to certain trademarks.

1.2 The Clearinghouse will be required to separate its two primary functions: (i) authentication and validation of the trademarks in the Clearinghouse; and (ii) serving as a database to provide information to the new gTLD registries to support pre-launch Sunrise or Trademark Claims Services. Whether the same provider could serve both functions or whether two providers will be determined in the tender process.

1.3 The Registry shall only need to connect with one centralized database to obtain the information it needs to conduct its Sunrise or Trademark Claims Services regardless of the details of the Trademark Clearinghouse Service Provider’s contract(s) with ICANN.

1.4 Trademark Clearinghouse Service Provider may provide ancillary services, as long as those services and any data used for those services are kept separate from the Clearinghouse database.

1.5 The Clearinghouse database will be a repository of authenticated information and disseminator of the information to a limited number of recipients. Its functions will be performed in accordance with a limited charter, and will not have any discretionary powers other than what will be set out in the charter with respect to authentication and validation. The Clearinghouse administrator(s) cannot create policy. Before material changes are made to the Clearinghouse functions, they will be reviewed through the ICANN public participation model.

1.6 Inclusion in the Clearinghouse is not proof of any right, nor does it create any legal rights. Failure to submit trademarks into the Clearinghouse should not be perceived to be lack of vigilance by trademark holders or a waiver of any rights, nor can any negative influence be drawn from such failure.

2. SERVICE PROVIDERS

2.1 The selection of Trademark Clearinghouse Service Provider(s) will be subject to predetermined criteria, but the foremost considerations will be the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability and security without interference with the integrity or timeliness of the registration process or registry operations.

2.2 Functions – Authentication/Validation; Database Administration. Public commentary has suggested that the best way to protect the integrity of the data and to avoid concerns that arise through sole-source providers would be to separate the functions of database administration and data authentication/validation.

2.2.1 One entity will authenticate registrations ensuring the word marks qualify as registered or are court-validated word marks or word marks that are protected by statute or treaty. This entity would also be asked to ensure that proof of use of marks is provided, which can be demonstrated by furnishing a signed declaration and one specimen of current use.

2.2.2 The second entity will maintain the database and provide Sunrise and Trademark Claims Services (described below).

2.3 Discretion will be used, balancing effectiveness, security and other important factors, to determine whether ICANN will contract with one or two entities - one to authenticate and validate, and the other to, administer in order to preserve integrity of the data.

2.4 Contractual Relationship.

2.4.1 The Clearinghouse shall be separate and independent from ICANN. It will operate based on market needs and collect fees from those who use its services. ICANN may coordinate or specify interfaces used by registries and registrars, and provide some oversight or quality assurance function to ensure rights protection goals are appropriately met.

2.4.2 The Trademark Clearinghouse Service Provider(s) (authenticator/validator and administrator) will be selected through an open and transparent process to ensure low costs and reliable, consistent service for all those utilizing the Clearinghouse services.

2.4.3 The Service Provider(s) providing the authentication of the trademarks submitted into the Clearinghouse shall adhere to rigorous standards and requirements that would be specified in an ICANN contractual agreement.

2.4.4 The contract shall include service level requirements, customer service availability (with the goal of seven days per week, 24 hours per day, 365 days per year), data escrow requirements, and equal access requirements for all persons and entities required to access the Trademark Clearinghouse database.

2.4.5 To the extent practicable, the contract should also include indemnification by Service Provider for errors such as false positives for participants such as Registries, ICANN, Registrants and Registrars.

2.5. Service Provider Requirements. The Clearinghouse Service Provider(s) should utilize regional marks authentication service providers (whether directly or through sub-contractors) to take advantage of local experts who understand the nuances of the trademark in question. Examples of specific performance criteria details in the contract award criteria and service-level-agreements are:

2.5.1 provide 24 hour accessibility seven days a week (database administrator);
2.5.2 employ systems that are technically reliable and secure (database administrator);
2.5.3 use globally accessible and scalable systems so that multiple marks from multiple sources in multiple languages can be accommodated and sufficiently cataloged (database administrator and validator);
2.5.4 accept submissions from all over the world - the entry point for trademark holders to submit their data into the Clearinghouse database could be regional entities or one entity;
2.5.5 allow for multiple languages, with exact implementation details to be determined;
2.5.6 provide access to the Registrants to verify and research Trademark Claims Notices;
2.5.7 have the relevant experience in database administration, validation or authentication, as well as accessibility to and knowledge of the various relevant trademark laws (database administrator and authenticator); and
2.5.8 ensure through performance requirements, including those involving interface with registries and registrars, that neither domain name registration timeliness, nor registry or registrar operations will be hindered (database administrator).

3. CRITERIA FOR TRADEMARK INCLUSION IN CLEARINGHOUSE

3.1 The trademark holder will submit to one entity – a single entity for entry will facilitate access to the entire Clearinghouse database. If regional entry points are used, ICANN will publish an information page describing how to locate regional submission points. Regardless of the entry point into the Clearinghouse, the authentication procedures established will be uniform.

3.2 The standards for inclusion in the Clearinghouse are:

3.2.1 Nationally or regionally registered word marks from all jurisdictions.
3.2.2 Any word mark that has been validated through a court of law or other judicial proceeding.

3.2.3 Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion.

3.2.4 Other marks that constitute intellectual property.

3.2.5 Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.

3.3 The type of data supporting entry of a registered word mark into the Clearinghouse must include a copy of the registration or the relevant ownership information, including the requisite registration number(s), the jurisdictions where the registrations have issued, and the name of the owner of record.

3.4 Data supporting entry of a judicially validated word mark into the Clearinghouse must include the court documents, properly entered by the court, evidencing the validation of a given word mark.

3.5 Data supporting entry into the Clearinghouse of word marks protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion, must include a copy of the relevant portion of the statute or treaty and evidence of its effective date.

3.6 Data supporting entry into the Clearinghouse of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the registry operator and the Clearinghouse based on the services any given registry operator chooses to provide.

3.7 Registrations that include top level extensions such as "icann.org" or ".icann" as the word mark will not be permitted in the Clearinghouse regardless of whether that mark has been registered or it has been otherwise validated or protected (e.g., if a mark existed for icann.org or .icann, neither will not be permitted in the Clearinghouse).

3.8 All mark holders seeking to have their marks included in the Clearinghouse will be required to submit a declaration, affidavit, or other sworn statement that the information provided is true and current and has not been supplied for an improper purpose. The mark holder will also be required to attest that it will keep the information supplied to the Clearinghouse current so that if, during the time the mark is included in the Clearinghouse, a registration gets cancelled or is transferred to another entity, or in the case of a court- or Clearinghouse-validated mark the holder abandons use of the mark, the mark holder has an affirmative obligation to notify the Clearinghouse. There will be penalties for failing to keep information current. Moreover, it is anticipated that there will be a process whereby registrations can be removed from the Clearinghouse if it is discovered that the marks are procured by fraud or if the data is inaccurate.

3.9 As an additional safeguard, the data will have to be renewed periodically by any mark holder wishing to remain in the Clearinghouse. Electronic submission should facilitate this process and minimize the cost associated with it. The reason for periodic authentication is to streamline the efficiencies of the Clearinghouse and the information the registry operators will need to process and limit the marks at issue to the ones that are in use.

4. USE OF CLEARINGHOUSE DATA

4.1 All mark holders seeking to have their marks included in the Clearinghouse will have to consent to the use of their information by the Clearinghouse. However, such consent would extend only to use in connection with the stated purpose of the Trademark Clearinghouse Database for Sunrise or Trademark Claims services. The reason for such a provision would be to presently prevent the Clearinghouse from using the data in other ways without permission. There shall be no bar on the Trademark Clearinghouse Service Provider or other third party service providers providing ancillary services on a non-exclusive basis.

4.2 In order not to create a competitive advantage, the data in the Trademark Clearinghouse should be licensed to competitors interested in providing ancillary services on equal and non-discriminatory terms and on commercially reasonable terms if the mark holders agree. Accordingly, two licensing options will be offered to the mark holder: (a) a license to use its data for all required features of the Trademark Clearinghouse, with no permitted use of such data for ancillary services either by the Trademark Clearinghouse Service Provider or any other entity; or (b) license to use its data for the mandatory features of the Trademark Clearinghouse and for any ancillary uses reasonably related to the protection of marks in new gTLDs, which would include a license to allow the Clearinghouse to license the use and data in the Trademark Clearinghouse to competitors that also provide those ancillary services. The specific implementation details will be determined, and all terms and conditions related to the provision of such services shall be included in the Trademark Clearinghouse Service Provider's contract with ICANN and subject to ICANN review.

4.3 Access by a prospective registrant to verify and research Trademark Claims Notices shall not be considered an ancillary service, and shall be provided at no cost to the Registrant. Misuse of the data by the service providers would be grounds for immediate termination.

5. DATA AUTHENTICATION AND VALIDATION GUIDELINES

5.1 One core function for inclusion in the Clearinghouse would be to authenticate that the data meets certain minimum criteria. As such, the following minimum criteria are suggested:

5.1.1 An acceptable list of data authentication sources, i.e. the web sites of patent and trademark offices throughout the world, third party providers who can obtain information from various trademark offices;

5.1.2 Name, address and contact information of the applicant is accurate, current and matches that of the registered owner of the trademarks listed;

5.1.3 Electronic contact information is provided and accurate;

5.1.4 The registration numbers and countries match the information in the respective trademark office database for that registration number.

5.2 For validation of marks by the Clearinghouse that were not protected via a court, statute or treaty, the mark holder shall be required to provide evidence of use of the mark in connection with the bona fide offering for sale of goods or services prior to application for inclusion in the Clearinghouse. Acceptable evidence of use will be a signed declaration and a single specimen of current use, which might consist of labels, tags, containers, advertising, brochures, screen shots, or something else that evidences current use.

6. MANDATORY RIGHTS PROTECTION MECHANISMS

All new gTLD registries will be required to use the Trademark Clearinghouse to support its pre-launch or initial launch period rights protection mechanisms (RPMs). These RPMs, at a minimum, must consist of a Trademark Claims service and a Sunrise process.

6.1 Trademark Claims service

6.1.1 New gTLD Registry Operators must provide Trademark Claims services during an initial launch period for marks in the Trademark Clearinghouse. This launch period must occur for at least the first 60 days that registration is open for general registration.

6.1.2 A Trademark Claims service is intended to provide clear notice to the prospective registrant of the scope of the mark holder’s rights in order to minimize the chilling effect on registrants (Trademark Claims Notice). A form that describes the required elements is attached. The specific statement by prospective registrant warrants that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

6.1.3 The Trademark Claims Notice should provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice to enhance understanding of the Trademark rights being claimed by the trademark holder. These links (or other sources) shall be provided in real time without cost to the prospective registrant. Preferably, the Trademark Claims Notice should be provided in the language used for the rest of the interaction with the registrar or registry, but it is anticipated that at the very least in the most appropriate UN-sponsored language (as specified by the prospective registrant or registrar/registry).

6.1.4 If the domain name is registered in the Clearinghouse, the registrar (again through an interface with the Clearinghouse) will promptly notify the mark holders(s) of the registration after it is effectuated.

6.1.5 The Trademark Clearinghouse Database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. "Identical Match" means that the domain name consists of the complete and identical textual elements of the mark. In this regard: (a) spaces contained within a mark that are either replaced by hyphens (and vice versa) or omitted; (b) only certain special characters contained within a trademark are spelled out with appropriate words describing it (@ and &); (c) punctuation or special characters contained within a mark that are unable to be used in a second-level domain name may either be (i) omitted or (ii) replaced by spaces, hyphens or underscores and still be considered identical matches; and (d) no plural and no "marks contained" would qualify for inclusion.

6.2 Sunrise service

6.2.1 Sunrise registration services must be offered for a minimum of 30 days during the pre-launch phase and notice must be provided to all trademark holders in the Clearinghouse if someone is seeking a sunrise registration. This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match to the name to be registered during Sunrise.

6.2.2 Sunrise Registration Process. For a Sunrise service, sunrise eligibility requirements (SERs) will be met as a minimum requirement, verified by Clearinghouse data, and incorporate a Sunrise Dispute Resolution Policy (SDRP).

6.2.3 The proposed SERs include: (i) ownership of a mark (that satisfies the criteria in section 7.2 below), (ii) optional registry elected requirements re: international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.

6.2.4 The proposed SDRP must allow challenges based on at least the following four grounds: (i) at time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

6.2.5 The Clearinghouse will maintain the SERs, validate and authenticate marks, as applicable, and hear challenges.

7. PROTECTION FOR MARKS IN CLEARINGHOUSE

The scope of registered marks that must be honored by registries in providing Trademarks Claims services is broader than those that must be honored by registries in Sunrise services.

7.1 For Trademark Claims services - Registries must recognize and honor all word marks that have been or are: (i) nationally or regionally registered; (ii) court-validated; or (iii) specifically protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion. No demonstration of use is required.

7.2 For Sunrise services - Registries must recognize and honor all word marks: (i) nationally or regionally registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse; or (ii) that have been court-validated; or (iii) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008.

8. COSTS OF CLEARINGHOUSE

Costs should be completely borne by the parties utilizing the services. Trademark holders will pay to register the Clearinghouse, and registries will pay for Trademark Claims and Sunrise services. Registrars and others who avail themselves of Clearinghouse services will pay the Clearinghouse directly.

TRADEMARK NOTICE

[In English and the language of the registration agreement]

You have received this Trademark Notice because you have applied for a domain name which matches at least one trademark record submitted to the Trademark Clearinghouse.

You may or may not be entitled to register the domain name depending on your intended use and whether it is the same or significantly overlaps with the trademarks listed below. ***Your rights to register this domain name may or may not be protected as noncommercial use or "fair use" by the laws of your country. [in bold italics or all caps]***

Please read the trademark information below carefully, including the trademarks, jurisdictions, and goods and service for which the trademarks are registered. Please be aware that not all jurisdictions review trademark applications closely, so some of the trademark information below may exist in a national or regional registry which does not conduct a thorough or substantive review of trademark rights prior to registration.
If you have questions, you may want to consult an attorney or legal expert on trademarks and intellectual property for guidance.

If you continue with this registration, you represent that, you have received and you understand this notice and to the best of your knowledge, your registration and use of the requested domain name will not infringe on the trademark rights listed below.
The following [number] Trademarks are listed in the Trademark Clearinghouse:

1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

[with links to the TM registrations as listed in the TM Clearinghouse]

2. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant:

Trademark Registrant Contact:
****** [with links to the TM registrations as listed in the TM Clearinghouse]

X. 1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

UNIFORM RAPID SUSPENSION SYSTEM ("URS")
4 JUNE 2012

DRAFT PROCEDURE

1. Complaint

1.1 Filing the Complaint

a) Proceedings are initiated by electronically filing with a URS Provider a Complaint outlining the trademark rights and the actions complained of entitling the trademark holder to relief.

b) Each Complaint must be accompanied by the appropriate fee, which is under consideration. The fees will be non-refundable.

c) One Complaint is acceptable for multiple related companies against one Registrant, but only if the companies complaining are related. Multiple Registrants can be named in one Complaint only if it can be shown that they are in some way related. There will not be a minimum number of domain names imposed as a prerequisite to filing.

1.2 Contents of the Complaint

The form of the Complaint will be simple and as formulaic as possible. There will be a Form Complaint. The Form Complaint shall include space for the following:

1.2.1 Name, email address and other contact information for the Complaining Party (Parties).

1.2.2 Name, email address and contact information for any person authorized to act on behalf of Complaining Parties.

1.2.3 Name of Registrant (i.e. relevant information available from Whois) and Whois listed available contact information for the relevant domain name(s).

1.2.4 The specific domain name(s) that are the subject of the Complaint. For each domain name, the Complainant shall include a copy of the currently available Whois information and a description and copy, if available, of the offending portion of the website content associated with each domain name that is the subject of the Complaint.

1.2.5 The specific trademark/service marks upon which the Complaint is based and pursuant to which the Complaining Parties are asserting their rights to them, for which goods and in connection with what services.

1.2.6 A statement of the grounds upon which the Complaint is based setting forth facts showing that the Complaining Party is entitled to relief, namely:

1.2.6.1. that the registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed.

a. Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use in commerce - was submitted to, and validated by, the Trademark Clearinghouse)

b. Proof of use may also be submitted directly with the URS Complaint.

and

1.2.6.2. that the Registrant has no legitimate right or interest to the domain name; and

1.2.6.3. that the domain was registered and is being used in bad faith.

A non-exclusive list of circumstances that demonstrate bad faith registration and use by the Registrant include:

a. Registrant has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of pocket costs directly related to the domain name; or

b. Registrant has registered the domain name in order to prevent the trademark holder or service mark from reflecting the mark in a corresponding domain name, provided that Registrant has engaged in a pattern of such conduct; or

c. Registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or

d. By using the domain name Registrant has intentionally attempted to attract for commercial gain, Internet users to Registrant’s web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of Registrant’s web site or location or of a product or service on that web site or location.

1.2.7 A box in which the Complainant may submit up to 500 words of explanatory free form text.

1.2.8. An attestation that the Complaint is not being filed for any improper basis and that there is a sufficient good faith basis for filing the Complaint.

2. Fees

2.1 URS Provider will charge fees to the Complainant. Fees are thought to be in the range of USD 300 per proceeding, but will ultimately be set by the Provider.

2.2 Complaints listing fifteen (15) or more disputed domain names registered by the same registrant will be subject to a Response Fee which will be refundable to the prevailing party. Under no circumstances shall the Response Fee exceed the fee charged to the Complainant.

3. Administrative Review

3.1 Complaints will be subjected to an initial administrative review by the URS Provider for compliance with the filing requirements. This is a review to determine that the Complaint contains all of the necessary information, and is not a determination as to whether a *prima facie* case has been established.

3.2 The Administrative Review shall be conducted within two (2) business days of submission of the Complaint to the URS Provider.

3.3 Given the rapid nature of this Procedure, and the intended low level of required fees, there will be no opportunity to correct inadequacies in the filing requirements.

3.4 If a Complaint is deemed non-compliant with filing requirements, the Complaint will be dismissed without prejudice to the Complainant filing a new complaint. The initial filing fee shall not be refunded in these circumstances.

4. Notice and Locking of Domain

4.1 Upon completion of the Administrative Review, the URS Provider must immediately notify the registry operator (via email) ("Notice of Complaint") after the Complaint has been deemed compliant with the filing requirements. Within 24 hours of receipt of the Notice of Complaint from the URS Provider, the registry operator shall "lock" the domain, meaning the registry shall restrict all changes to the registration data, including transfer and deletion of the domain names, but the name will continue to resolve. The registry operator will notify the URS Provider immediately upon locking the domain name ("Notice of Lock").

4.2 Within 24 hours after receiving Notice of Lock from the registry operator, the URS Provider shall notify the Registrant of the Complaint, sending a hard copy of the Notice of Complaint to the addresses listed in the Whois contact information, and providing an electronic copy of the Complaint, advising of the locked status, as well as the potential effects if the Registrant fails to respond and defend against the Complaint. Notices must be clear and understandable to Registrants located globally. The Notice of Complaint shall be in English and translated by the Provider into the predominant language used in the registrant's country or territory.

4.3 All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The Complaint and accompanying exhibits, if any, shall be served electronically.

4.4 The URS Provider shall also electronically notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN.

5. The Response

5.1 A Registrant will have 14 calendar days from the date the URS Provider sent its Notice of Complaint to the Registrant to electronically file a Response with the URS Provider. Upon receipt, the Provider will electronically send a copy of the Response, and accompanying exhibits, if any, to the Complainant.

5.2 No filing fee will be charged if the Registrant files its Response prior to being declared in default or not more than thirty (30) days following a Determination. For Responses filed more than thirty (30) days after a Determination, the Registrant should pay a reasonable non-refundable fee for re-examination, plus a Response Fee as set forth in section 2.2 above if the Complaint lists twenty-six (26) or more disputed domain names against the same registrant. The Response Fee will be refundable to the prevailing party.

5.3 Upon request by the Registrant, a limited extension of time to respond may be granted by the URS Provider if there is a good faith basis for doing so. In no event shall the extension be for more than seven (7) calendar days.

5.4 The Response shall be no longer than 2,500 words, excluding attachments, and the content of the Response should include the following:

5.4.1 Confirmation of Registrant data.

5.4.2 Specific admission or denial of each of the grounds upon which the Complaint is based.

5.4.3 Any defense which contradicts the Complainant's claims.

5.4.4 A statement that the contents are true and accurate.

5.5 In keeping with the intended expedited nature of the URS and the remedy afforded to a successful Complainant, affirmative claims for relief by the Registrant will not be permitted except for an allegation that the Complainant has filed an abusive Complaint.

5.6 Once the Response is filed, and the URS Provider determines that the Response is compliant with the filing requirements of a Response (which shall be on the same day), the Complaint, Response and supporting materials will immediately be sent to a qualified Examiner, selected by the URS Provider, for review and Determination. All materials submitted are considered by the Examiner.

5.7 The Response can contain any facts refuting the claim of bad faith registration by setting out any of the following circumstances:

5.7.1 Before any notice to Registrant of the dispute, Registrant's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

5.7.2 Registrant (as an individual, business or other organization) has been commonly known by the domain name, even if Registrant has acquired no trademark or service mark rights; or

5.7.3 Registrant is making a legitimate or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Such claims, if found by the Examiner to be proved based on its evaluation of all evidence, shall result in a finding in favor of the Registrant.

5.8 The Registrant may also assert Defenses to the Complaint to demonstrate that the Registrant's use of the domain name is not in bad faith by showing, for example, one of the following:

5.8.1 The domain name is generic or descriptive and the Registrant is making fair use of it.

5.8.2 The domain name sites are operated solely in tribute to or in criticism of a person or business that is found by the Examiner to be fair use.

5.8.3 Registrant's holding of the domain name is consistent with an express term of a written agreement entered into by the disputing Parties and that is still in effect.

5.8.4 The domain name is not part of a wider pattern or series of abusive registrations because the Domain Name is of a significantly different type or character to other domain names registered by the Registrant.

5.9 Other factors for the Examiner to consider:

5.9.1 Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves not indicia of bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner must review each case on its merits.

5.9.2 Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) does not in and of itself constitute bad faith under the URS.

Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner will take into account:

5.9.2.1. the nature of the domain name;

5.9.2.2. the nature of the advertising links on any parking page associated with the domain name; and

5.9.2.3. that the use of the domain name is ultimately the Registrant's responsibility.

6. Default

6.1 If at the expiration of the 14-day answer period (or extended period if granted), the Registrant does not submit an answer, the Complaint proceeds to Default.

6.2 In either case, the Provider shall provide Notice of Default via email to the Complainant and Registrant, and via mail and fax to Registrant. During the Default period, the Registrant will be prohibited from changing content found on the site to argue that it is now a legitimate use and will also be prohibited from changing the Whois information.

6.3 All Default cases proceed to Examination for review on the merits of the claim.

6.4 If after Examination in Default cases, the Examiner rules in favor of Complainant, Registrant shall have the right to seek relief from Default via de novo review by filing a Response at any time up to six months after the date of the Notice of Default. The Registrant will also be entitled to request an extension of an additional six months if the extension is requested before the expiration of the initial six-month period.

6.5 If a Response is filed after: (i) the Respondent was in Default (so long as the Response is filed in accordance with 6.4 above); and (ii) proper notice is provided in accordance with the notice requirements set forth above, the domain name shall again resolve to the original IP address as soon as practical, but shall remain locked as if the Response had been filed in a timely manner before Default. The filing of a Response after Default is not an appeal; the case is considered as if responded to in a timely manner.

6.5 If after Examination in Default case, the Examiner rules in favor of Registrant, the Provider shall notify the Registry Operator to unlock the name and return full control of the domain name registration to the Registrant.

7. Examiners

7.1 One Examiner selected by the Provider will preside over a URS proceeding.

7.2 Examiners should have demonstrable relevant legal background, such as in trademark law, and shall be trained and certified in URS proceedings. Specifically, Examiners shall be provided with instructions on the URS elements and defenses and how to conduct the examination of a URS proceeding.

7.3 Examiners used by any given URS Provider shall be rotated to the extent feasible to avoid "forum or examiner shopping." URS Providers are strongly encouraged to work equally with all certified Examiners, with reasonable exceptions (such as language needs, non-performance, or malfeasance) to be determined on a case by case analysis.

8. Examination Standards and Burden of Proof

8.1 The standards that the qualified Examiner shall apply when rendering its Determination are whether:

8.1.2 The registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty currently in effect and that was in effect at the time the URS Complaint is filed; and

8.1.2.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.

8.1.2.2 Proof of use may also be submitted directly with the URS Complaint.

8.1.2 The Registrant has no legitimate right or interest to the domain name; and

8.1.3 The domain was registered and is being used in a bad faith.

8.2 The burden of proof shall be clear and convincing evidence.

8.3 For a URS matter to conclude in favor of the Complainant, the Examiner shall render a Determination that there is no genuine issue of material fact. Such Determination may include that: (i) the Complainant has rights to the name; and (ii) the Registrant has no rights or legitimate interest in the name. This means that the Complainant must present adequate evidence to substantiate its trademark rights in the domain name (e.g., evidence of a trademark registration and evidence that the domain name was registered and is being used in bad faith in violation of the URS).

8.4 If the Examiner finds that the Complainant has not met its burden, or that genuine issues of material fact remain in regards to any of the elements, the Examiner will reject the Complaint under the relief available under the URS. That is, the Complaint shall be dismissed if the Examiner finds that evidence was presented or is available to the Examiner to indicate that the use of the domain name in question is a non-infringing use or fair use of the trademark.

8.5 Where there is any genuine contestable issue as to whether a domain name registration and use of a trademark are in bad faith, the Complaint will be denied, the URS proceeding will be terminated without prejudice, e.g., a UDRP, court proceeding or another URS may be filed. The URS is not intended for use in any proceedings with open questions of fact, but only clear cases of trademark abuse.

8.6 To restate in another way, if the Examiner finds that all three standards are satisfied by clear and convincing evidence and that there is no genuine contestable issue, then the Examiner shall issue a Determination in favor of the Complainant. If the Examiner finds that any of the standards have not been satisfied, then the Examiner shall deny the relief requested, thereby terminating the URS proceeding without prejudice to the Complainant to proceed with an action in court of competent jurisdiction or under the UDRP.

9. Determination

9.1 There will be no discovery or hearing; the evidence will be the materials submitted with the Complaint and the Response, and those materials will serve as the entire record used by the Examiner to make a Determination.

9.2 If the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider's website. However, there should be no other preclusive effect of the Determination other than the URS proceeding to which it is rendered.

9.3 If the Complainant does not satisfy the burden of proof, the URS proceeding is terminated and full control of the domain name registration shall be returned to the Registrant.

9.4 Determinations resulting from URS proceedings will be published by the service provider in a format specified by ICANN.

9.5 Determinations shall also be emailed by the URS Provider to the Registrant, the Complainant, the Registrar, and the Registry Operator, and shall specify the remedy and required actions of the registry operator to comply with the Determination.

9.6 To conduct URS proceedings on an expedited basis, examination should begin immediately upon the earlier of the expiration of a fourteen (14) day Response period (or extended period if granted), or upon the submission of the Response. A Determination shall be rendered on an expedited basis, with the stated goal that it be rendered within three (3) business days from when Examination began. Absent extraordinary circumstances, however, Determinations must be issued no later than five (5) days after the Response is filed. Implementation details will be developed to accommodate the needs of service providers once they are selected. (The tender offer for potential service providers will indicate that timeliness will be a factor in the award decision.)

10. Remedy

10.1 If the Determination is in favor of the Complainant, the decision shall be immediately transmitted to the registry operator.

10.2 Immediately upon receipt of the Determination, the registry operator shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The URS Provider shall not be allowed to offer any other services on such page, nor shall it directly or indirectly use the web page for advertising purposes (either for itself or any other third party). The Whois for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the Whois shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration.

10.3 There shall be an option for a successful Complainant to extend the registration period for one additional year at commercial rates.

10.4 No other remedies should be available in the event of a Determination in favor of the Complainant.

11. Abusive Complaints

11.1 The URS shall incorporate penalties for abuse of the process by trademark holders.

11.2 In the event a party is deemed to have filed two (2) abusive Complaints, or one (1) "deliberate material falsehood," that party shall be barred from utilizing the URS for one-year following the date of issuance of a Determination finding a complainant to have: (i) filed its second abusive complaint; or (ii) filed a deliberate material falsehood.

11.3 A Complaint may be deemed abusive if the Examiner determines:

11.3.1 it was presented solely for improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of doing business; and

11.3.2 (i) the claims or other assertions were not warranted by any existing law or the URS standards; or (ii) the factual contentions lacked any evidentiary support

11.4 An Examiner may find that Complaint contained a deliberate material falsehood if it contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding.

11.5 Two findings of "deliberate material falsehood" shall permanently bar the party from utilizing the URS.

11.6 URS Providers shall be required to develop a process for identifying and tracking barred parties, and parties whom Examiners have determined submitted abusive complaints or deliberate material falsehoods.

11.7 The dismissal of a complaint for administrative reasons or a ruling on the merits, in itself, shall not be evidence of filing an abusive complaint.

11.8 A finding that filing of a complaint was abusive or contained a deliberate materially falsehood can be appealed solely on the grounds that an Examiner abused his/her discretion, or acted in an arbitrary or capricious manner.

12. Appeal

12.1 Either party shall have a right to seek a de novo appeal of the Determination based on the existing record within the URS proceeding for a reasonable fee to cover the costs of the appeal. An appellant must identify the specific grounds on which the party is appealing, including why the appellant claims the Examiner's Determination was incorrect.

12.2 The fees for an appeal shall be borne by the appellant. A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint. The Appeal Panel, to be selected by the Provider, may request, in its sole discretion, further statements or documents from either of the Parties.

12.3 Filing an appeal shall not change the domain name's resolution. For example, if the domain name no longer resolves to the original nameservers because of a Determination in favor or the Complainant, the domain name shall continue to point to the informational page provided by the URS Provider. If the domain name resolves to the original nameservers because of a Determination in favor of the registrant, it shall continue to resolve during the appeal process.

12.4 An appeal must be filed within 14 days after a Determination is issued and any Response must be filed 14 days after an appeal is filed.

12.5 If a respondent has sought relief from Default by filing a Response within six months (or the extended period if applicable) of issuance of initial Determination, an appeal must be filed within 14 days from date the second Determination is issued and any Response must be filed 14 days after the appeal is filed.

12.6 Notice of appeal and findings by the appeal panel shall be sent by the URS Provider via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator.

12.7 The Providers' rules and procedures for appeals, other than those stated above, shall apply.

13. Other Available Remedies

The URS Determination shall not preclude any other remedies available to the appellant, such as UDRP (if appellant is the Complainant), or other remedies as may be available in a court of competition jurisdiction. A URS Determination for or against a party shall not prejudice the party in UDRP or any other proceedings.

14. Review of URS

A review of the URS procedure will be initiated one year after the first Examiner Determination is issued. Upon completion of the review, a report shall be published regarding the usage of the procedure, including statistical information, and posted for public comment on the usefulness and effectiveness of the procedure.

TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (TRADEMARK PDDRP)
4 JUNE 2012

1. Parties to the Dispute

The parties to the dispute will be the trademark holder and the gTLD registry operator. ICANN shall not be a party.

2. Applicable Rules

2.1 This procedure is intended to cover Trademark post-delegation dispute resolution proceedings generally. To the extent more than one Trademark PDDRP provider (“Provider”) is selected to implement the Trademark PDDRP, each Provider may have additional rules that must be followed when filing a Complaint. The following are general procedures to be followed by all Providers.

2.2 In the Registry Agreement, the registry operator agrees to participate in all post-delegation procedures and be bound by the resulting Determinations.

3. Language

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

4. Communications and Time Limits

4.1 All communications with the Provider must be submitted electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.

4.5 All references to day limits shall be considered as calendar days unless otherwise specified.

5. Standing

5.1 The mandatory administrative proceeding will commence when a third-party complainant ("Complainant") has filed a Complaint with a Provider asserting that the Complainant is a trademark holder (which may include either registered or unregistered marks as defined below) claiming that one or more of its marks have been infringed, and thereby the Complainant has been harmed, by the registry operator's manner of operation or use of the gTLD.

5.2 Before proceeding to the merits of a dispute, and before the Respondent is required to submit a substantive Response, or pay any fees, the Provider shall appoint a special one-person Panel to perform an initial "threshold" review ("Threshold Review Panel").

6. Standards

For purposes of these standards, "registry operator" shall include entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where 'control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.

6.1 Top Level:

A complainant must assert and prove, by clear and convincing evidence, that the registry operator's affirmative conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant's mark, causes or materially contributes to the gTLD doing one of the following*:*

(a) taking unfair advantage of the distinctive character or the reputation of the complainant's mark; or

(b) impairing the distinctive character or the reputation of the complainant's mark; or

(c) creating a likelihood of confusion with the complainant's mark.

An example of infringement at the top-level is where a TLD string is identical to a trademark and then the registry operator holds itself out as the beneficiary of the mark.

6.2 Second Level

Complainants are required to prove, by clear and convincing evidence that, through the registry operator's affirmative conduct:

(a) there is a substantial pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names; and

(b) the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD that are identical or confusingly similar to the complainant's mark, which:

(i) takes unfair advantage of the distinctive character or the reputation of the complainant's mark; or

(ii) impairs the distinctive character or the reputation of the complainant's mark, or

(iii) creates a likelihood of confusion with the complainant's mark.

In other words, it is not sufficient to show that the registry operator is on notice of possible trademark infringement through registrations in the gTLD. The registry operator is not liable under the PDDRP solely because: (i) infringing names are in its registry; or (ii) the registry operator knows that infringing names are in its registry; or (iii) the registry operator did not monitor the registrations within its registry.

A registry operator is not liable under the PDDRP for any domain name registration that: (i) is registered by a person or entity that is unaffiliated with the registry operator; (ii) is registered without the direct or indirect encouragement, inducement, initiation or direction of any person or entity affiliated with the registry operator; and (iii) provides no direct or indirect benefit to the registry operator other than the typical registration fee (which may include other fees collected incidental to the registration process for value added services such enhanced registration security).

An example of infringement at the second level is where a registry operator has a pattern or practice of actively and systematically encouraging registrants to register second level domain names and to take unfair advantage of the trademark to the extent and degree that bad faith is apparent. Another example of infringement at the second level is where a registry operator has a pattern or practice of acting as the registrant or beneficial user of infringing registrations, to monetize and profit in bad faith.

7. Complaint

7.1 Filing:

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint be in compliance, the Provider will electronically serve the Complaint and serve a paper notice on the registry operator that is the subject of the Complaint ("Notice of Complaint") consistent with the contact information listed in the Registry Agreement.

7.2 Content:

7.2.1 The name and contact information, including address, phone, and email address, of the Complainant, and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.

7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.

7.2.3 A statement of the nature of the dispute, and any relevant evidence, which shall include:

(a) The particular legal rights claim being asserted, the marks that form the basis for the dispute and a short and plain statement of the basis upon which the Complaint is being filed.

(b) A detailed explanation of how the Complainant's claim meets the requirements for filing a claim pursuant to that particular ground or standard.

(c) A detailed explanation of the validity of the Complaint and why the Complainant is entitled to relief.

(d) A statement that the Complainant has at least 30 days prior to filing the Complaint notified the registry operator in writing of: (i) its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks and (ii) it willingness to meet to resolve the issue.

(e) An explanation of how the mark is used by the Complainant (including the type of goods/services, period and territory of use – including all on-line usage) or otherwise protected by statute, treaty or has been validated by a court or the Clearinghouse.

(f) Copies of any documents that the Complainant considers to evidence its basis for relief, including evidence of current use of the Trademark at issue in the Complaint and domain name registrations.

(g) A statement that the proceedings are not being brought for any improper purpose.

(h) A statement describing how the registration at issue has harmed the trademark owner.

7.3 Complaints will be limited 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.

7.4 At the same time the Complaint is filed, the Complainant will pay a non-refundable filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice.

8. Administrative Review of the Complaint

8.1 All Complaints will be reviewed by the Provider within five (5) business days of submission to the Provider to determine whether the Complaint contains all necessary information and complies with the procedural rules.

8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue to the Threshold Review. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliant and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded.

8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve the Notice of Complaint consistent with the contact information listed in the Registry Agreement.

9. Threshold Review

9.1 Provider shall establish a Threshold Review Panel, consisting of one panelist selected by the Provider, for each proceeding within five (5) business days after completion of Administrative Review and the Complaint has been deemed compliant with procedural rules.

9.2 The Threshold Review Panel shall be tasked with determining whether the Complainant satisfies the following criteria:

9.2.1 The Complainant is a holder of a word mark that: (i) is nationally or regionally registered and that is in current use; or (ii) has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty at the time the PDDRP complaint is filed;

9.2.1.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse

9.2.1.2 Proof of use may also be submitted directly with the Complaint.

9.2.2 The Complainant has asserted that it has been materially harmed as a result of trademark infringement;

9.2.3 The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Top Level Standards herein
OR

The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Second Level Standards herein;

9.2.4 The Complainant has asserted that: (i) at least 30 days prior to filing the Complaint the Complainant notified the registry operator in writing of its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks, and it willingness to meet to resolve the issue; (ii) whether the registry operator responded to the Complainant's notice of specific concerns; and (iii) if the registry operator did respond, that the Complainant attempted to engage in good faith discussions to resolve the issue prior to initiating the PDDRP.

9.3 Within ten (10) business days of date Provider served Notice of Complaint, the registry operator shall have the opportunity, but is not required, to submit papers to support its position as to the Complainant's standing at the Threshold Review stage. If the registry operator chooses to file such papers, it must pay a filing fee.

9.4 If the registry operator submits papers, the Complainant shall have ten (10) business days to submit an opposition.

9.5 The Threshold Review Panel shall have ten (10) business days from due date of Complainant's opposition or the due date of the registry operator's papers if none were filed, to issue Threshold Determination.

9.6 Provider shall electronically serve the Threshold Determination on all parties.

9.7 If the Complainant has not satisfied the Threshold Review criteria, the Provider will dismiss the proceedings on the grounds that the Complainant lacks standing and declare that the registry operator is the prevailing party.

9.8 If the Threshold Review Panel determines that the Complainant has standing and satisfied the criteria then the Provider to will commence the proceedings on the merits.

10. Response to the Complaint

10.1 The registry operator must file a Response to each Complaint within forty-five (45) days after the date of the Threshold Review Panel Declaration.

10.2 The Response will comply with the rules for filing of a Complaint and will contain the name and contact information for the registry operator, as well as a point-by-point response to the statements made in the Complaint.

10.3 The Response must be filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.

10.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon confirmation that the electronic Response and hard-copy notice of the Response was sent by the Provider to the addresses provided by the Complainant.

10.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.

11. Reply

11.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not "without merit." A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.

11.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

12. Default

12.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.

12.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will they be permitted absent a showing of good cause to set aside the finding of default.

12.3 The Provider shall provide notice of Default via email to the Complainant and registry operator.

12.4 All Default cases shall proceed to Expert Determination on the merits.

13. Expert Panel

13.1 The Provider shall establish an Expert Panel within 21 days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.

13.2 The Provider shall appoint a one-person Expert Panel, unless any party requests a three- member Expert Panel. No Threshold Panel member shall serve as an Expert Panel member in the same Trademark PDDRP proceeding.

13.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Providers rules or procedures. Trademark PDDRP panelists within a Provider shall be rotated to the extent feasible.

13.4 Expert Panel member must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

14. Costs

14.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider rules. Such costs will be estimated to cover the administrative fees of the Provider, the Threshold Review Panel and the Expert Panel, and are intended to be reasonable.

14.2 The Complainant shall be required to pay the filing fee as set forth above in the "Complaint" section, and shall be required to submit the full amount of the Provider estimated administrative fees, the Threshold Review Panel fees and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant's share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator's share if the registry operator prevails.

14.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred. Failure to do shall be deemed a violation of the Trademark PDDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.

15. Discovery

15.1 Whether and to what extent discovery is allowed is at the discretion of the Panel, whether made on the Panel's own accord, or upon request from the Parties.

15.2 If permitted, discovery will be limited to that for which each Party has a substantial need.

15.3 In extraordinary circumstances, the Provider may appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.

15.4 At the close of discovery, if permitted by the Expert Panel, the Parties will make a final evidentiary submission, the timing and sequence to be determined by the Provider in consultation with the Expert Panel.

16. Hearings

16.1 Disputes under this Procedure will be resolved without a hearing unless either party requests a hearing or the Expert Panel determines on its own initiative that one is necessary.

16.2 If a hearing is held, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the Parties cannot agree.

16.3 Hearings should last no more than one day, except in the most extraordinary circumstances.

16.4 All dispute resolution proceedings will be conducted in English.

17. Burden of Proof

The Complainant bears the burden of proving the allegations in the Complaint; the burden must be by clear and convincing evidence.

18. Remedies

18.1 Since registrants are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).

18.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 14.

18.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if it the Expert Panel determines that the registry operator is liable under this Trademark PDDRP, including:

18.3.1 Remedial measures for the registry to employ to ensure against allowing future infringing registrations, which may be in addition to what is required under the registry agreement, except that the remedial measures shall not:

(a) Require the Registry Operator to monitor registrations not related to the names at issue in the PDDRP proceeding; or

(b) Direct actions by the registry operator that are contrary to those required under the Registry Agreement;

18.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;

OR,

18.3.3 In extraordinary circumstances where the registry operator acted with malice, providing for the termination of a Registry Agreement.

18.4 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.

18.5 The Expert Panel may also determine whether the Complaint was filed "without merit," and, if so, award the appropriate sanctions on a graduated scale, including:

18.5.1 Temporary bans from filing Complaints;

18.5.2 Imposition of costs of registry operator, including reasonable attorney fees; and

18.5.3 Permanent bans from filing Complaints after being banned temporarily.

18.6 Imposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel.

19. The Expert Panel Determination

19.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is issued within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.

19.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for that Determination. The Expert Determination should be publicly available and searchable on the Provider's web site.

19.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Panel's Determination.

19.4 The Expert Determination shall state which party is the prevailing party.

19.5 While the Expert Determination that a registry operator is liable under the standards of the Trademark PDDRP shall be taken into consideration, ICANN will have the authority to impose the remedies, if any, that ICANN deems appropriate given the circumstances of each matter.

20. Appeal of Expert Determination

20.1 Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the Trademark PDDRP proceeding for a reasonable fee to cover the costs of the appeal.

20.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20 days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, “Communication and Time Limits.”

20.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.

20.4 The fees for an appeal in the first instance shall be borne by the appellant.

20.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.

20.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.

20.7 The prevailing party shall be entitled to an award of costs of appeal.

20.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

21. Challenge of a Remedy

21.1 ICANN shall not implement a remedy for violation of the Trademark PDDRP for at least 20 days after the issuance of an Expert Determination, providing time for an appeal to be filed.

21.2 If an appeal is filed, ICANN shall stay its implementation of a remedy pending resolution of the appeal.

21.3 If ICANN decides to implement a remedy for violation of the Trademark PDDRP, ICANN will wait ten (10) business days (as observed in the location of its principal office) after notifying the registry operator of its decision. ICANN will then implement the decision unless it has received from the registry operator during that ten (10) business-day period official documentation that the registry operator has either: (a) commenced a lawsuit against the Complainant in a court of competent jurisdiction challenging the Expert Determination of liability against the registry operator, or (b) challenged the intended remedy by initiating dispute resolution under the provisions of its Registry Agreement. If ICANN receives such documentation within the ten (10) business day period, it will not seek to implement the remedy in furtherance of the Trademark PDDRP until it receives: (i) evidence of a resolution between the Complainant and the registry operator; (ii) evidence that registry operator’s lawsuit against Complainant has been dismissed or withdrawn; or (iii) a copy of an order from the dispute resolution provider selected pursuant to the Registry Agreement dismissing the dispute against ICANN whether by reason of agreement of the parties or upon determination of the merits.

21.4 The registry operator may challenge ICANN's imposition of a remedy imposed in furtherance of an Expert Determination that the registry operator is liable under the PDDRP, to the extent a challenge is warranted, by initiating dispute resolution under the provisions of its Registry Agreement. Any arbitration shall be determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor the decision of ICANN to implement a remedy is intended to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement.

21.5 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

22. Availability of Court or Other Administrative Proceedings

22.1 The Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.

22.2 In those cases where a Party submits documented proof to the Provider that a Court action involving the same Parties, facts and circumstances as the Trademark PDDRP was instituted prior to the filing date of the Complaint in the Trademark PDDRP, the Provider shall suspend or terminate the Trademark PDDRP.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)[1]
4 JUNE 2012

1. Parties to the Dispute

The parties to the dispute will be the harmed established institution and the gTLD registry operator. ICANN shall not be a party.

2. Applicable Rules

2.1 This procedure is intended to cover these dispute resolution proceedings generally. To the extent more than one RRDRP provider ("Provider") is selected to implement the RRDRP, each Provider may have additional rules and procedures that must be followed when filing a Complaint. The following are the general procedure to be followed by all Providers.

2.2 In any new community-based gTLD registry agreement, the registry operator shall be required to agree to participate in the RRDRP and be bound by the resulting Determinations.

3. Language

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the RRDRP Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

4. Communications and Time Limits

4.1 All communications with the Provider must be filed electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

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[1] Initial complaints that a Registry has failed to comply with registration restrictions shall be processed through a Registry Restriction Problem Report System (RRPRS) using an online form similar to the Whois Data Problem Report System (WDPRS) at InterNIC.net. A nominal processing fee could serve to decrease frivolous complaints. The registry operator shall receive a copy of the complaint and will be required to take reasonable steps to investigate (and remedy if warranted) the reported non-compliance. The Complainant will have the option to escalate the complaint in accordance with this RRDRP, if the alleged non-compliance continues. Failure by the Registry to address the complaint to complainant's satisfaction does not itself give the complainant standing to file an RRDRP complaint.

4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.

4.5 All references to day limits shall be considered as calendar days unless otherwise specified.

5. Standing

5.1 The mandatory administrative proceeding will commence when a third-party complainant ("Complainant") has filed a Complaint with a Provider asserting that the Complainant is a harmed established institution as a result of the community-based gTLD registry operator not complying with the registration restrictions set out in the Registry Agreement.

5.2 Established institutions associated with defined communities are eligible to file a community objection. The "defined community" must be a community related to the gTLD string in the application that is the subject of the dispute. To qualify for standing for a community claim, the Complainant must prove both: it is an established institution, and has an ongoing relationship with a defined community that consists of a restricted population that the gTLD supports.

5.3 Complainants must have filed a claim through the Registry Restriction Problem Report System (RRPRS) to have standing to file an RRDRP.

5.4 The Panel will determine standing and the Expert Determination will include a statement of the Complainant's standing.

6. Standards

6.1 For a claim to be successful, the claims must prove that:

6.1.1 The community invoked by the objector is a defined community;

6.1.2 There is a strong association between the community invoked and the gTLD label or string;

6.1.3 The TLD operator violated the terms of the community-based restrictions in its agreement;

6.1.4 There is a measureable harm to the Complainant and the community named by the objector.

7. Complaint

7.1 Filing:

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint to be in compliance, the Provider will electronically serve the Complaint and serve a hard copy and fax notice on the registry operator consistent with the contact information listed in the Registry Agreement.

7.2 Content:

7.2.1 The name and contact information, including address, phone, and email address, of the Complainant, the registry operator and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.

7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.

7.2.3 A statement of the nature of the dispute, which must include:

7.2.3.1 The particular registration restrictions in the Registry Agreement with which the registry operator is failing to comply; and

7.2.3.2 A detailed explanation of how the registry operator's failure to comply with the identified registration restrictions has caused harm to the complainant.

7.2.4 A statement that the proceedings are not being brought for any improper purpose.

7.2.5 A statement that the Complainant has filed a claim through the RRPRS and that the RRPRS process has concluded.

7.2.6 A statement that Complainant has not filed a Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) complaint relating to the same or similar facts or circumstances.

7.3 Complaints will be limited to 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.

7.4 Any supporting documents should be filed with the Complaint.

7.5 At the same time the Complaint is filed, the Complainant will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice to the Complainant to file another complaint.

8. Administrative Review of the Complaint

8.1 All Complaints will be reviewed within five (5) business days of submission by panelists designated by the applicable Provider to determine whether the Complainant has complied with the procedural rules.

8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliance and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded if the Complaint is deemed not in compliance.

8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve a paper notice on the registry operator that is the subject of the Complaint consistent with the contact information listed in the Registry Agreement.

9. Response to the Complaint

9.1 The registry operator must file a response to each Complaint within thirty (30) days of service the Complaint.

9.2 The Response will comply with the rules for filing of a Complaint and will contain the names and contact information for the registry operator, as well as a point by point response to the statements made in the Complaint.

9.3 The Response must be electronically filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.

9.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon electronic transmission of the Response.

9.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in it Response the specific grounds for the claim.

9.6 At the same time the Response is filed, the registry operator will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the Provider, the Response will be deemed improper and not considered in the proceedings, but the matter will proceed to Determination.

10 Reply

10.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not "without merit." A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.

10.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

11. Default

11.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.

11.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will it be permitted absent a showing of good cause to set aside the finding of Default.

11.3 The Provider shall provide Notice of Default via email to the Complainant and registry operator.

11.4 All Default cases shall proceed to Expert Determination on the merits.

12. Expert Panel

12.1 The Provider shall select and appoint a single-member Expert Panel within (21) days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.

12.2 The Provider will appoint a one-person Expert Panel unless any party requests a three-member Expert Panel.

12.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Provider's rules or procedures. RRDRP panelists within a Provider shall be rotated to the extent feasible.

12.4 Expert Panel members must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an Expert for lack of independence.

13. Costs

13.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider Rules. Such costs will cover the administrative fees, including the Filing and Response Fee, of the Provider, and the Expert Panel fees, and are intended to be reasonable.

13.2 The Complainant shall be required to pay the Filing fee as set forth above in the "Complaint" section, and shall be required to submit the full amount of the other Provider-estimated administrative fees, including the Response Fee, and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant's share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator's share if the registry operator prevails.

13.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred, including the Filing Fee. Failure to do shall be deemed a violation of the RRDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.

13.4 If the Panel declares the registry operator to be the prevailing party, the Provider shall reimburse the registry operator for its Response Fee.

14. Discovery/Evidence

14.1 In order to achieve the goal of resolving disputes rapidly and at a reasonable cost, discovery will generally not be permitted. In exceptional cases, the Expert Panel may require a party to provide additional evidence.

14.2 If permitted, discovery will be limited to that for which each Party has a substantial need.

14.3 Without a specific request from the Parties, but only in extraordinary circumstances, the Expert Panel may request that the Provider appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.

15. Hearings

15.1 Disputes under this RRDRP will usually be resolved without a hearing.

15.2 The Expert Panel may decide on its own initiative, or at the request of a party, to hold a hearing. However, the presumption is that the Expert Panel will render Determinations based on written submissions and without a hearing.

15.3 If a request for a hearing is granted, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the parties cannot agree.

15.4 Hearings should last no more than one day, except in the most exceptional circumstances.

15.5 If the Expert Panel grants one party’s request for a hearing, notwithstanding the other party’s opposition, the Expert Panel is encouraged to apportion the hearing costs to the requesting party as the Expert Panel deems appropriate.

15.6 All dispute resolution proceedings will be conducted in English.

16. Burden of Proof

The Complainant bears the burden of proving its claim; the burden should be by a preponderance of the evidence.

17. Recommended Remedies

17.1 Since registrants of domain names registered in violation of the agreement restriction are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations that were made in violation of the agreement restrictions (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).

17.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 13.

17.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if the Expert Panel determines that the registry operator allowed registrations outside the scope of its promised limitations, including:

17.3.1 Remedial measures, which may be in addition to requirements under the registry agreement, for the registry to employ to ensure against allowing future registrations that do not comply with community-based limitations; except that the remedial measures shall not:

(a) Require the registry operator to monitor registrations not related to the names at issue in the RRDRP proceeding, or

(b) direct actions by the registry operator that are contrary to those required under the registry agreement

17.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;

OR,

17.3.3 In extraordinary circumstances where the registry operator acted with malice providing for the termination of a registry agreement.

17.3 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.

18. The Expert Determination

18.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.

18.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for its

Determination. The Expert Determination should be publicly available and searchable on the Provider's web site.

18.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Determination.

18.4 The Expert Determination shall state which party is the prevailing party.

18.5 While the Expert Determination that a community-based restricted gTLD registry operator was not meeting its obligations to police the registration and use of domains within the applicable restrictions shall be considered, ICANN shall have the authority to impose the remedies ICANN deems appropriate, given the circumstances of each matter.

19. Appeal of Expert Determination

19.1 Either party shall have a right to seek a de novo appeal of the Expert Determination based on the existing record within the RRDRP proceeding for a reasonable fee to cover the costs of the appeal.

19.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20 days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, "Communication and Time Limits."

19.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.

19.4 The fees for an appeal in the first instance shall be borne by the appellant.

19.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.

19.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.

19.7 The prevailing party shall be entitled to an award of costs of appeal.

19.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

20. Breach

20.1 If the Expert determines that the registry operator is in breach, ICANN will then proceed to notify the registry operator that it is in breach. The registry operator will be given the opportunity to cure the breach as called for in the Registry Agreement.

20.2 If registry operator fails to cure the breach then both parties are entitled to utilize the options available to them under the registry agreement, and ICANN may consider the recommended remedies set forth in the Expert Determination when taking action.

20.3 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

21. Availability of Court or Other Administrative Proceedings

21.1 The RRDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.

21.2 The parties are encouraged, but not required to participate in informal negotiations and/or mediation at any time throughout the dispute resolution process but the conduct of any such settlement negotiation is not, standing alone, a reason to suspend any deadline under the proceedings.

ICANN

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement http://newgtlds.icann.org/en/applicants/agb/program-privacy, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:

    a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;

    b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;

    c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

d. Applicant may be requested to supply certain information in the original language as well as in English.

9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.

10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11. Applicant authorizes ICANN to:

a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.

14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

Forrest-014

Forrest-014

ICANN Resolutions » 2008-06-26 - GNSO Recommendations on New gTLDs

Important note: The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

2008-06-26 - GNSO Recommendations on New gTLDs

Resolution of the ICANN Board

Topic:

GNSO recommendations on New gTLDs

Summary:

Board adopts GNSO policy recommendations on new gTLDs and directs staff to complete detailed implementation plan in consultation with the community, subject to final approval before the New gTLD Program is launched.

Category:

gTLDs

Meeting Date:

Thu, 26 Jun 2008

Resolution Number:

2008.06.26.02, 2008.06.26.03

URL for Resolution:

http://www.icann.org/en/minutes/resolutions-26jun08.htm

Status:

Complete

Implementation Actions:

- Publish first Applicant Guidebook draft for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 23 October 2008
- Publish Applicant Guidebook draft v2 for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 19 February 2009
- Publish updated Applicant Guidebook excerpts for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 31 May 2009
- Attend global consultation on overarching issues / outreach events in New York, London, Hong Kong, and Abu Dhabi.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 4 August 2009
- Publish Applicant Guidebook draft v3 for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 4 October 2009
- Publish updated Applicant Guidebook excerpts for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 15 February 2010

- Publish Applicant Guidebook draft v4 for public comment and discussion.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 31 May 2010
- Publish proposed final version of Applicant Guidebook for public comment, discussion, and possible adoption.
    - Responsible entity: Cross-departmental team for policy implementation
    - Due date: None provided
    - Completion date: 12 November 2010

Resolution Text:

Whereas, the GNSO initiated a policy development process on the introduction of New gTLDs in December 2005. <http://gnso.icann.org/issues/new-gtlds/>

Whereas, the GNSO Committee on the Introduction of New gTLDs addressed a range of difficult technical, operational, legal, economic, and policy questions, and facilitated widespread participation and public comment throughout the process.

Whereas, the GNSO successfully completed its policy development process on the Introduction of New gTLDs and on 7 September 2007, and achieved a Supermajority vote on its 19 policy recommendations. <http://gnso.icann.org/meetings/minutes-gnso-06sep07.shtml>

Whereas, the Board instructed staff to review the GNSO recommendations and determine whether they were capable of implementation.

Whereas, staff has engaged international technical, operational and legal expertise to provide counsel on details to support the implementation of the Policy recommendations and as a result, ICANN cross-functional teams have developed implementation details in support of the GNSO's policy recommendations, and have concluded that the recommendations are capable of implementation.

Whereas, staff has provided regular updates to the community and the Board on the implementation plan. <http://icann.org/topics/new-gtld-program.htm>

Whereas, consultation with the DNS technical community has led to the conclusion that there is not currently any evidence to support establishing a limit to how many TLDs can be inserted in the root based on technical stability concerns. <http://www.icann.org/topics/dns-stability-draft-

paper-06feb08.pdf>

Whereas, the Board recognizes that the process will need to be resilient to unforeseen circumstances.

Whereas, the Board has listened to the concerns about the recommendations that have been raised by the community, and will continue to take into account the advice of ICANN's supporting organizations and advisory committees in the implementation plan.

Resolved (2008.06.26.02), based on both the support of the community for New gTLDs and the advice of staff that the introduction of new gTLDs is capable of implementation, the Board adopts the GNSO policy recommendations for the introduction of new gTLDs <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

Resolved (2008.06.26.03), the Board directs staff to continue to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the board and community to approve before the new gTLD introduction process is launched.

Other Related Resolutions:

- Resolutions 06.22, 06.23, and 06.24 authorize ICANN Staff to post "Notice of Intent to Advance Implementation of New gTLD Process"; request GNSO to complete initial report on new gTLDs at or before ICANN's next public meeting in Marrakech, Morocco:http://www.icann.org/en/minutes/minutes-31mar06.htm.
- Resolution 06.49 and 06.50 call for GNSO to complete PDP on new gTLDs (requesting GNSO to publish its report for public comment by November 2006) and call for Community to comment on the reports published by the New TLDs Committee:http://www.icann.org/en/minutes/minutes-30jun06.htm.
- Resolution 07.93, 07.94, and 07.95 acknowledge the GNSO Committee's work and ask staff to continue working on implementation analysis of policy recommendations and report to Board:http://www.icann.org/en/minutes/resolutions-02nov07.htm.
- Resolution 2008.02.15.06 directs staff to continue consultation with Board, GNSO, and community on implementation issues and progress concerning GNSO policy recommendations on new gTLDs:http://www.icann.org/en/minutes/resolutions-15feb08.htm.
- Other resolutions TBD.

Additional Information:

- Information on the New gTLD Program, available at:http://www.icann.org/en/topics/new-gtld-program.htm.
- GNSO Policy Work on new gTLDs, available at:http://gnso.icann.org/issues/new-gtlds/.
- Recommendations on Policy Development for introduction of new gTLDs, available at: http://gnso.icann.org/issues/new-gtlds/goel-mehta-01feb06.pdf.
- A copy of the Final Report regarding Introduction of New Generic Top-Level Domains is available at: http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.
- The resolution does not address funding for the items identified therein.

Forrest-015

Forrest-015

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Generic Names Supporting Organization

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Final Report - Introduction of New Generic Top-Level Domains

TRANSLATE

bing

To translate any GNSO document (PDF, DOC, etc.), use Google Translate.

Last Updated: 4 September 2009

Date 8 August 2007

ICANN Generic Names Supporting Organisation

Final Report

Introduction of New Generic Top-Level Domains

8 August 2007

Part A Final Report

Introduction of New Generic Top-Level Domains

ABSTRACT

This is the Generic Names Supporting Organization's Final Report on the Introduction of New Top-Level Domains. The Report is in two parts. Part A contains the substantive discussion of the Principles, Policy Recommendations and Implementation Guidelines and Part B contains a range of supplementary materials that have been used by the Committee during the course of the Policy Development Process.

The GNSO Committee on New Top-Level Domains consisted of all GNSO Council members. All meetings were open to a wide range of interested stakeholders and observers. A set of participation data is found in Part B.

Many of the terms found here have specific meaning within the context of ICANN and new top-level domains discussion. A full glossary of terms is available in the Reference Material section at the end of Part A.

BACKGROUND

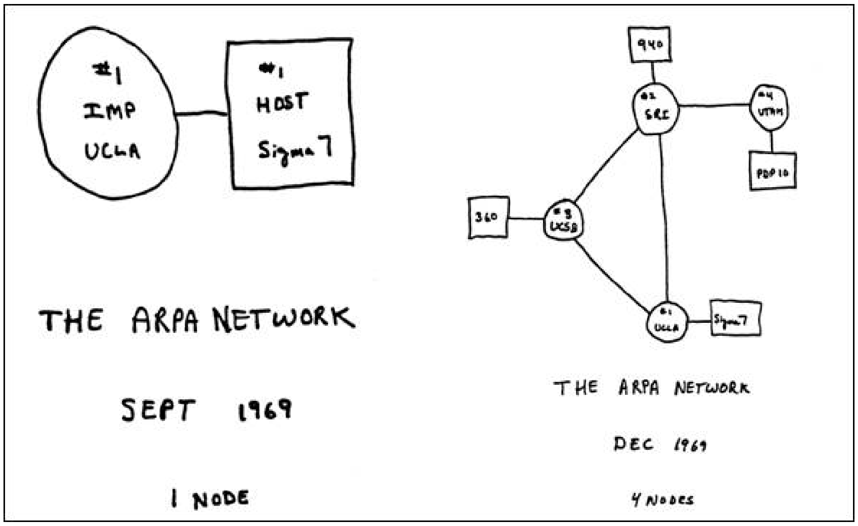
1. The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for the overall coordination of "the global Internet's system of unique identifiers" and ensuring the "stable and secure operation of the Internet's unique identifier systems. In particular, ICANN coordinates the "allocation and assignment of the three sets of unique identifiers for the Internet". These are "domain names"(forming a system called the DNS); Internet protocol (IP) addresses and autonomous system (AS) numbers and Protocol port and parameter numbers". ICANN is also responsible for the "operation and evolution of the DNS root name server system and policy development reasonably and appropriately related to these technical functions". These elements are all contained in ICANN's Mission and Core Values[1] in addition to provisions which enable policy development work that, once approved by the ICANN Board, become binding on the organization. The results of the policy development process found here relate to the introduction of new generic top-level domains.

2. This document is the *Final Report* of the Generic Names Supporting Organisation's (GNSO) Policy Development Process (PDP) that has been conducted using ICANN's Bylaws and policy development guidelines that relate to the work of the GNSO. This *Report* reflects a comprehensive examination of four Terms of Reference designed to establish a stable and ongoing process that facilitates the introduction of new top-level domains. The policy development process (PDP) is part of the Generic Names Supporting Organisation's (GNSO) mandate within the ICANN structure. However, close consultation with other ICANN Supporting Organisations and Advisory Committees has been an integral part of the process. The

consultations and negotiations have also included a wide range of interested stakeholders from within and outside the ICANN community[2].

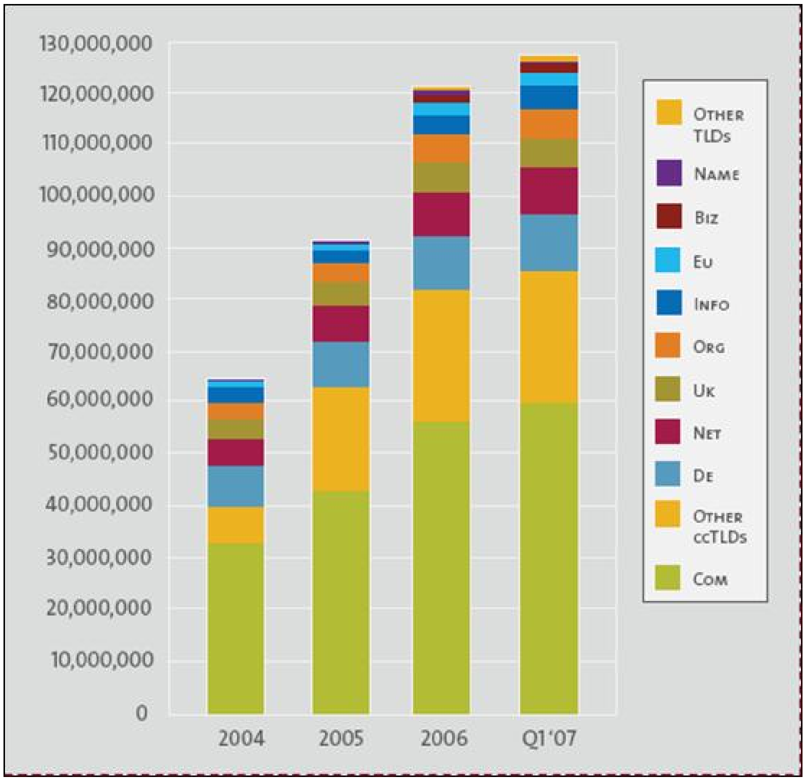
3. The *Final Report* is in two parts. This document is Part A and contains the full explanation of each of the Principles, Recommendations and Implementation Guidelines that the Committee has developed since December 2005[3]. Part B of the *Report* contains a wide range of supplementary materials which have been used in the policy development process including Constituency Impact Statements (CIS), a series of Working Group Reports on important sub-elements of the Committee's deliberations, a collection of external reference materials, and the procedural documentation of the policy development process[4].

4. The finalisation of the policy for the introduction of new top-level domains is part of a long series of events that have dramatically changed the nature of the Internet. The 1969 ARPANET diagram shows the initial design of a network that is now global in its reach and an integral part of many lives and businesses. The policy recommendations found here illustrate the complexity of the Internet of 2007 and, as a package, propose a system to add new top-level domains in an orderly and transparent way. The ICANN Staff Implementation Team, consisting of policy, operational and legal staff members, has worked closely with the Committee on all aspects of the policy development process[5]. The ICANN Board has received regular information and updates about the process and the substantive results of the Committee's work.



5. The majority of the early work on the introduction of new top-level domains is found in the ETF's Request for Comment series. RFC 1034[6] is a fundamental resource that explains key concepts of the naming system. Read in conjunction with RFC920[7], an historical picture emerges of how and why the domain name system hierarchy has been organised. Postel & Reynolds set out in their RFC920 introduction about the "General Purpose Domains" that ..."While the initial domain name "ARPA" arises from the history of the development of this system and environment, in the future most of the top level names will be very general categories like "government", "education", or "commercial". The motivation is to provide an organization name that is free of undesirable semantics."

6. In 2007, the Internet is multi-dimensional and its development is driven by widespread access to inexpensive communications technologies in many parts of the world. In addition, global travel is now relatively inexpensive, efficient and readily available to a diverse range of travellers. As a consequence, citizens no longer automatically associate themselves with countries but with international communities of linguistic, cultural or professional interests independent of physical location. Many people now exercise multiple citizenship rights, speak many different languages and quite often live far from where they were born or educated. The 2007 OECD *Factbook*[8] provides comprehensive statistics about the impact of migration on OECD member countries. In essence, many populations are fluid and changing due in part to easing labour movement restrictions but also because technology enables workers to live in one place and work in another relatively easily. As a result, companies and organizations are now global and operate across many geographic borders and jurisdictions. The following illustration[9] shows how rapidly the number of domain names under registration has increased and one could expect that trend to continue with the introduction of new top-level domains.



7. A key driver of change has been the introduction of competition in the registration of domain names through ICANN Accredited Registrars[10]. In June 2007, there were more than 800 accredited registrars who register names for end users with ongoing downward pressure on the prices end-users pay for domain name registration.

8. ICANN's work on the introduction of new top-level domains has been underway since 1999. By mid-1999, Working Group C[11] had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, coop, .aero and .biz.

9. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, mobi and travel[12].

10. The July 2007 zone file survey statistics from www.registrarstats.com[13] shows that there are slightly more than 96,000,000 top level domains registered across a selection of seven top-level domains including .com, .net and info. Evidence from potential new applicants provides more impetus to implement a system that enables the ongoing introduction of new top level domains[14]. In addition, interest from Internet users who could use Internationalised Domain Names (DNs) in a wide variety of scripts beyond ASCII is growing rapidly.

11. To arrive at the full set of policy recommendations which are found here, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[15], and which was augmented by a full set of GNSO Constituency Statements[16]. These are all found in Part B of the *Final Report* and should be read in conjunction with this document. In addition, the Committee received detailed responses from the Implementation Team about proposed policy recommendations and the implementation of the recommendations package as an on-line application process that could be used by a wide array of potential applicants.

12. The Committee reviewed and analysed a wide variety of materials including Working Group C's findings, the evaluation reports from the 2003 & 2004 round of sponsored top-level domains and a full range of other historic materials[17].

13. In the past, a number of different approaches to new top level domains have been considered including the formulation of a structured taxonomy[18] of names, for example, auto, .books, .travel and music. The Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable. It is expected that applicants will apply for targeted community strings such as .travel for the travel industry and .cat for the Catalan community as well as some generic strings. The Committee identified five key drivers for the introduction of new top-level domains.

(i) t is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated

(ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds

(iii) Expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.

(iv) There is demand for additional top-level domains as a business opportunity. The GNSO Committee expects that this business opportunity will stimulate competition at the registry service level which is consistent with ICANN's Core Value 6.

(v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

14. The remainder of this Report is structured around the four *Terms of Reference.* This includes an explanation of the Principles that have guided the work taking into account the Governmental Advisory Committee's March 2007 *Public Policy Principles for New gTLDs*[19]; a comprehensive set of Recommendations which has majority Committee support and a set of Implementation Guidelines which has been discussed in great detail with the ICANN Staff Implementation Team. The Implementation Team has released two *ICANN Staff Discussion Points* documents (in November 2006 and June 2007). Version 2 provides detailed analysis of the proposed recommendations from an implementation standpoint and provides suggestions about the way in which the implementation plan may come together. The ICANN Board will make the final decision about the actual structure of the application and evaluation process.

15. In each of the sections below the Committee's recommendations are discussed in more detail with an explanation of the rationale for the decisions. The recommendations have been the subject of numerous public comment periods and intensive discussion across a range of stakeholders including ICANN's GNSO Constituencies, ICANN Supporting Organisations and Advisory Committees and members of the broader Internet-using public that is interested in ICANN's work[20]. In particular, detailed work has been conducted through the Internationalised Domain Names Working Group (IDN-WG)[21], the Reserved Names Working Group (RN-WG)[22] and the Protecting the Rights of Others Working Group (PRO-WG) [23]. The Working Group Reports are found in full in Part B of the *Final Report* along with the March 2007 GAC Public Policy Principles for New Top-Level Domains, Constituency Impact Statements. A minority statement from the NCUC about Recommendations 6 & 20 are found Annexes for this document along with individual comments from Nominating Committee appointee Ms Avri Doria.

SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES

1. This section sets out, in table form, the set of Principles, proposed Policy Recommendations and Guidelines that the Committee has derived through its work. The addition of new gTLDs will be done in accordance with ICANN's primary mission which is to ensure the security and stability of the DNS and, in particular, the Internet's root server system[24].

2. The Principles are a combination of GNSO Committee priorities, ICANN staff implementation principles developed in tandem with the Committee and the March 2007 GAC Public Policy Principles on New Top-Level Domains. The Principles are supported by all GNSO Constituencies [25]

3. ICANN's Mission and Core Values were key reference points for the development of the Committee's Principles, Recommendations and Implementation Guidelines. These are referenced in the right-hand column of the tables below.

4. The Principles have support from all GNSO Constituencies.

	PRINCIPLES	**MISSION & CORE VALUES**
A	**New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.**	**M1 & CV1 & 2, 4-10**
B	Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of DNs being available in the root.	M1-3 & CV 1, 4 & 6
C	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.	M3 & CV 4-10
D	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.	M1-3 & CV 1
E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN's registry agreement.	M1-3 & CV 1
F	**A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.**	**M1-3 & CV 1**
G	**The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.**	

	RECOMMENDATIONS[26]	**MISSION & CORE VALUES**
1	**ICANN must implement a process that allows the introduction of new top-level domains.** **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.**	**M1-3 & CV1-11**

2	Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.	M1-3 & C1-6-11
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. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).	CV3
4	Strings must not cause any technical instability.	M1-3 & CV 1
5	Strings must not be a Reserved Word[27].	M1-3 & CV 1 & 3
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.** **Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).**	**M3 & CV 4**
7	**Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.**	**M1-3 & CV1**
8	Applicants must be able to demonstrate their financial and organisational operational capability.	M1-3 & CV1
9	**There must be a clear and pre-published application process using objective and measurable criteria.**	**M3 & CV6-9**
10	**There must be a base contract provided to applicants at the beginning of the application process.**	**CV7-9**
11	**[Replaced with Recommendation 20 and Implementation Guideline P and inserted into Term of Reference 3 Allocation Methods section]**	
12	**Dispute resolution and challenge processes must be established prior to the start of the process.**	**CV7-9**
13	Applications must initially be assessed in rounds until the scale of demand is clear.	**CV7-9**
14	The initial registry agreement term must be of a commercially reasonable length**.**	**CV5-9**
15	**There must be renewal expectancy.**	**CV5-9**
16	**Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.**	**CV5-9**
17	**A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.**	**M1 & CV1**
18	If an applicant offers an IDN service, then ICANN's DN guidelines[28] must be followed.	M1 & CV1
19	Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.	M1 & CV1
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.	

* The NCUC submitted Minority Statements on Recommendations 6 and 20. The remainder of the Recommendations have support from all GNSO Constituencies.

	IMPLEMENTATION GUIDELINES	**MISSION & CORE VALUES**
IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	CV 2, 5, 6, 8 & 9
IG B	Application 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.	CV 5, 6, 8 & 9

IG C	ICANN will provide frequent communications with applicants and the public including comment forums.	CV 9 & 10
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.	CV 8-10
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	CV 9 & 10
IG F*	**If there is contention for strings, applicants may[29]** **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.**	CV 7-10
IG H*	Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions: (i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and (ii) a formal objection process is initiated. Under these exceptions, Staff Evaluators will devise criteria and procedures to investigate the claim. Under exception (ii), an expert panel will apply the process, guidelines, and definitions set forth in IG P.	CV 7 - 10
IG H	External dispute providers will give decisions on objections.	CV 10
IG I	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	CV 10
IG J	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.	CV 4-10
IG K	ICANN should take a consistent approach to the establishment of registry fees.	CV 5
IG L	The use of personal data must be limited to the purpose for which it is collected.	CV 8
IG M	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way that no longer requires all participants in the conversation to be able to read and write English[30].	CV 3 - 7
IG N	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	CV 3 - 7
IG O	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	CV 8 -10
IG P*	The following process, definitions and guidelines refer to Recommendation 20. **Process** Opposition must be objection based. Determination will be made by a dispute resolution panel constituted for the purpose. The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection). **Guidelines** The task of the panel is the determination of substantial opposition. a) **substantial** – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the	

	explicit or implicit targeting. c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. t may be a closely related community which believes it is impacted. d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application. e) i**mplicitly targeting** – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use. f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years. Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO. g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar. **h) detriment** – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.	
IG Q	ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.	
IG R	Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.	

* The NCUC submitted Minority Statements on Implementation Guidelines F, H & P. The remainder of the Implementation Guidelines have support from all GNSO Constituencies.

1. This set of implementation guidelines is the result of detailed discussion, particularly with respect to the two *ICANN Staff Discussion Points*[31] documents that were prepared to facilitate consultation with the GNSO Committee about the implementation impacts of the proposed policy Recommendations. The Implementation Guidelines will be used to inform the final Implementation Plan which is approved by the ICANN Board

2. The *Discussion Points* documents contain draft flowcharts which have been developed by the Implementation Team and which will be updated, based on the final vote of the GNSO Council and the direction of the ICANN Board. The *Discussion Points* documents have been used in the ongoing internal implementation discussions that have focused on ensuring that draft recommendations proposed by the Committee are implementable in an efficient and transparent manner[32]. The flowchart setting out the proposed Contention Evaluation Process is a more detailed component within the Application Evaluation Process and will be amended to take into account the inputs from Recommendation 20 and its related Implementation Guidelines.

3. This policy development process has been designed to produce a systemised and ongoing mechanism for applicants to propose new top-level domains. The Request for Proposals (RFP) for the first round will include scheduling information for the subsequent rounds to occur within one year. After the first round of new applications, the application system will be evaluated by ICANN's TLDs Project Office to assess the effectiveness of the application system. Success metrics will be developed and any necessary adjustments made to the process for subsequent rounds.

4. The following sections set out in detail the explanation for the Committee's recommendations for each Term of Reference.

TERM OF REFERENCE ONE -- WHETHER TO INTRODUCE NEW TOP-LEVEL DOMAINS

1. **Recommendation 1 Discussion – All GNSO Constituencies supported the introduction of new top-level domains.**

2. The GNSO Committee was asked to address the question of whether to introduce new top-level domains. The Committee recommends that ICANN should implement a process that allows the introduction of new top level domains and that work should proceed to develop policies that will enable the introduction of new generic top-level domains, taking into account the recommendations found in the latter sections of the *Report* concerning Selection Criteria (Term of Reference 2), Allocation Methods (Term of Reference 3) and Policies for Contractual Conditions (Term of Reference 4).

3. ICANN's work on the introduction of new top-level domains has been ongoing since 1999. The early work included the 2000 Working Group C Report[33] that also asked the question of "whether there should be new TLDs". By mid-1999, the Working Group had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new

gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, coop, .aero and .biz.

4. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, mobi and travel.

5. In addressing Term of Reference One, the Committee arrived at its recommendation by reviewing and analysing a wide variety of materials including Working Group C's findings; the evaluation reports from the 2003-2004 round of sponsored top-level domains and full range of other historic materials which are posted athttp://gnso icann org/issues/new-gtlds//

6. In addition, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[34]. These papers augmented a full set of GNSO Constituency Statements[35] and a set of Constituency Impact Statements[36] that addressed specific elements of the Principles, Recommendations and Implementation Guidelines.

7. The Committee was asked, at its February 2007 Los Angeles meeting, to confirm its rationale for recommending that ICANN introduce new top-level domains. In summary, there are five threads which have emerged:

(i) t is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated

(ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds

(iii) It is hoped that expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.

(iv) In addition, the introduction of a new top-level domain application process has the potential to promote competition in the provision of registry services, and to add to consumer choice, market differentiation and geographic and service-provider diversity which is consistent with ICANN's Core Value 6.

(v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

8. Article X, Part 7, Section E of the GNSO's Policy Development Process requires the submission of "constituency impact statements" which reflect the potential implementation impact of policy recommendations. By 4 July 2007 all GNSO Constituencies had submitted Constituency Impact Statements (CIS) to the gtld-council mailing list[37]. Each of those statements is referred to throughout the next sections[38] and are found in full in Part B of the *Report*. The NCUC submitted Minority Statements on Recommendations 6 & 20 and on Implementation Guidelines F, H & P. These statements are found in full here in Annex A & C, respectively, as they relate specifically to the finalised text of those two recommendations. GNSO Committee Chair and Nominating Committee appointee Ms Avri Doria also submitted individual comments on the recommendation package. Her comments are found in Annex B here.

9. All Constituencies support the introduction of new TLDs particularly if the application process is transparent and objective. For example, the ISPCP said that, "...the ISPCP is highly supportive of the principles defined in this section, especially with regards to the statement in [principle A] (A): New generic top-level domains must be introduced in an orderly, timely and predictable way. Network operators and ISPs must ensure their customers do not encounter problems in addressing their emails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace. The various criteria as defined in D, E and F, are also of great importance in contributing to minimise the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process". The Business Constituency's (BC) CIS said that "...If the outcome is the best possible there will be a beneficial impact on business users from: a reduction in the competitive concentration in the Registry sector; increased choice of domain names; lower fees for registration and ownership; increased opportunities for innovative on-line business models." The Registrar Constituency (RC) agreed with this view stating that "...new gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs if implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model."

10. The Registry Constituency (RyC) said that ".. Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that: there is a clear demand for new TLDs; competition creates more choices for potential registrants; introducing new TLDs with different purposes increases the public benefit; new gTLDS will result in creativity and differentiation in the domain name industry; the total market for all TLDs, new and old, will be expanded." In summary, the Committee recommended, "ICANN must implement a process that allows the introduction of new top-level domains. 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". Given that this recommendation has support from all Constituencies, the following sections set out the other Terms of Reference recommendations.

TERM OF REFERENCE -- SELECTION CRITERIA

1. **Recommendation 2 Discussion -- Strings must not be confusingly similar to an existing top-level domain.**

i) This recommendation has support from all the GNSO Constituencies. Ms Doria accepted the recommendation with the concern expressed below[39].

ii) The list of existing top-level domains is maintained by IANA and is listed in full on ICANN's website[40]. Naturally, as the application process enables the operation of new top-level domains this list will get much longer and the test more complex. The RyC, in its Impact Statement, said that "...This recommendation is especially important to the RyC. ... t is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create confusion with currently existing gTLD strings or with strings that are introduced in the future. There is a strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated." The ISPCP also stated that this recommendation was "especially important in the avoidance of any negative impact on network activities." The RC stated that ".. Registrars would likely be hesitant to offer confusingly similar gTLDs due to customer demand and support concerns. On the other hand, applying the concept too broadly would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers".

iii) There are two other key concepts within this recommendation. The first is the issue of "confusingly similar" [41]and the second "likelihood of confusion". There is extensive experience within the Committee with respect to trademark law and the issues found below have been discussed at length, both within the Committee and amongst the Implementation Team.

iv) The Committee used a wide variety of existing law[42], international treaty agreements and covenants to arrive at a common understanding that strings should not be confusingly similar either to existing top-level domains like .com and net or to existing trademarks[43]. For example, the Committee considered the World Trade Organisation's TRIPS agreement, in particular Article 16 which discusses the rights which are conferred to a trademark owner [44] In particular, the Committee agreed upon an expectation that strings must avoid increasing opportunities for entities or individuals, who operate in bad faith and who wish to defraud consumers. The Committee also considered the Universal Declaration of Human Rights[45] and the International Covenant on Civil and Political Rights which address the "freedom of expression" element of the Committee's deliberations.

v) The Committee also benefited from the work of the Protecting the Rights of Others Working Group (PRO-WG). The PRO-WG presented its *Final Report*[46] to the Committee at the June 2007 San Juan meeting. The Committee agreed that the Working Group could develop some reference implementation guidelines on rights protection mechanisms that may inform potential new TLD applicants during the application process. A small ad-hoc group of interested volunteers are preparing those materials for consideration by the Council by mid-October 2007.

vi) The Committee had access to a wide range of differing approaches to rights holder protection mechanisms including the United Kingdom, the USA, Jordan, Egypt and Australia[47].

vii) In addition, the Committee referred to the 1883 *Paris Convention on the Protection of Industrial Property*[48]. t describes the notion of confusion and describes creating confusion as "to create confusion by any means whatever" {Article 10bis (3) (1} and, further, being "liable to mislead the public" {Article 10bis (3) (3)}. The treatment of confusingly similar is also contained in European Union law (currently covering twenty-seven countries) and is structured as follows. "...because of its identity with or similarity to.. there exists a likelihood of confusion on the part of the public...; the likelihood of confusion includes the likelihood of association..." {Article 4 (1) (b) of the 1988 EU Trade Mark directive 89/104/EEC}. Article 8 (1) (b) of the 1993 European Union Trade Mark regulation 40/94 is also relevant.

viii)In the United States, existing trade mark law requires applicants for trademark registration to state under penalty of perjury that "...to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive..." which is contained in Section 1051 (3) (d) of the US Trademark Act 2005 (found athttp://www bitlaw com/source/15usc/1051 html.)[49]

ix) In Australia, the Australian Trade Marks Act 1995 Section 10 says that "...For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or cause confusion" (found athttp://www ipaustralia.gov au/resources/legislation_index shtml)

x) A number of different trademark offices provide guidance on how to interpret confusion. For example, the European Union Trade Mark Office provides guidance on how to interpret confusion. *"...confusion may be visual, phonetic or conceptual. A mere aural similarity may create a likelihood of confusion. A mere visual similarity may create a likelihood of confusion. Confusion is based on the fact that the relevant public does not tend to analyse a word in detail but pays more attention to the distinctive and dominant components. Similarities are more significant than dissimilarities. The visual comparison is based on an analysis of the number and sequence of the letters, the number of words and the structure of the signs. Further particularities may be of relevance, such as the existence of special letters or accents that may be perceived as an indication of a specific language. For words, the visual comparison coincides with the phonetic comparison unless in the relevant language the word is not pronounced as it is written. It should be assumed that the relevant public is either unfamiliar with that foreign language, or even if it understands the meaning in that foreign language, will still tend to pronounce it in accordance with the phonetic rules of their native language. The length of a name may influence the effect of differences. The shorter a name, the more easily the public is able to perceive all its single elements. Thus, small differences may frequently lead in short words to a different overall impression. In contrast, the public is less aware of differences between long names. The overall phonetic impression is particularly influenced by the number and sequence of syllables."* (found athttp://oami europa.eu/en/mark/marque/direc htm).

xi) An extract from the United Kingdom's Trade Mark Office's Examiner's Guidance Manual is useful in explaining further the Committee's approach to developing its Recommendation. *"For likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average consumer.*

Likelihood of association is not an alternative to likelihood of confusion, "but serves to define its scope". Mere association, in the sense that the later mark brings the earlier mark to mind is insufficient to find a likelihood of confusion, unless the average consumer, in bringing the earlier mark to mind, is led to expect the goods or services of both marks to be under the control of one single trade source. "The risk that the public might believe that the goods/services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion...". (found athttp://www patent gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm)

xii) The Committee also looked in detail at the existing provisions of ICANN's Registrar Accreditation Agreement, particularly Section 3.7.7 9[50] which says that "...The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party."

xiii)The implications of the introduction of Internationalised Domain Names (IDNs) are, in the main, the same as for ASCII top-level domains. On 22 March 2007 the IDN-WG released its *Outcomes Report*[51] that the Working Group presented to the GNSO Committee. The Working Group's exploration of IDN-specific issues confirmed that the new TLD recommendations are valid for IDN TLDs. The full IDN WG Report is found in Part B of the*Report*.

xiv) The technical testing for IDNs at the top-level is not yet completed although strong progress is being made. Given this and the other work that is taking place around the introduction of IDNs at the top-level, there are some critical factors that may impede the immediate acceptance of new IDN TLD applications. The conditions under which those applications would be assessed would remain the same as for ASCII TLDs.

xv) Detailed work continues on the preparation of an Implementation Plan that reflects both the Principles and the Recommendations. The proposed Implementation Plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users[52].

xvi) The draft Implementation Plan (included in the *Discussion Points* document), illustrates the flow of the application and evaluation process and includes a detailed dispute resolution and extended evaluation tracks designed to resolve objections to applicants or applications.

xvii) There is tension between those on the Committee who are concerned about the protection of existing TLD strings and those concerned with the protection of trademark and other rights as compared to those who wish, as far as possible, to preserve freedom of expression and creativity. The *Implementation Plan* sets out a series of tests to apply the recommendation during the application evaluation process.

2. **Recommendation 3 Discussion -- Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).**

i. This recommendation has support from all GNSO Constituencies. Ms Doria supported the recommendation with concern expressed below[53].

ii. This recommendation was discussed in detail in the lead up to the Committee's 7 June 2007 conference call and it was agreed that further work would be beneficial. That work was conducted through a series of teleconferences and email exchanges. The Committee decided to leave the recommendation text as it had been drafted and insert a new Principle G that reads "...The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."

iii. Prior to this, the Committee engaged in comprehensive discussion about this recommendation and took advice from a number of experts within the group[54]. The original text of the recommendation has been modified to recognise that an applicant would be bound by the laws of the country where they are located and an applicant may be bound by another country that has jurisdiction over them. In addition, the original formulation that included "freedom of speech" was modified to read the more generally applicable "freedom of expression".

iv. Before reaching agreement on the final text, the IPC and the NCUC, in their respective Constituency Impact Statements (CIS), had differing views. The NCUC argued that "...there is no recognition that trade marks (and other legal rights have legal limits and *defenses*." The IPC says "agreed [to the recommendation], and, as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others."

3. **Recommendation 4 Discussion -- Strings must not cause any technical instability.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. It was agreed by the Committee that the string should not cause any technical issues that threatened the stability and security of the Internet.

iii. In its CIS, the ISPCP stated that ".. this is especially important in the avoidance of any negative impact on network activities...The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The IPC also agreed that "technical and operational stability are imperative to any new gTLD introduction." The

RC said "...This is important to Registrars in that unstable registry and/or zone operations would have a serious and costly impact on its operations and customer service and support."

iv. The Security and Stability Advisory Committee (SSAC) has been involved in general discussions about new top level domains and will be consulted formally to confirm that the implementation of the recommendations will not cause any technical instability.

v. A reserved word list, which includes strings which are reserved for technical reasons, has been recommended by the RN-WG. This table is found in the section below.

4. **Recommendation 5 Discussion -- Strings must not be a Reserved Word.**[55]

i. This recommendation is supported by all GNSO Constituencies. Ms Doria supported the recommendation but expressed some concerns outlined in the footnote below.[56]

ii. The RN WG developed a definition of "reserved word" in the context of new TLDs which said ".. depending on the specific reserved name category as well as the type (ASCII or IDN), the reserved name requirements recommended may apply in any one or more of the following levels as indicated:

1. At the top level regarding gTLD string restrictions
2. At the second-level as contractual conditions
3. At the third-level as contractual conditions for any new gTLDs that offer domain name registrations at the third-level.

iii. The notion of "reserved words" has a specific meaning within the ICANN context. Each of the existing ICANN registry contracts has provisions within it that govern the use of reserved words. Some of these recommendations will become part of the contractual conditions for new registry operators.

iv. The Reserved Names Working Group (RN-WG) developed a series of recommendations across a broad spectrum of reserved words. The Working Group's *Final Report*[57] was reviewed and the recommendations updated by the Committee at ICANN's Puerto Rico meeting and, with respect to the recommendations relating to IDNs, with IDN experts. The final recommendations are included in the following table.

	Reserved Name Category	**Domain Name Level(s)**	**Recommendation**
1	ICANN & IANA	All ASCII	The names listed as ICANN and IANA names will be reserved at all levels.
2	ICANN & IANA	Top level, IDN	Any names that appear in the IDN evaluation facility[58] which consist exclusively of translations of 'example' or 'test' that appear in the document at http //www.icann org/topics/idn/idn-evaluation-plan-v2%209.pdf shall be reserved.
3	ICANN & IANA	2nd & 3rd levels, IDN	Any names that appear in the IDN evaluation facility which consist exclusively of translations of 'example' or 'test' that appear in the document at http //www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf shall be reserved.
4	Symbols	All	We recommend that the current practice be maintained, so that no symbols other than the '-' [hyphen] be considered for use, with further allowance for any equivalent marks that may explicitly be made available in future revisions of the IDNA protocol.
5	Single and Two Character IDNs	IDNA-valid strings at all levels	Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be granted for allocation in the DNS with particular caution applied to U-labels in Latin script (see Recommendation 10 below). Single and two character labels at the second level and the third level if applicable should be available for registration, provided they are consistent with the IDN Guidelines.
6	Single Letters	Top Level	We recommend reservation of single letters at the top level based on technical questions raised. If sufficient research at a later date demonstrates that the technical issues and concerns are addressed, the topic of releasing reservation status can be reconsidered.
7	Single Letters and Digits	2nd Level	In future gTLDS we recommend that single letters and single digits be available at the second (and third level if applicable).
8	Single and Two Digits	Top Level	A top-level label must not be a plausible component of an IPv4 or IPv6 address. (e g., .3, 99, .123, .1035, .0xAF, .1578234)
9	Single Letter, Single Digit Combinations	Top Level	Applications may be considered for single letter, single digit combinations at the top level in accordance with the terms set forth in the new gTLD process.

			Examples include .3F, A1, u7.
10	Two Letters	Top Level	We recommend that the current practice of allowing two letter names at the top level, only for ccTLDs, remains at this time.[59] Examples include .AU, .DE, .UK.
11	Any combination of Two Letters, Digits	2nd Level	Registries may propose release provided that measures to avoid confusion with any corresponding country codes are implemented.[60] Examples include ba.aero, ub.cat, 53.com, 3M com, e8.org.
12	Tagged Names	Top Level ASCII	In the absence of standardization activity and appropriate IANA registration, all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved at the top-level.[61]
13	N/A	Top Level IDN	For each IDN gTLD proposed, applicant must provide both the "ASCII compatible encoding" ("A-label") and the "Unicode display form" ("U-label")[62] For example: • If the Chinese word for 'Beijing' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lq90i) and the U-label (北京). • If the Japanese word for 'Tokyo' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lqs71d) and the U-label (東京).
14	Tagged Names	2nd Level ASCII	The current reservation requirement be reworded to say, "*In the absence of standardization activity and appropriate IANA registration,* all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the second (2nd) level.[63] – added words in*italics*. (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
15	Tagged Names	3rd Level ASCII	All labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the third (3rd level) for gTLD registries that register names at the third level."[64] – added words in *italics*. (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
16	NIC, WHOIS, WWW	Top ASCII	The following names must be reserved: nic, whois, www.
17	NIC, WHOIS, WWW	Top IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist.
18	NIC, WHOIS, WWW	Second and Third* ASCII	The following names must be reserved for use in connection with the operation of the registry for the Registry TLD: nic, whois, www Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the Registry TLD, they shall be transferred as specified by ICANN. (*Third level only applies in cases where a registry offers registrations at the third level.)
19	NIC, WHOIS, WWW	Second and Third* IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist, except on a case by case basis as proposed by given registries. (*Third level only applies in cases where a registry offers registrations at the third level.)
20	Geographic and geopolitical	Top Level ASCII and IDN	There should be no geographical reserved names (i.e., no exclusionary list, no presumptive right of registration, no separate administrative procedure, etc.). The proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge, therefore no additional protection mechanisms are needed. Potential applicants for a new TLD need to represent that the use of the proposed string is not in violation of the national laws in which the applicant is incorporated. However, new TLD applicants interested in applying for a TLD that incorporates a country, territory, or place name should be advised of the GAC Principles, and the advisory role vested to it under the ICANN Bylaws. Additionally, a summary overview of the obstacles encountered by previous applicants involving similar TLDs should be provided to allow an applicant to make an informed decision.

			Potential applicants should also be advised that the failure of the GAC, or an individual GAC member, to file a challenge during the TLD application process, does not constitute a waiver of the authority vested to the GAC under the ICANN Bylaws. *Note New gTLD Recommendation 20*
21	Geographic and geopolitical	All Levels ASCII and IDN	The term 'geopolitical names' should be avoided until such time that a useful definition can be adopted. The basis for this recommendation is founded on the potential ambiguity regarding the definition of the term, and the lack of any specific definition of it in the WIPO Second Report on Domain Names or GAC recommendations. *Note New gTLD Recommendation 20*
22	Geographic and geopolitical	Second Level & Third Level if applicable, ASCII & IDN	The consensus view of the working group is given the lack of any established international law on the subject, conflicting legal opinions, and conflicting recommendations emerging from various governmental fora, the current geographical reservation provision contained in the sTLD contracts during the 2004 Round should be removed, and harmonized with the more recently executed .COM, .NET, .ORG, .BIZ and .INFO registry contracts. The only exception to this consensus recommendation is those registries incorporated/organized under countries that require additional protection for geographical identifiers. In this instance, the registry would have to incorporate appropriate mechanisms to comply with their national/local laws. For those registries incorporated/organized under the laws of those countries that have expressly supported the guidelines of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications as adopted by the WIPO General Assembly, it is strongly recommended (but not mandated) that these registries take appropriate action to promptly implement protections that are in line with these WIPO guidelines and are in accordance with the relevant national laws of the applicable Member State. *Note New gTLD Recommendation 20*
23	gTLD Reserved Names	Second & Third Level ASCII and IDN (when applicable)	Absent justification for user confusion[65], the recommendation is that gTLD strings should no longer be reserved from registration for new gTLDs at the second or when applicable at the third level.Applicants for new gTLDs should take into consideration possible abusive or confusing uses of existing gTLD strings at the second level of their corresponding gTLD, based on the nature of their gTLD, when developing the startup process for their gTLD.
24	Controversial Names	All Levels, ASCII & IDN	There should not be a new reserved names category for Controversial Names.
25	Controversial Names	Top Level, ASCII & IDN	There should be a list of disputed names created as a result of the dispute process to be created by the new gTLD process. *Note New gTLD Recommendation 6*
26	Controversial Names	Top Level, ASCII & IDN	In the event of the initiation of a CN-DRP process, applications for that label will be placed in a HOLD status that would allow for the dispute to be further examined. If the dispute is dismissed or otherwise resolved favorably, the applications will reenter the processing queue. The period of time allowed for dispute should be finite and should be relegated to the CN-DRP process. The external dispute process should be defined to be objective, neutral, and transparent. The outcome of any dispute shall not result in the development of new categories of Reserved Names.[66] *Note New gTLD Recommendation 6*
27	Controversial Names	Top Level, ASCII & IDN	The new GTLD Controversial Names Dispute Resolution Panel should be established as a standing mechanism that is convened at the time a dispute is initiated. Preliminary elements of that process are provided in this report but further work is needed in this area. *Note New gTLD Recommendation 6*
28	Controversial Names	Top Level, ASCII & IDN	Within the dispute process, disputes would be initiated by the ICANN Advisory Committees (e.g, ALAC or GAC) or supporting organizations (e g, GNSO or ccNSO). As these organizations do not currently have formal processes for receiving, and deciding on such activities, these processes would need to be defined: o The Advisory Groups and the Supporting Organizations, using their own processes and consistent with their organizational structure, will need to define procedures for deciding on any requests for dispute initiation.

			o Any consensus or other formally supported position from an ICANN Advisory Committee or ICANN Supporting Organization must document the position of each member within that committee or organization (i.e., support, opposition, abstention) in compliance with both the spirit and letter of the ICANN bylaws regarding openness and transparency. *Note New gTLD Recommendation 6*
29	Controversial Names	Top Level, ASCII & IDN	Further work is needed to develop predictable and transparent criteria that can be used by the Controversial Resolution Panel. These criteria must take into account the need to: ▪·⚐❒□⧫♏♍⧫ ♐❒♏♏♎□❍ □♐ ♏⌧◻❒♏⬧⬧♓□■ ▪·✌♐♐♓❒❍ ⧫♒♏ ♐◆■♎♋❍♏■⧫♋● ♒◆❍♋■ ❒♓♑♒⧫⬧📪 ♓■ ⧫♒♏ ♎♓♑■♓⧫⍓ ♋■♎ ⬥□❒⧫♒ □♐ ⧫♒♏ ♒◆❍♋■ ◻♏❒⬧□■ ♋■♎ ⧫♒♏ ♏❑◆♋● ❒♓♑♒⧫⬧ □♐ ❍♏■ ♋■♎ ⬥□❍♏■ ▪·❄♋🙵♏ ♓■⧫□ ♋♍♍□◆■⧫ ⬧♏■⬧♓⧫♓❖♓⧫♓♏⬧ ❒♏♑♋❒♎♓■♑ ⧫♏❒❍⬧ ⬥♓⧫♒ ♍◆●⧫◆❒♋● ♋■♎ ❒♏●♓♑♓□◆⬧ ⬧♓♑■♓♐♓♍♋■♍♏📭 *Note New gTLD Recommendation 6*
30	Controversial Names	Top Level, ASCII & IDN	In any dispute resolution process, or sequence of issue resolution processes, the Controversial name category should be the last category considered. *Note New gTLD Recommendation 6*

v. With respect to geographic terms, the NCUC's CIS stated that "...We oppose any attempts to create lists of reserved names. Even examples are to be avoided as they can only become prescriptive. We are concerned that geographic names should not be fenced off from the commons of language and rather should be free for the use of all.. Moreover, the proposed recommendation does not make allowance for the duplication of geographic names outside the ccTLDs – where the real issues arise and the means of resolving competing use and fair and nominative use."

vi. The GAC's Public Policy Principle 2.2 states that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities."

vii. The Implementation Team has developed some suggestions about how this recommendation may be implemented. Those suggestions and the process flow were incorporated into the Version 2 of the ICANN Staff *Discussion Points* document for consideration by the Committee.

5. **Recommendation 6 Discussion -- Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.**
Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention of the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

i. This Recommendation is supported by all GNSO Constituencies except the NCUC. The NCUC has submitted a Minority Statement which is found in full in Annex A. The NCUC's earlier Constituency Impact Statement is found, along with all the GNSO Constituency Impact Statements, in Part B of this report. Ms Doria has submitted individual comments[67]. The Committee has discussed this recommendation in great detail and has attempted to address the experiences of the 2003-2004 sTLD round and the complex issues surrounding the .xxx application. The Committee has also recognised the GAC's Public Policy Principles, most notably Principle 2.1 a) and b) which refer to both freedom of expression and terms with significance in a variety of contexts. In addition, the Committee recognises the tension respecting freedom of expression and being sensitive to the legitimate concerns others have about offensive terms. The NCUC's earlier CIS says "...we oppose any string criteria based on morality and public order".

ii. Other Constituencies did not address this recommendation in their CISs. The Implementation Team has tried to balance these views by establishing an Implementation Plan that recognises the practical effect of opening a new top-level domain application system that will attract applications that some members of the community do not agree with. Whilst ICANN does have a technical co-ordination remit, it must also put in place a system of handling objections to strings or to applicants, using pre-published criteria, that is fair and predictable for applicants. t is also necessary to develop guidance for independent evaluators tasked with making decisions about objections.

iii. In its consideration of public policy aspects of new top-level domains the Committee examined the approach taken in a wide variety of jurisdictions to issues of morality and public order. This was done not to make decisions about acceptable strings but to provide a series of potential tests for independent evaluators to use should an objection be raised to an application. The use of the phrase "morality and public order" within the recommendation was done to set some guidelines for potential applicants about areas that may raise objections. The phrasing was also intended to set parameters for potential objectors so that any objection to an application could be analysed within the framework of broadly accepted legal norms that independent evaluators could use across a broad spectrum of possible objections. The Committee also sought to ensure that the objections process would have parameters set for who could object. Those suggested parameters are found within the Implementation Guidelines.

iv. In reaching its decision about the recommendation, the Committee sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94. In addition, the phrasing "contrary to morality or public order and in particular of such a nature as to deceive the public" comes from Article 6quinques (B)(3) of the 1883*Paris Convention*. The reference to the *Paris Convention* remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.

v. The concept of "morality" is captured in Article 19 United Nations Convention on Human Rights (http://www unhchr ch/udhr/lang/eng.htm) says ".. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 continues by saying that "...In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

vi. The EU Trade Mark Office's Examiner's guidelines provides assistance on how to interpret morality and deceit. "...Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste. The latter do not offend against this provision." The further element is deception of the public which is treated in the following way. "...Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue." For more information, see Sections 8.7 and 8 8 athttp://oami europa.eu/en/mark/marque/direc htm

vii. The UK Trade Mark office provides similar guidance in its Examiner's Guidance Manual. "Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage." For more information, see http //www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm)

viii. This recommendation has been the subject of detailed Committee and small group work in an attempt to reach consensus about both the text of the recommendation and the examples included as guidance about generally accepted legal norms. The work has been informed by detailed discussion within the GAC and through interactions between the GNSO Committee and the GAC.

6. **Recommendation 7 Discussion -- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The Committee agreed that the technical requirements for applicants would include compliance with a minimum set of technical standards and that this requirement would be part of the new registry operator's contractual conditions included in the proposed base contract. The more detailed discussion about technical requirements has been moved to the contractual conditions section.

iii. Reference was made to numerous Requests for Comment (RFCs) and other technical standards which apply to existing registry operators. For example, Appendix 7 of the June 2005 net agreement[68] provides a comprehensive listing of technical requirements in addition to other technical specifications in other parts of the agreement. These requirements are consistent with that which is expected of all current registry operators. These standards would form the basis of any new top-level domain operator requirements.

iv. This recommendation is referred to in two CISs. "The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organisational and operational capabilities of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The NCUC submitted "...we record that this must be limited to transparent, predictable and minimum technical requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination."

v. The GAC supported this direction in its Public Policy Principles 2 6, 2.10 and 2.11.

7. **Recommendation 8 Discussion -- Applicants must be able to demonstrate their financial and organisational operational capability.**

i. This recommendation is supported by all GNSO Constituencies and accepted with concern by Ms Doria[69].

ii. The Committee discussed this requirement in detail and determined that it was reasonable to request this information from potential applicants. It was also consistent with past practices including the prior new TLD rounds in 2000 and 2003-2004; the net and .org rebids and the conditions associated with ICANN registrar accreditation.

iii. This is also consistent with best practice procurement guidelines recommended by the World Bank (www.worldbank org), the OECD (www.oecd.org) and the Asian Development Bank (www.adb.org) as well as a range of federal procurement agencies such as the UK telecommunications regulator, Ofcom; the US Federal Communications Commission and major public companies.

iv. The challenging aspect of this recommendation is to develop robust and objective criteria against which applicants can be measured, recognising a vast array of business conditions and models. This will be an important element of the ongoing development of the Implementation Plan.

v. The ISPCP discussed the importance of this recommendation in its CIS, as found in Recommendation 7 above.

vi. The NCUC's CIS addressed this recommendation by saying "...we support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operationally capability.. All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination."

vii. The GAC echoed these views in its Public Policy Principle 2.5 that said "...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."

8. **Recommendation 9 Discussion -- There must be a clear and pre-published process using objective and measurable criteria.**

i. This recommendation is supported by all GNSO Constituencies and by Ms Doria. It is consistent with ICANN's previous TLD rounds in 2000 and 2003-2004 and with its re-bid of both the .net and .org registry contracts.

ii. It is also consistent with ICANN's Mission and Core Values especially 7, 8 and 9 which address openness in decision-making processes and the timeliness of those processes.

iii. The Committee decided that the "process" criteria for introducing new top-level domains would follow a pre-published application system including the levying of an application fee to recover the costs of the application process. This is consistent with ICANN's approach to the introduction of new TLDs in the previous 2000 and 2004 round for new top-level domains.

iv. The RyC reiterated its support for this recommendation in its CIS. It said that ".. this Recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans." The NCUC said that "...we strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We all stress the need that all evaluation criteria be objective and measurable."

9. **Recommendation 10 Discussion -- There must be a base contract provided to applicants at the beginning of the process.**

i. This recommendation is supported by all GNSO Constituencies and by Ms Doria.

ii. The General Counsel's office has been involved in discussions about the provision of a base contract which would assist applicants both during the application process and in any subsequent contract negotiations.

iii. A framework for the base contract was developed for discussion at the June 2007 ICANN meeting in Puerto Rico. The base contract will not be completed until the policy recommendations are in place. Completion of the policy recommendations will enable the completion of a draft base contract that would be available to applicants prior to the start of the new gTLD process, that is, prior to the beginning of the four-month window preceding the application submittal period.

iv. The RyC, in its CIS, said, ".. like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan."

10. **Recommendation 11 Discussion** -- (This recommendation has been removed and is left intentionally blank. Note Recommendation 20 and its Implementation Guidelines).

11. **Recommendation 12 Discussion -- Dispute resolution and challenge processes must be established prior to the start of the process.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The Committee has provided clear direction on its expectations that all the dispute resolution and challenge processes would be established prior to the opening of the application round. The full system will be published prior to an application round starting. However, the finalisation of this process is contingent upon a completed set of recommendations being agreed; a public comment period and the final agreement of the ICANN Board.

iii. The draft Implementation Plan in the Implementation Team *Discussion Points* document sets out the way in which the ICANN Staff proposes that disputes between applicants and challenge processes may be handled. Expert legal and other professional advice from, for example, auctions experts is being sought to augment the Implementation Plan.

TERM OF REFERENCE THREE -- ALLOCATION METHODS

12. **Recommendation 13 Discussion -- Applications must initially be assessed in rounds until the scale of demand is clear.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. This recommendation sets out the principal allocation methods for TLD applications. The narrative here should be read in conjunction with the draft flowcharts and the draft Request for Proposals.

iii. An application round would be opened on Day 1 and closed on an agreed date in the future with an unspecified number of applications to be processed within that round.

iv. This recommendation may be amended, after an evaluation period and report that may suggest modifications to this system. The development of objective "success metrics" is a necessary part of the evaluation process that could take place within the new TLDs Project Office.

v. The ISPCP expressed its support for this recommendation. Its CIS said that "...this is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs."

13. **Recommendation 20 Discussion -- 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.**

i. This recommendation is supported by the majority of GNSO Constituencies. Ms Doria supports the recommendation but has concerns about its implementation[70]. The NCUC has submitted a Minority Statement which is found in full in Annex C about the recommendation and its associated Implementation Guidelines F, H and P.

ii. This recommendation was developed during the preparations for the Committee's 7 June 2007 conference call and during subsequent Committee deliberations. The intention was to factor into the process the very likely possibility of objections to applications from a wide variety of stakeholders.

iii. The language used here is relatively broad and the implementation impact of the proposed recommendation is discussed in detail in the Implementation Team's *Discussion Points* document.

iv. The NCUC's response to this recommendation in its earlier CIS says, in part, "...recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties." This view has, in part, been addressed in the Implementation Team's proposed plan but this requires further discussion and agreement by the Committee.

TERM OF REFERENCE FOUR -- CONTRACTUAL CONDITIONS

14. **Recommendation 14 Discussion** -- **The initial registry agreement term must be of a commercially reasonable length.**

i. The remainder of the recommendations address Term of Reference Four on policies for contractual conditions and should be read in conjunction with Recommendation 10 on the provision of a base contract prior to the opening of an application round. The recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and biz agreements.

iii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.

iv. The RyC commented on this recommendation in its CIS saying that "...the members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registration systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations [14 & 15] will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs. These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community."

15. **Recommendation 15 -- There must be renewal expectancy.**

i. This recommendation is consistent with the existing registry contract provisions found in, for example, the com and .biz agreements and is supported by all Constituencies. Ms Doria supported the recommendation and provided the comments found in the footnote below.[71]

ii. These conditions would form the baseline conditions of term length for new TLD operators. t was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.

iii. See the CIS comments from the RyC in the previous section.

16. **Recommendation 16 -- Registries must apply existing Consensus Policies**[72] **and adopt new Consensus Policies as they are approved.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The full set of existing ICANN registry contracts can be found here http://www.icann.org/registries/agreements.htm and ICANN's seven current Consensus Policies are found at http //www.icann.org/general/consensus-policies.htm.

iii. ICANN develops binding Consensus Policies through its policy development processes, in this case, through the GNSO[73].

17. **Recommendation 17 -- A clear compliance and sanctions process must be set out in the base contract which**

could lead to contract termination.

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. Referring to the recommendations on contractual conditions above, this section sets out the discussion of the policies for contractual conditions for new top-level domain registry operators. The recommendations are consistent with the existing provisions for registry operators which were the subject of detailed community input throughout 2006[74].

iii. The Committee developed its recommendations during the Brussels and Amsterdam face-to-face consultations, with assistance from the ICANN General Counsel's office. The General Counsel's office has also provided a draft base contract which will be completed once the policy recommendations are agreed. Reference should also be made to Recommendation 5 on reserved words as some of the findings could be part of the base contract.

iv. The Committee has focused on the key principles of consistency, openness and transparency. It was also determined that a scalable and predictable process is consistent with industry best practice standards for services procurement. The Committee referred in particular to standards within the broadcasting, telecommunications and Internet services industries to examine how regulatory agencies in those environments conducted, for example, spectrum auctions, broadcasting licence distribution and media ownership frameworks.

v. Since then ICANN has developed and published a new approach to its compliance activities. These are found on ICANN's website at http //www.icann.org/compliance/ and will be part of the development of base contract materials.

vi. The Committee found a number of expert reports[75] beneficial. In particular, the World Bank report on mobile licensing conditions provides some guidance on best practice principles for considering broader market investment conditions. "...A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favouring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment."

vii. The Recommendations which the Committee has developed with respect to the introduction of new TLDs are consistent with the World Bank principles.

18. **Recommendation 18 Discussion -- If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria. The introduction of internationalised domain names at the root presents ICANN with a series of implementation challenges. This recommendation would apply to any new gTLD (IDN or ASCII TLD) offering DN services. The initial technical testing[76] has been completed and a series of live root tests will take place during the remainder of 2007.

ii. The Committee recognises that there is ongoing work in other parts of the ICANN organisation that needs to be factored into the application process that will apply to IDN applications. The work includes the President's Committee on IDNs and the GAC and ccNSO joint working group on IDNs.

19. **Recommendation 19 Discussion -- Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. There is a long history associated with the separation of registry and registrar operations for top-level domains. The structural separation of VeriSign's registry operations from Network Solutions registrar operations explains much of the ongoing policy to require the use of ICANN accredited registrars.

iii. In order to facilitate the stable and secure operation of the DNS, the Committee agreed that it was prudent to continue the current requirement that registry operators be obliged to use ICANN accredited registrars.

iv. ICANN's Registrar Accreditation Agreement has been in place since 2001[77]. Detailed information about the accreditation of registrars can be found on the ICANN website[78]. The accreditation process is under active discussion but the critical element of requiring the use of ICANN accredited registrars remains constant.

v. In its CIS, the RyC noted that "...the RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is no good business reason to devote resources. In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution."

NEXT STEPS

1. Under the GNSO's Policy Development Process, the production of this *Final Report* completes Stage 9. The next steps are to conduct a twenty-day public comment period running from 10 August to 30 August 2007. The GNSO Council is due to meet on 6 September 2007 to vote on the package of principles, policy recommendations and implementation

guidelines.

2. After the GNSO Council have voted the Council Report to the Board is prepared. The GNSO's PDP guidelines stipulate that "the Staff Manager will be present at the final meeting of the Council, and will have five (5) calendar days after the meeting to incorporate the views of the Council into a report to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:
    - a. A clear statement of any Supermajority Vote recommendation of the Council;
    - b. If a Supermajority Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) that held the position;
    - c. An analysis of how the issue would affect each constituency, including any financial impact on the constituency;
    - d. An analysis of the period of time that would likely be necessary to implement the policy;
    - e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest;
    - f. The Final Report submitted to the Council; and
    - g. A copy of the minutes of the Council deliberation on the policy issue, including the all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.
3. It is expected that, according to the Bylaws, "...The Board will meet to discuss the GNSO Council recommendation as soon as feasible after receipt of the Board Report from the Staff Manager. In the event that the Council reached a Supermajority Vote, the Board shall adopt the policy according to the Council Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN. In the event that the Board determines not to act in accordance with the Council Supermajority Vote recommendation, the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council. The Council shall review the Board Statement for discussion with the Board within twenty (20) calendar days after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for its current recommendation. In the event that the Council is able to reach a Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than sixty-six (66%) percent of the Board determines that such policy is not in the interests of the ICANN community or ICANN. In any case in which the Council is not able to reach Supermajority, a majority vote of the Board will be sufficient to act. When a final decision on a GNSO Council Recommendation or Supplemental Recommendation is timely, the Board shall take a preliminary vote and, where practicable, will publish a tentative decision that allows for a ten (10) day period of public comment prior to a final decision by the Board."
4. The final stage in the PDP is the implementation of the policy which is also governed by the Bylaws as follows, "...Upon a final decision of the Board, the Board shall, as appropriate, give authorization or direction to the ICANN staff to take all necessary steps to implement the policy."

Annex A – NCUC Minority Statement Recommendation 6

STATEMENT OF DISSENT ON RECOMMENDATION #6 OF

GNSO'S NEW GTLD REPORT FROM

the Non-Commercial Users Constituency (NCUC)
20 July 2007

NCUC supports most of the recommendations in the GNSO's Final Report, but Recommendation #6 is one we cannot support.[79]

We oppose Recommendation #6 for the following reasons:

1) t will completely undermine ICANN's efforts to make the gTLD application process predictable, and instead make the evaluation process arbitrary, subjective and political;

2) t will have the effect of suppressing free and diverse expression;

3) t exposes ICANN to litigation risks;

4) t takes ICANN too far away from its technical coordination mission and into areas of legislating morality and public order.

We also believe that the objective of Recommendation #6 is unclear, in that much of its desirable substance is already covered by Recommendation #3. At a minimum, we believe that the words "relating to morality and public order" must be struck from the recommendation.

1) Predictability, Transparency and Objectivity

Recommendation #6 poses severe implementation problems. It makes it impossible to achieve the GNSO's goals of predictable and transparent evaluation criteria for new gTLDs.

Principle 1 of the New gTLD Report states that the evaluation process must be "predictable," and Recommendation #1 states that the evaluation criteria must be transparent, predictable, and fully available to applicants prior to their application.

NCUC strongly supports those guidelines. But no gTLD applicant can possibly know in advance what people or governments in a far away land will object to as "immoral" or contrary to "public order." When applications are challenged on these grounds, applicants cannot possibly know what decision an expert panel – which will be assembled on an ad hoc basis with no precedent to draw on – will make about it.

Decisions by expert panels on "morality and public order" *must* be subjective and arbitrary, because there is no settled and well-established international law regarding the relationship between TLD strings and morality and public order. There is no single "community standard" of morality that ICANN can apply to all applicants in every corner of the globe. What is considered "immoral" in Teheran may be easily accepted in Los Angeles or Stockholm; what is considered a threat to "public order" in China and Russia may not be in Brazil and Qatar.

2) Suppression of expression of controversial views

gTLD applicants will respond to the uncertainty inherent in a vague "morality and public order" standard and lack of clear standards by suppressing and avoiding any ideas that might generate controversy. Applicants will have to invest sizable sums of money to develop a gTLD application and see it through the ICANN process. Most of them will avoid risking a challenge under Recommendation #6. In other words, the presence of Recommendation #6 will result in self-censorship by most applicants.

That policy would strip citizens everywhere of their rights to express controversial ideas because someone else finds them offensive. This policy recommendation ignores international and national laws, in particular freedom of expression guarantees that permit the expression of "immoral" or otherwise controversial speech on the Internet.

3) Risk of litigation

Some people in the ICANN community are under the mistaken impression that suppressing controversial gTLDs will protect it from litigation. Nothing could be further from the truth. By introducing subjective and culturally divisive standards into the evaluation process Recommendation #6 will increase the likelihood of litigation.

ICANN operates under authority from the US Commerce Department. It is undisputed that the US Commerce Department is prohibited from censoring the expression of US citizens in the manner proposed by Recommendation #6. The US Government cannot "contract away" the constitutional protections of its citizens to ICANN any more than it can engage in the censorship itself.

Adoption of Recommendation #6 invites litigation against ICANN to determine whether its censorship policy is compatible with the US First Amendment. An ICANN decision to suppress a gTLD string that would be permitted under US law could and probably would lead to legal challenges to the decision as a form of US Government action.

If ICANN left the adjudication of legal rights up to courts, it could avoid the legal risk and legal liability that this policy of censorship brings upon it.

4) ICANN's mission and core values

Recommendation #6 exceeds the scope of ICANN's technical mission. t asks ICANN to create rules and adjudicate disputes about what is permissible expression. t enables it to censor expression in domain names that would be lawful in some countries. It would require ICANN and "expert panels" to make decisions about permitting top-level domain names based on arbitrary "morality" judgments and other subjective criteria. Under Recommendation #6, ICANN will evaluate domain names based on ideas about "morality and public order" -- concepts for which there are varying interpretations, in both law and culture, in various parts of the world. Recommendation #6 risks turning ICANN into the arbiter of "morality" and "appropriate" public policy through global rules.

This new role for ICANN conflicts with its intended narrow technical mission, as embodied in its mission and core values. ICANN holds no legitimate authority to regulate in this entirely non-technical area and adjudicate the legal rights of others. This recommendation takes the adjudication of people's rights to use domain names out of the hands of democratically elected representatives and into the hands of "expert panels" or ICANN staff and board with no public accountability.

Besides exceeding the scope of ICANN's authority, Recommendation #6 seems unsure of its objective. t mandates "morality and public order" in domain names, but then lists, as examples of the type of rights to protect, the WTO TR PS Agreement and all 24 World Intellectual Property (WIPO) Treaties, which deal with economic and trade rights, and have little to do with "morality and public order". Protection for intellectual property rights was fully covered in Recommendation #3, and no explanation has been provided as to why intellectual property rights would be listed again in a recommendation on "morality and public order", an entirely separate concept.

In conclusion Recommendation #6 exceeds ICANN's authority, ignores Internet users' free expression rights, and its adoption would impose an enormous burden on and liability for ICANN. It should not be adopted by the Board of Directors in the final policy decision for new gtlds.

Annex B – Nominating Committee Appointee Avri Doria[80] Individual Comments

Comments from Avri Doria

The "Personal level of support" indications fall into 3 categories:

l Support: these are principles, recommendations or guidelines that are compatible with my personal opinions

l Support with concerns: While these principles, recommendations and guidelines are not incompatible with my personal opinions, I have some concerns about them.

l Accept with concern: these recommendations and guidelines do not necessarily correspond to my personal opinions, but I am able to accept them in that they have the broad support of the committee. I do, however, have concerns with these recommendations and guideline.

I believe these comments are consistent with comments I have made throughout the process and do not constitute new input.

Principles

#	Personal level of support	Explanation
A	Support	
B	Support with concerns	While I strongly support the introduction of IDN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of DN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers.
C	Support	
D	Support with concerns	While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability.
E-G	Support	

Recommendations

#	Level of support	Explanation
1	Support	
2	Accept with concern	My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria. l In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on. l By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation. l As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages.
3	Support with concerns	My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system.
4	Support	
5	Support with concerns	Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to DNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration.
6	Accept with concern	My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN

		or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.
7	Support	
8	Accept with concern	While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts. Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities then those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels.
9,10, 12-14	Support	
15	Support with concerns	In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal.
16-19	Support	
20	Support with concerns	In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)

Implementation Guidelines

#	Level of support	Explanation
A-E	Support	
F	Accept with concern	In designing a New gTLD process, one of the original design goals had been to design a predictable and timely process that did not include the involvement of the Board of Directors except for very rare and exceptional cases and perhaps in the due diligence check of a final approval. My concern is that the use of Board in step (iii) may make them a regular part of many of the application procedure and may overload both the Board and the process. If every dispute can fall through to Board consideration in the process sieve, then the incentive to resolve the dispute earlier will be lessened.
G-M	Support	
N	Support with concerns	I strongly support the idea of financial assistance programs and fee reduction for less developed communities. I am concerned that not providing pricing that enables applications from less developed countries and communities may serve to increase the divide between the haves and the haves nots in the Internet and may lead to a foreign 'land grab' of choice TLD names, especially DN TLD names in a new form of resource colonialism because only those with well developed funding capability will be able to participate in the process as currently planned.
O	Support	
P	Support with concerns	While I essentially agree with the policy recommendation and its implementation guideline, its social justice and fairness depends heavily on the implementation issues. While the implementation details are not yet settled, I have serious concerns about the published draft plans of the ICANN staff in this regard. The current proposal involves using fees to prevent vexatious or unreasonable objections. In my personal opinion this would be a cause of social injustice in the application of the policy as it would prejudice the objection policy in favor of the rich. I also believe that an objection policy based on financial means would allow for well endowed entities to object to any term they found objectionable, hence enabling them to be as vexatious as they wish to be. In order for an objection system to work properly, it must be fair and it must allow for any applicant to understand the basis on which they might have to answer an objection. If the policy and implementation are clear about objections only being considered when they can be shown to cause irreparable harm to a community then it may be possible to build a just process. In addition to the necessity for there to be strict filters on which potential objections are actually processed for further

		review by an objections review process, it is essential that an external and impartial professional review panel have a clear basis for judging any objections. I do not believe that the ability to pay for a review will provide a reasonable criteria, nor do I believe that financial barriers are an adequate filter for stopping vexatious or unreasonable objections though they are a sufficient barrier for the poor. I believe that ICANN should investigate other methods for balancing the need to allow even the poorest to raise an issue of irreparable harm while filtering out unreasonable disputes. I believe, as recommend in the Reserved Names Working group report, that the ALAC and GAC may be an important part of the solution. IG (P) currently includes support for treating ALAC and GAC as established institutions in regard to raising objections to TLD concerns. I believe this is an important part of the policy recommendation and should be retained in the implementation. I believe that it should be possible for the ALAC or GAC, through some internal procedure that they define, to take up the cause of the individual complainant and to request a review by the external expert review panel. Some have argued that this is unacceptable because it operationalizes these Advisory Committees. I believe we do have precedence for such an operational role for volunteers within ICANN and that it is in keeping with their respective roles and responsibilities as representatives of the user community and of the international community of nations. I strongly recommend that such a solution be included in the Implementation of the New gTLD process.
Q	Support	

Annex C – NCUC Minority Statement Recommendation 20 and Implementation Guidelines F, H & P

Statement of DISSENT on Recommendation #20 &

Implementation Guidelines F, H, & P in the

GNSO New GTLD Committee's Final Report

from the

Non-Commercial Users Constituency (NCUC)

RE Domain Name Objection and Rejection Process
25 July 2007

Text of 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."

Text of 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.

Text of Implementation Guideline H

External dispute providers will give decisions on complaints.

Text of Implementation Guideline P

The following process, definitions, and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

a) substantial

In determining substantial the panel will assess the following: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.

b) significant portion:

In determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) community

Community should be interpreted broadly and will include for example an economic sector, a cultural community, or a linguistic community. t may also be a closely related community which believes it is impacted.

d) explicitly targeting

Explicitly targeting means there is a description of the intended use of the TLD in the application.

e) implicitly targeting

Implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) established institution

An institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer then 5 years. Exceptional circumstance include but are not limited to reorganisation, merger, or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) formal existence

Formal existence may be demonstrated by: appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organisation or similar.

h) detriment

<< A >> Evidence of detriment to the community or to users more widely must be provided.
<< B >> [A likelihood of detriment to the community or to users more widely must be provided.]

Recommendation #20

The Non-Commercial Users Constituency (NCUC) Dissenting Statement on Recommendation #20 of the New GTLD Committee's Final Report[81] should be read in combination with Implementation Guidelines F, H & P, which detail the implementation of Recommendation #20. This statement should also be read in conjunction with its statement[82] of 13 June 2007 on the committee's draft report.

NCUC cannot support the committee's proposal for ICANN to establish a broad objection and rejection process for domain names that empowers ICANN and its "experts" to adjudicate the legal rights of domain name applicants (and objectors). The proposal would also empower ICANN and its "experts" to invent entirely new rights to domain names that do not exist in law and that will compete with existing legal rights to domains.

However "good-intentioned", the proposal would inevitably set up a system that decides legal rights based on subjective beliefs of "expert panels" and the amount of insider lobbying. The proposal would give "established institutions" veto power over applications for domain names to the detriment of innovators and start-ups. The proposal is further flawed because it makes no allowances for generic words to which no community claims exclusive "ownership" of. Instead, it wants to assign rights to use language based on subjective standards and will over-regulate to the detriment of competition, innovation, and free expression.

There is no limitation on the type of objections that can be raised to kill a domain name, no requirement that actual harm be shown to deny an application, and no recourse for the wrongful denial of legal rights by ICANN and its experts under this proposal. An applicant must be able to appeal decisions of ICANN and its experts to courts, who have more competence and authority to decide the applicant's legal rights. Legal due process requires maintaining a right to appeal these decisions to real courts.

The proposal is hopelessly flawed and will result in the improper rejection of many legitimate domain names. The reasons permitted to object to a domain are infinite in number. Anyone may make an objection; and an application will automatically be rejected upon a very low threshold of "detriment" or an even lower standard of "a likelihood of detriment" to anyone. Not a difficult bar to meet.

If ICANN attempted to put this policy proposal into practice it would intertwine itself in general policy debates, cultural clashes, business feuds, religious wars, and national politics, among a few of the disputes ICANN would have to rule on through this domain name policy.

The proposal operates under false assumptions of "communities" that can be defined, and that parties can be rightfully appointed representatives of "the community" by ICANN. The proposal gives preference to "established institutions" for domain names, and leaves applicants' without the backing of "established institutions" with little right to a top-level domain. The proposal operates to the detriment of small-scale start-ups and innovators who are clever enough to come up with an idea for a domain first, but lack the insider-connections and financial resources necessary to convince an ICANN panel of their worthiness.

It will be excessively expensive to apply for either a controversial or a popular domain name, so only well-financed "established institutions" will have both the standing and financial wherewithal to be awarded a top-level domain. The proposal privileges who is awarded a top-level domain, and thus discourages diversity of thought and the free flow of information by making it more difficult to obtain information on controversial ideas or from innovative new-comers.

Implementation Guideline F

NCUC does not agree with the part of Implementation Guideline F that empowers ICANN identified "communities" to support or oppose applications. Why should all "communities" agree before a domain name can be issued? How to decide who speaks for a "community"?

NCUC also notes that ICANN's Board of Directors would make the final decisions on applications and thus the legal rights of applicants under proposed IG-F. ICANN Board Members are not democratically elected, accountable to the public in any meaningful way, or trained in the adjudication of legal rights. Final decisions regarding legal rights should come from legitimate law-making processes, such as courts.

"Expert panels" or corporate officers are not obligated to respect an applicant's free expression rights and there is no recourse for a decision by the panel or ICANN for rights wrongfully denied. None of the "expert" panelists are democratically elected, nor accountable to the public for their decisions. Yet they will take decisions on the boundaries between free expression and trademark rights in domain names; and "experts" will decide what ideas are too controversial to be permitted in a domain name under this process.

Implementation Guideline H

Implementation Guideline H recommends a system to adjudicate legal rights that exists entirely outside of legitimate democratic law-making processes. The process sets up a system of unaccountable "private law" where "experts" are free to pick and choose favored laws, such as trademark rights, and ignore disfavored laws, such as free expression guarantees.

IG-H operates under the false premise that external dispute providers are authorized to adjudicate the legal rights of domain name applicants and objectors. t further presumes that such expert panels will be qualified to adjudicate the legal rights of applicants and others. But undertaking the creation of an entirely new international dispute resolution process for the adjudication of legal rights and the creation of new rights is not something that can be delegated to a team of experts. Existing international law that takes into account conflict of laws, choice of laws, jurisdiction, standing, and due process must be part of any legitimate process; and the applicant's legal rights including freedom of expression rights must be respected in the process.

Implementation Guideline P

"The devil is in the details" of Implementation Guideline P as it describes in greater detail the proposed adversarial dispute process to adjudicate legal rights to top-level domain names in Recommendation #20. IG-P mandates the rejection of an application if there is "substantial opposition" to it according to ICANN's expert panel. But "substantial" is defined in such as way so as to actually mean "insubstantial" and as a result many legitimate domain names would be rejected by such an extremely low standard for killing an application.

Under IG-P, opposition against and support for an application must be made by an "established institution" for it to count as "significant", again favoring major industry players and mainstream cultural institutions over cultural diversity, innovative individuals, small niche, and medium-sized Internet businesses.

IG-P states that "community" should be interpreted broadly, which will allow for the maximum number of objections to a domain name to count against an application. It includes examples of "the economic sector, cultural community or linguistic community" as those who have a right to complain about an application. t also includes any "related community which believes it is impacted." So anyone who claims to represent a community and believes to be impacted by a domain name can file a complaint and have standing to object to another's application.

There is no requirement that the objection be based on legal rights or the operational capacity of the applicant. There is no requirement that the objection be reasonable or the belief about impact to be reasonable. There is no requirement that the harm be actual or verifiable. The standard for "community" is entirely subjective and based on the personal beliefs of the objector.

The definition of "implicitly targeting" further confirms this subjective standard by inviting objections where "the objector makes the assumption of targeting" and also where "the objector believes there may be confusion by users". Such a subjective process will inevitably result in the rejection of many legitimate domain names.

Picking such a subjective standard conflicts with Principle A in the Final Report that states domain names must be introduced in a "predictable way", and also with Recommendation 1 that states "All applicants for a new gTLD registry should be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." The subjectivity and unpredictability invited into the process by Recommendation #20 turn Principle A and Recommendation 1 from the same report upside down.

Besides the inherent subjectivity, the standard for killing applications is remarkably low. An application need not be intended to serve a particular community for "community-based" objections to kill the application under the proposal. Anyone who believed that he or she was part of the targeted community or who believes others face "detriment" have standing to object to a domain name, and the objection weighs in favor of "significant opposition". This standard is even lower than the "reasonable person" standard, which would at least require that the belief be "reasonable" for it to count against an applicant. The proposed standard for rejecting domains is so low it even permits unreasonable beliefs about a domain name to weigh against an applicant.

If a domain name does cause confusion, existing trademark law and unfair competition law have dealt with it for years and already balanced intellectual property rights against free expression rights in domain names. There is neither reason nor authority for ICANN processes to overtake the adjudication of legal rights and invite unreasonable and illegitimate objections to domain names.

IG-P falsely assumes that the number of years in operation is indicative of one's right to use language. It privileges entities over 5 years old with objection rights that will effectively veto innovative start-ups who cannot afford the dispute resolution process and will be forced to abandon their application to the incumbents.

IG-P sets the threshold for harm that must be shown to kill an application for a domain name remarkably low. Indeed harm need not be actual or verified for an application to be killed based on "substantial opposition" from a single objector.

Whether the committee selects the unbounded definition for "detriment" that includes a "likelihood of detriment" or the narrower definition of "evidence of detriment" as the standard for killing an application for a domain name is largely irrelevant. The difference is akin to re-arranging the deck chairs on the Titanic. ICANN will become bogged down with the approval of domain names either way, although it is worth noting that "likelihood of detriment" is a very long way from "substantial harm" and an easy standard to meet, so will result in many more domain names being rejected.

The definitions and guidelines detailed in IG-P invite a lobby-fest between competing businesses, instill the "heckler's veto" into domain name policy, privilege incumbents, price out of the market non-commercial applicants, and give third-parties who have no legal rights to domain names the power to block applications for those domains. A better standard for killing an application for non-technical reasons would be for a domain name to be shown to be illegal in the applicant's jurisdiction before it can rejected.

In conclusion, the committee's recommendation for domain name objection and rejection processes are far too broad and unwieldy to be put into practice. They would stifle freedom of expression, innovation, cultural diversity, and market competition. Rather than follow existing law, the proposal would set up an illegitimate process that usurps jurisdiction to adjudicate peoples' legal rights (and create new rights) in a process designed to favor incumbents. The adoption of this "free-for-all" objection and rejection process will further call into question ICANN's legitimacy to govern and its ability to serve the global public interest that respects the rights of all citizens.

NCUC respectfully submits that ICANN will best serve the global public interest by resisting the temptation to stray from its technical mandate and meddle in international lawmaking as proposed by Rec. #20 and IG-F, IG-H, and IG-P of the New GTLD Committee Final Report.

REFERENCE MATERIAL -- GLOSSARY[83]

TERM	ACRONYM & EXPLANATION
A-label	The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible (ACE) form of an DNA string; for example "xn--11b5bs1di".
ASCII Compatible Encoding	ACE ACE is a system for encoding Unicode so each character can be transmitted using only the letters a-z, 0-9 and hyphens. Refer also to http://www ietf.org/rfc/rfc3467 txt?number=3467
American Standard Code for Information Exchange	ASCII ASCII is a common numerical code for computers and other devices that work with text. Computers can only understand numbers, so an ASCII code is the numerical representation of a character such as 'a' or '@'. See above referenced RFC for more information.
Advanced Research Projects Agency	ARPA http://www darpa mil/body/arpa_darpa.html
Commercial & Business Users Constituency	CBUC http://www bizconst org/
Consensus Policy	A defined term in all ICANN registry contracts usually found in Article 3 (Covenants). See, for example, http://www icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm
Country Code Names Supporting Organization	ccNSO http://ccnso.icann.org/
Country Code Top Level Domain	ccTLD Two letter domains, such as uk (United Kingdom), .de (Germany) and jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country. Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in .biz, .com, .info, .name, net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services. For more information regarding registering names in ccTLDs, including a complete database of designated ccTLDs and managers, please refer to http://www iana.org/cctld/cctld.htm.
Domain Names	The term **domain name** has multiple related meanings: A name that identifies a computer or computers on the internet. These names appear as a component of a Web site's URL, e g. www.wikipedia org. This type of domain name is also called a hostname. The product that Domain name registrars provide to their customers. These names are often called **registered domain names**. Names used for other purposes in the Domain Name System (DNS), for example the special name which follows the @ sign in an email address, or the Top-level domains like .com, or the names used by the Session Initiation Protocol (VoIP),

	or DomainKeys. http://en.wikipedia.org/wiki/Domain_names
Domain Name System	The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its " P address" (IP stands for "Internet Protocol"). P Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www internic net. t is a "mnemonic" device that makes addresses easier to remember.
Generic Top Level Domain	gTLD Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below. In the 1980s, seven gTLDs (com, edu, .gov, int, mil, .net, and .org) were created. Domain names may be registered in three of these (com, .net, and .org) without restriction; the other four have limited purposes. In 2001 & 2002 four new unsponsored TLDs (.biz, .info, .name, and pro) were introduced. The other three new TLDs (.aero, .coop, and museum) were sponsored. Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, 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 thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.
Governmental Advisory Committee	GAC http://gac.icann org/web/index.shtml
Intellectual Property Constituency	IPC http://www ipconstituency.org/
Internet Service & Connection Providers Constituency	ISPCP
Internationalized Domain Names	IDNs IDNs are domain names represented by local language characters. These domain names may contain characters with diacritical marks (required by many European languages) or characters from non-Latin scripts like Arabic or Chinese.
Internationalized Domain Names in Application	IDNA IDNA is a protocol that makes it possible for applications to handle domain names with non-ASCII characters. IDNA converts domain names with non-ASCII characters to ASCII labels that the DNS can accurately understand. These standards are developed within the IETF (http://www ietf.org)
Internationalized Domain Names – Labels	IDN A Label The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible ACE) form of an DN A string. For example "xn-1lq90i". IDN U Label The U-label is what should be displayed to the user and is the representation of the IDN in Unicode. For example "北京" ("Beijing" in Chinese). LDH Label The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org"
Internationalized Domain Names Working Group	IDN-WG http://forum icann org/lists/gnso-idn-wg/
Letter Digit Hyphen	LDH The hostname convention used by domain names before internationalization. This meant that domain names could only practically contain the letters a-z, digits 0-9 and the hyphen "-". The term "LDH code points" refers to this subset. With the introduction of IDNs this rule is no longer relevant for all domain names. The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org".

Nominating Committee	NomCom http://nomcom icann.org/
Non-Commercial Users Constituency	NCUC http://www ncdnhc.org/
Policy Development Process	PDP See http //www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA
Protecting the Rights of Others Working Group	PRO-WG See the mailing list archive at http //forum.icann.org/lists/gnso-pro-wg/
Punycode	Punycode is the ASCII-compatible encoding algorithm described in Internet standard [RFC3492]. This is the method that will encode DNs into sequences of ASCII characters in order for the Domain Name System (DNS) to understand and manage the names. The intention is that domain name registrants and users will never see this encoded form of a domain name. The sole purpose is for the DNS to be able to resolve for example a web-address containing local characters.
Registrar	Domain names ending with aero, .biz, .com, coop, .info, museum, .name, net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of these companies appears in the Accredited Registrar Directory. The registrar asks registrants to provide various contact and technical information that makes up the domain name registration. The registrar keeps records of the contact information and submits the technical information to a central directory known as the "registry."
Registrar Constituency	RC http://www icann-registrars.org/
Registry	A registry is the authoritative, master database of all domain names registered in each Top Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Internet users don't interact directly with the registry operator. Users can register names in TLDs including .biz, .com, .info, .net, .name, org by using an ICANN-Accredited Registrar.
Registry Constituency	RyC http://www gtldregistries.org/
Request for Comment A full list of all Requests for Commenthttp://www rfc-editor.org/rfcxx00.html Specific references used in this report are shown in the next column. This document uses language, for example, "should", "must" and "may", consistent with RFC2119.	RFC ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt
Reserved Names Working Group	RN-WG See the mailing list archive at http //forum.icann.org/lists/gnso-rn-wg/
Root server	A **root nameserver** is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to describe the thirteen well-known root nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System. All domain names on the Internet can be regarded as ending in a full stopcharacter e g. "en.wikipedia.org.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an P address. The empty string after the final dot is called the root domain, and all other domains (i.e. com, .org, net, etc.) are contained within the root domain http://en.wikipedia.org/wiki/Root_server
Sponsored Top Level Domain	sTLD A Sponsor is an organization to which some policy making is delegated from ICANN. The sponsored TLD has a Charter, which defines the purpose for which

	the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.
U-label	The U-label is what should be displayed to the user and is the representation of the Internationalized Domain Name (DN) in Unicode.
Unicode Consortium	A not-for-profit organization found to develop, extend and promote use of the Unicode standard. See http://www unicode.org
Unicode	Unicode is a commonly used single encoding scheme that provides a unique number for each character across a wide variety of languages and scripts. The Unicode standard contains tables that list the code points for each local character identified. These tables continue to expand as more characters are digitalized.

Continue to Final Report Part B

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[1] http //www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#I

[2] The ICANN "community" is a complex matrix of intersecting organizations and which are represented graphically here. http://www.icann.org/structure/

[3] The *Final Report* is Step 9 in the GNSO's policy development process which is set out in full at http://www.icann.org/general/archive-bylaws/bylaws-28feb06 htm#AnnexA.

[4] Found here http://gnso icann org/issues/new-gtlds/.

[5] The ICANN Staff *Discussion Points* documents can be found at http://gnso.icann org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06 pdf and http://gnso.icann.org/drafts/PDP-Dec05-StaffMemo-19-jun-07.pdf

[6] Authored in 1987 by Paul Mockapetris and found at http //www.ietf.org/rfc/rfc1034

[7] Authored in October 1984 by Jon Postel and J Reynolds and found at http://www.ietf org/rfc/rfc920

[8] Found at http://www oecd.org/dataoecd/15/37/38336539 pdf

[9] From Verisign's June 2007 *Domain Name Industry Brief.*

[10] The full list is available here http //www.icann.org/registrars/accredited-list.html

[11] Report found at http://www.icann org/dnso/wgc-report-21mar00.htm

[12] Found at http://www.icann.org/announcements/announcement-31aug04.htm

[13] http://www.registrarstats.com/Public/ZoneFileSurvey.aspx

[14] Verisign produce a regular report on the domain name industry.http //www.verisign.com/Resources/Naming_Services_Resources/Domain_Name_Industry_Brief/index.html

[15] The announcement is here http://icann.org/announcements/announcement-03jan06.htm and the results are here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input htm

[16] Found here http://gnso icann.org/issues/new-gtlds/new-gtld-pdp-input htm

[17] http://gnso.icann org/issues/new-gtlds//

[18] For example, see the GA List discussion thread found at http://gnso icann org/mailing-lists/archives/ga/msg03337.html & earlier discussion on IANA lists http://www iana.org/comments/26sep1998-02oct1998/msg00016.html. The 13 June 2002 paper regarding a taxonomy for non-ASCII TLDs is also illuminating http://www icann org/committees/idn/registry-selection-paper-13jun02.htm

[19] Found here http://gac icann org/web/home/gTLD_principles pdf

[20] A list of the working materials of the new TLDs Committee can be found at http://gnso icann.org/issues/new-gtlds/.

[21] The Outcomes Report for the DN-WG is found http://gnso icann.org/drafts/idn-wg-fr-22mar07 htm. A full set of resources which the WG is using is found at http://gnso icann org/issues/idn-tlds/.

[22] The Final Report of the RN-WG is found at http://gnso icann org/drafts/rn-wg-fr19mar07 pdf

[23] The Final Report of the PRO-WG is found at http //gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf

[24] The root server system is explained here http://en.wikipedia.org/wiki/Rootserver

[25] Ms Doria supports all of the Principles but expressed concern about Principle B by saying "...While I strongly support the introduction of IDN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of IDN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers" and Principle D "...While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability."

[26] Note the updated recommendation text sent to the gtld-council list after the 7 June meeting. http://forum icann.org/lists/gtld-council/msg00520.html

[27] Reserved word limitations will be included in the base contract that will be available to applicants prior to the start of the application round.

[28] http://www.icann org/general/idn-guidelines-22feb06 htm

[29] The Implementation Team sought advice from a number of auction specialists and examined other industries in which auctions were used to make clear and binding decisions. Further expert advice will be used in developing the implementation of the application process to ensure the fairest and most appropriate method of resolving contention for strings.

[30] Detailed work is being undertaken, lead by the Corporate Affairs Department, on establishing a translation framework for ICANN documentation. This element of the Implementation Guidelines may be addressed separately.

[31] http://gnso.icann org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf

[32] Consistent with ICANN's commitments to accountability and transparency found at http://www.icann.org/announcements/announcement-26jan07b.htm

[33] Found at http://www.icann.org/dnso/wgc-report-21mar00.htm

[34] The announcement is here http://icann.org/announcements/announcement-03jan06.htm and the results are here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input htm

[35] Found here http://gnso icann.org/issues/new-gtlds/new-gtld-pdp-input htm

[36] Found here http://forum icann org/lists/gtld-council/

[37] Archived at http://forum icann.org/lists/gtld-council/

[38] Business Constituency http://forum icann org/lists/gtld-council/msg00501.html, Intellectual Property Constituencyhttp://forum.icann org/lists/gtld-council/msg00514 html, Internet Service Providers http //forum.icann.org/lists/gtld-council/msg00500.html, NCUC http://forum.icann org/lists/gtld-council/msg00530.html, Registry Constituency http://forum.icann org/lists/gtld-council/msg00494 html

[39] "My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.

In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.

By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.

As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages."

[40] http://data.iana org/TLD/tlds-alpha-by-domain txt

[41] See section 4A -- http://www icann org/udrp/udrp-policy-24oct99 htm.

[42] In addition to the expertise within the Committee, the NCUC provided, as part of its Constituency Impact Statement expert outside advice from Professor Christine Haight Farley which said, in part, ".. A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not like to cause confusion, and therefore do not infringe. ... In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily that U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion". However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used."

[43] In addition, advice was sought from experts within W PO who continue to provide guidance on this and other elements of dispute resolution procedures.

[44] Kristina Rosette provided the reference to the *Agreement on Trade-Related Aspects of Intellectual Property Rights*which is found online at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e htm

".. *Article 16Rights Conferred* . 1The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use...."

[45] http://www.ohchr.org/english/bodies/hrc/comments.htm

[46] http://gnso.icann org/drafts/GNSO-PRO-WG-final-01Jun07.pdf

[47] Charles Sha'ban provided a range of examples from Arabic speaking countries. For example, in Jordan, Article 7 Trademarks eligible for registration are - A 1trademark shall be registered if it is distinctive, as to words, letters, numbers, figures, colors, or other signs or any combination thereof and visually perceptible. - F2or the purposes of this Article, "distinctive" shall mean applied in a manner which secures distinguishing the goods of the proprietor of the trademark from those of other persons. Article 8 Marks which may not be registered as trademarks. The following may not be registered as

trademarks: 10- A mark identical with one belonging to a different proprietor which is already entered in the register in respect of the same goods or class of goods for which the mark is intended to be registered, or so closely resembling such trademark to the extent that it may lead to deceiving third parties.

12- The trademark which is identical or similar to, or constitutes a translation of, a well-known trademark for use on similar or identical goods to those for which that one is well-known for and whose use would cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods as well as the marks which are similar or identical to the honorary badges, flags, and other insignia as well as the names and abbreviations relating to international or regional organizations or those that offend our Arab and Islamic age-old values.

In Oman for example, Article 2 of the Sultan Decree No. 38/2000 states:

"The following shall not be considered as trademarks and shall not be registered as such: f the mark is identical, similar to a degree which causes confusion, or a translation of a trademark or a commercial name known in the Sultanate of Oman with respect to identical or similar goods or services belonging to another business, or if it is known and registered in the Sultanate of Oman on goods and service which are neither identical nor similar to those for which the mark is sought to be registered provided that the usage of the mark on those goods or services in this last case will suggest a connection between those goods or services and the owner of the known trademark and such use will cause damage to the interests of the owner of the known trademark."

Although the laws In Egypt do not have specific provisions regarding confusion they stress in great detail the importance of distinctiveness of a trade mark.

Article 63 in the IP Law of Egypt No.82 for the year 2002 states:

"A trademark is any sign distinguishing goods, whether products or services, and include is particular names represented in a distinctive manner, signatures, words, letters, numerals, design, symbols, signposts, stamps, seal, drawings, engravings, a combination of distinctly formed colors and any other combination of these elements if used, or meant to be used, to distinguish the precedents of a particular industry, agriculture, forest or mining venture or any goods, or to indicate the origin of products or goods or their quality, category, guarantee, preparation process, or to indicate the provision of any service. In all cases, a trademark shall be a sign that is recognizable by sight."

[48] Found at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.ht with 171 contracting parties.

[49] Further information can be found at the US Patent and Trademark Office's website http://www uspto gov/

[50] Found at http://www.icann.org/registrars/ra-agreement-17may01.htm#3

[51] Found at http://gnso.icann.org/drafts/idn-wg-fr-22mar07 htm.

[52] The 2003 correspondence between ICANN's then General Counsel and the then GAC Chairman is also usefulhttp //www.icann.org/correspondence/touton-letter-to-tarmizi-10feb03 htm.

[53] "My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system."

[54] For example, David Maher, Jon Bing, Steve Metalitz, Philip Sheppard and Michael Palage.

[55] Reserved Word has a specific meaning in the ICANN context and includes, for example, the reserved word provisions in ICANN's existing registry contracts. See http://www icann org/registries/agreements.htm.

[56] "Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to DNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration."

[57] Found online at http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07 htm and in full in Part B of the*Report*.

[58] The Committee are aware that the terminology used here for the purposes of policy recommendations requires further refinement and may be at odds with similar terminology developed in other context. The terminology may be imprecise in other contexts than the general discussion about reserved words found here.

[59] The subgroup was encouraged by the ccNSO not to consider removing the restriction on two-letter names at the top level. IANA has based its allocation of two-letter names at the top level on the ISO 3166 list. There is a risk of collisions between any interim allocations, and ISO 3166 assignments which may be desired in the future.

[60] The existing gTLD registry agreements provide for a method of potential release of two-character LDH names at the second level. In addition, two character LDH strings at the second level may be released through the process for new registry services, which process involves analysis of any technical or security concerns and provides opportunity for public input. Technical issues related to the release of two-letter and/or number strings have been addressed by the RSTEP Report on GNR's proposed registry service. The GAC has previously noted the WIPO II Report statement that "If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimises the potential for confusion with the ccTLDs."

[61] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[62] Internet Draft IDNAbis Issues: http://www.ietf org/internet-drafts/draft-klensin-idnabis-issues-01 txt (J. Klensin), Section 3.1.1.1

[63] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[64] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[65] With its recommendation, the sub-group takes into consideration that justification for potential user confusion (i.e., the minority view) as a result of removing the contractual condition to reserve gTLD strings for new TLDs may surface during one or more public comment periods.

[66] Note that this recommendation is a continuation of the recommendation in the original RN-WG report, modified to synchronize with the additional work done in the 30-day extension period.

[67] Ms Doria said "...My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality."

[68] http://www.icann org/tlds/agreements/net/appendix7.html

[69] 'While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts.

Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities then those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels."

[70] "In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)".

[71] "In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal."

[72] Consensus Policies has a particular meaning within the ICANN environment. Refer tohttp://www icann org/general/consensus-policies htm for the full list of ICANN's Consensus Policies.

[73] http://www.icann org/general/bylaws htm#AnnexA

[74] http://www.icann org/registries/agreements.htm

[75] The full list of reports is found in the Reference section at the end of the document.

[76] http://www.icann org/announcements/announcement-4-07mar07 htm

[77] Found at http://www.icann.org/registrars/ra-agreement-17may01.htm

[78] Found at http://www.icann.org/registrars/accreditation.htm.

[79] Text of Recommendation #6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."

[80] Ms Doria took over from former GNSO Council Chairman (and GNSO new TLDs Committee Chairman) Dr Bruce Tonkin on 7 June 2007. Ms Doria's term runs until 31 January 2008.

[81] Available at: http://forum.icann org/lists/gtld-council/pdfOQqgaRNrXf.pdf

[82] Available at: http://ipjustice.org/wp/2007/06/13/ncuc-newgtld-stmt-june2007/

[83] This glossary has been developed over the course of the policy development process. Refer here to ICANN's glossary of terms http //www.icann.org/general/glossary.htm for further information.

Forrest-016

Forrest-016

ICANN

The Internet Corporation for Assigned Names and Numbers

To All Prospective Applicants for New gTLDs –

Since ICANN's founding ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles has been to promote competition in the domain-name marketplace while ensuring Internet security and stability.

We are now engaging the Internet community in agreeing a way forward to introduce new gTLDs in the domain name space. Such expansion is driven by the demand for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The launch of these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. Major contributors to this policy work were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO) and Security and Stability Advisory Committee (SSAC). All this policy development work culminated with ICANN's Board of Directors deciding to adopt the community-developed policy at the ICANN Paris meeting in June 2008. You can see a thorough brief to the policy process and outcomes at http://gnso.icann.org/issues/new-gtlds/.

Please note that the Applicant Guidebook that follows this letter is a draft. Applicants should not rely on any of the proposed details of the new gTLD program, as the program remains subject to further consultation and revision. Also, some of the modules in this guidebook highlight areas of the process that remain under development. These areas will be made available for public consultation in the near future.

In addition to the Draft Applicant Guidebook, ICANN is posting a series of papers that serve as explanatory memoranda to assist the Internet community to better understand the implementation work.

ICANN expects to engage in a productive and robust dialogue with the Internet community through a consultative process. Comments will be used to revise and prepare the final Applicant Guidebook, to be released early in 2009.

The New gTLD Program enables the Internet community to open up the name space to new and innovative uses for top-level domains, and can meet some of the needs unmet by the current market. It has the potential to be one of the biggest influences on the future of the Internet.

Sincerely,

Paul D Twomey

Paul Twomey
President and CEO

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New gTLD Program: Draft Applicant Guidebook (Draft RFP)

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

ICANN

24 October 2008

Table of Contents

5.2.2 Additional Requirements

New gTLD Program: Applicant Guidebook

How to Use

The Draft Applicant Guidebook (Request for Proposals) consists of a series of modules, each focused on specific topics within the application and evaluation process:

Module 1: Introduction to the Application Process

Provides an overview of the application process, documentation requirements, and fees

Module 2: Evaluation Procedures

Describes the various reviews that occur during the evaluation process and criteria for approval of applications

Module 3: Dispute Resolution Procedures

Contains the grounds for formal objection by third parties concerning gTLD applications submitted, and the dispute resolution procedure triggered by an objection

Module 4: String Contention Procedures

Describes mechanisms for resolving contention when there is more than one qualified applicant for identical or similar gTLD strings

Module 5: Transition to Delegation

Describes the final steps required of an applicant, including execution of a registry agreement and completion of pre-delegation tests

Module 6: Terms and Conditions

Contains the terms and conditions applicable to all entities submitting an application

Glossary

Contains definitions for terms used in the Applicant Guidebook

ICANN is posting a series of explanatory memoranda to accompany this draft, to provide further details on the background work completed by ICANN. Links to these memoranda are noted within the relevant modules.

All materials contained in the Draft Applicant Guidebook are being presented for public comment. Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

ICANN

Draft Applicant Guidebook

Module 1

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 1

Introduction to the gTLD Application Process

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the application life cycle.

For more about the origins, history and details of ICANN's policies on new gTLDs, please see http://gnso.icann.org/issues/new-gtlds/.

A glossary of relevant terms is included with the Draft Applicant Guidebook (Draft RFP).

Prospective applicants are encouraged to read and become familiar with the content of this entire module as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

1.1 Application Life Cycle and Timelines

This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

1.1.1 Application Submission Dates

The application submission period opens at [time] UTC [date].

The application submission period closes at [time] UTC [date].

Applications may be submitted electronically through ICANN's online application system.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the due date.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. In Figure 1-1, the shortest and most straightforward path is marked with bold lines, while stages that may or may not apply in any given case are also shown. A brief description of each stage follows.

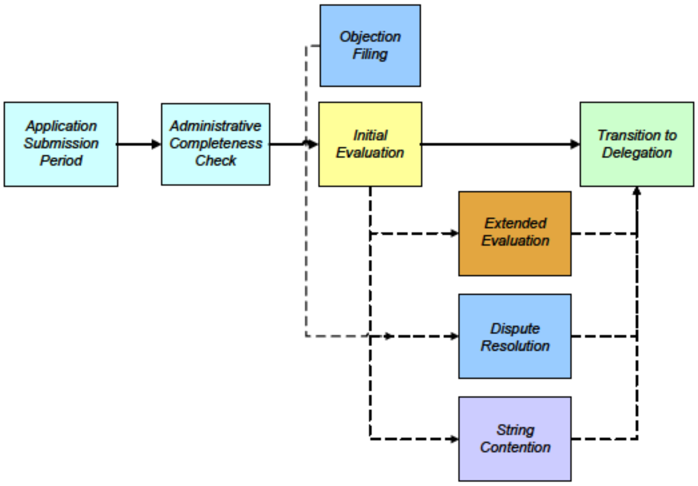


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, applicants wishing to apply for a new gTLD can become registered users of the online application system.

Through the application system, applicants will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. . The supporting documents listed in subsection 1.2.3 of this module must also be submitted through the application system.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Following the close of the application period, applicants can continue to use the application system as a resource to track the progress of their applications, although they may receive communications from ICANN through other means.

1.1.2.2 Administrative Completeness Check

Immediately following the close of the application period, ICANN will check all applications for completeness. This check ensures that:

- All questions are answered (except those questions identified as optional);
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post a list of applications considered complete and ready for evaluation as soon as practical after the close of the application period. The status information for each application will also be updated in the online application system.

1.1.2.3 Initial Evaluation

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.

There are two main elements of the Initial Evaluation:

- String reviews (concerning the applied-for gTLD string); and
- Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services).

Applicant reviews include a determination of whether the applicant has the requisite technical and financial capability to operate a registry.

- Panels of independent evaluators will perform these reviews based on the information provided by each applicant in its responses to the application form.
- There may be one round of questions and answers between the applicant and evaluators to clarify information contained in the application. Refer to Module 2 for further details on the evaluation process.

Evaluators will report whether the applicant passes or fails each of the parts of the Initial Evaluation. These reports will be available in the online application system.

At the conclusion of the Initial Evaluation period, ICANN will post a notice of all applications that have passed the Initial Evaluation. Depending on the volume of applications received, ICANN may post such notices in batches over the course of the Initial Evaluation period.

1.1.2.4 Objection Filing

Formal objections to applications can be filed on any of four enumerated grounds by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in paragraph 1.1.2.2. Objectors will file directly with dispute resolution service providers (DRSPs). Refer to Module 3, Dispute Resolution Procedures, for further details.

The objection filing phase will close following the end of the Initial Evaluation period (refer to paragraph 1.1.2.3). Objections that have been filed during the objection filing phase will be addressed in the dispute resolution phase, which is outlined in paragraph 1.1.2.6 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during this period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures (refer to Module 3).

An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

1.1.2.5 Extended Evaluation

Extended Evaluation applies only to applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for one additional round of questions and answers between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An Extended Evaluation may also be required if the applied-for gTLD string or one or more proposed registry services raise technical issues that might adversely affect the security and stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such reviews are required at the end of the Initial Evaluation period. Evaluators and any applicable experts consulted will communicate their conclusions at the end of the Extended Evaluation period. These reports will be available in the online application system.

At the conclusion of the Extended Evaluation period, ICANN will post all evaluator reports from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next stage. If the application does not pass the Extended Evaluation, it will proceed no further.

1.1.2.6 Dispute Resolution

Dispute resolution applies only to applicants that are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing phase, dispute resolution service providers will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been received by ICANN. Dispute resolution service providers provide the fora to adjudicate the proceedings based on the subject matter and the needed expertise.

As a result of the proceeding, either the applicant will prevail (in which case the application can proceed to the next stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). Refer to Module 3, Objection and Dispute Resolution, for detailed information. Applicants will be notified by the Dispute Resolution Service Provider of the results of dispute proceedings. The online application system will also be updated with these results.

1.1.2.7 String Contention

String contention applies only when there is more than one qualified applicant for the same or similar gTLD strings.

String contention refers to the scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are so similar that they create a probability of detrimental user confusion if more than one is delegated. ICANN will resolve cases of string contention either through comparative evaluation or through an alternative mechanism for efficient resolution of string contention.

In the event of contention between applied-for strings that represent geographical names, the parties may be asked to follow a different process to resolve the contention.

Groups of applied-for strings that are either identical or confusingly similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B elects Extended Evaluation. A third party files an objection to Applicant C's application, and Applicant C enters the dispute resolution proceeding. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.

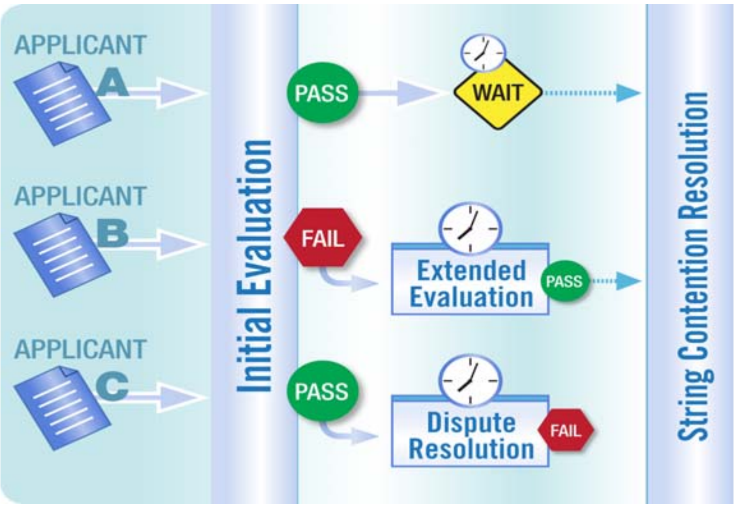


Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of applied-for gTLD strings. The online application system will be updated with the resolution of the string contention procedures.

1.1.2.8 Transition to Delegation

Applicants that successfully complete all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD string into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and satisfactory performance on technical checks before delegation of the gTLD into the root zone. If the initial start-up requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD string into the DNS root zone.

1.1.3 Accounting for Public Comment in the Evaluation of Applications once the New gTLD Process is Launched

Public comment mechanisms are part of ICANN's policy development and implementation processes. As a private-public partnership, ICANN is dedicated to preserving the operational security and stability of the Internet, to promoting competition, to achieving broad representation of global Internet communities, and to developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

In the new gTLD application process, public comments will be a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. ICANN will open a public comment forum at the time the applications are publicly posted on ICANN's website (refer to paragraph 1.1.2.2), which will remain open through the application round.

Public comments received will be provided to the evaluators during the Initial and Extended Evaluation periods. Evaluators will have discretion to take the information provided in these comments into consideration as deemed necessary. Consideration of the applicability of the information submitted through public comments will be included in the evaluators' reports.

Public comments may also be relevant to one or more objection grounds. (Refer to Module 3, Dispute Resolution Procedures, for the objection grounds.) ICANN will provide all public comments received to DRSPs, who will have discretion to consider them.

A distinction should be made between public comments, which may be relevant to ICANN's task of determining whether applications meet the established criteria, and formal objections that concern matters outside this evaluation. ICANN created the formal objection process to allow a full and fair consideration of objections based on subject areas outside ICANN's mission and expertise. A party contacting ICANN to pursue an objection will be referred to the formal objection channels designed specifically for resolving these matters in the new gTLD space. More information on the objection and dispute resolution processes is available in Module 3.

1.1.4 Sample Application Scenarios

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows summarizes some processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Scenario Number	Initial Evaluation	Extended Evaluation	Objection(s) Raised	String Contention	Approved for Subsequent Steps
1	Pass	N/A	None	No	Yes
2	Fail	Pass	None	No	Yes
3	Pass	N/A	None	Yes	Yes
4	Pass	N/A	Applicant prevails	No	Yes
5	Pass	N/A	Objector prevails	N/A	No
6	Fail	Quit	n/a	N/A	No
7	Fail	Fail	n/a	N/A	No
8	Fail	Pass	Applicant prevails	Yes	Yes
9	Fail	Pass	Applicant prevails	Yes	No

Scenario 1 – Pass Initial Evaluation, No Objection, No Contention – In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are raised during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation

Scenario 2 – Extended Evaluation, No Objection, No Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are raised during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation.

Scenario 3 – Pass Initial Evaluation, No Objection, Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are raised during the objection period, so there is no dispute to resolve and no appeal. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, one application wins the contention resolution, and the other contenders are denied their applications, so the winning applicant can enter into a registry agreement and the application can proceed toward delegation.

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, a valid objection is raised by an objector with standing on one of the objection grounds (refer to Module 3, Dispute Resolution Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application proceeds toward delegation.

Scenario 5 – Pass Initial Evaluation, Lose Objection – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple valid objections are raised by one or more objectors with standing in one or more of the objection grounds. Each objection category for which there are objections is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

Scenario 6 – Fail Initial Evaluation, Applicant Withdraws – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation
In this case, the application fails one or more steps in the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the application fails Extended Evaluation also. The application does not proceed.

Scenario 8 – Extended Evaluation, Win Objection, Pass Contention –In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection period, one valid objection is raised by an objector with standing. The objection is heard by a dispute resolution service provider panel that rules in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement and the application can proceed toward the delegation phase.

Scenario 9 – Extended Evaluation, Objection, Fail Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection period, one valid objection is raised by an objector with standing. The objection is heard by a dispute resolution service provider that rules in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

Transition to Delegation – After an application has completed Initial or Extended Evaluation, dispute resolution, if applicable, and string contention, if applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the relevant steps in this phase.

1.1.5 Subsequent Application Rounds

ICANN's goal is to launch the next 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 this round.

1.2 Information for All Applicants

1.2.1 Eligibility

Any established corporation, organization, or institution in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered.

1.2.2 Two Application Types: Open or Community-Based

All applicants are required to designate each application for a new gTLD as **open** or **community-based**.

1.2.2.1 Definitions

For purposes of this RFP, an **open gTLD** is one that can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. An open gTLD may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions.

For purposes of this RFP, a **community-based gTLD** is a gTLD that is operated for the benefit of a defined community consisting of a restricted population. An applicant designating its application as community-based will be asked to substantiate its status as representative of the community it names in the application, and additional information may be requested in the event of a comparative evaluation (refer to Section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a defined community that consists of a restricted population.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD.
4. Have its application endorsed in writing by an established institution representing the community it has named.

1.2.2.2 Implications of Application Designation

Applicants should understand how their designation as open or community-based will affect application processing at particular stages, as described in the following paragraphs.

Objection/Dispute Resolution – All applicants should understand that an objection may be filed against any application on community opposition grounds, even if the applicant has not designated itself as community-based or declared the TLD to be aimed at a particular community. Refer to Module 3, Dispute Resolution Procedures.

String Contention – Any applicant that has been identified as part of a contention set (refer to Module 4.1) may be obliged to participate in either a comparative evaluation or another efficient mechanism for contention resolution if the application reaches the string contention stage and the applicant elects to proceed.

A **comparative evaluation** will take place if a community-based applicant in a contention set has elected comparative evaluation.

Another efficient mechanism for contention resolution will result in other cases. If a comparative evaluation occurs but does not produce a clear winner, the efficient mechanism will then result.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

Contract Execution and Post-Delegation – A community-based gTLD applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation, once it begins operating the gTLD. ICANN must approve material changes to the community-based nature of the gTLD and any associated contract changes.

1.2.2.3 Changes to Application Designation

An applicant may not change its designation as open or community-based once it has submitted a gTLD application for processing.

1.2.3 Required Documents

Applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment –** Examples of acceptable documentation include articles or a certificate of incorporation, articles of association or equivalent documents relative to the type of entity and the jurisdiction in which it is formed, such as statutes or membership agreements of the entity.
2. **Proof of good standing** – Examples of acceptable documentation include a certificate of good standing or other equivalent official document issued by a competent government authority, if offered by a governmental authority for the jurisdiction.

Under some laws or jurisdictions, it may be possible to prove both establishment and good standing with a single document. That is, the same document may suffice for items 1 and 2.

If no such certificates or documents are available in the applicant's jurisdiction, an affidavit drafted and signed by a notary public or a legal practitioner duly qualified to represent clients before the courts of the country in which the applicant's organization is established, declaring that the organization is established and in good standing, must be submitted.

3. If the applicant is a government body or organization, it must provide a **certified copy of the act** wherein or governmental decision whereby the government body or organization was established.

ICANN is aware that practices and documentation standards vary from region to region, and has attempted to account for a variety of these practices when specifying the requirements. Applicants with exceptional circumstances should contact ICANN to determine how to provide appropriate documentation.

4. **Financial statements**. Applicants must provide audited financial statements for the most recently completed fiscal year for the applicant, and unaudited financial statements for the most recently ended interim financial period for the applicant.
5. Before delegation: **documentary evidence of ability to fund ongoing basic registry operations** for then-existing registrants for a period of three to five years in the event of registry failure, default or until a successor operator can be designated.

All documents must be valid at the time of submission.

Supporting documentation should be submitted in the original language. English translations are not required.

Some supporting documentation will be required only in certain cases:

1. ***Community endorsement –*** If an applicant has designated its application as community-based, it will be asked to submit a written endorsement of its application by an established institution representing the community it has named.
2. ***Government support or non-objection*** – If an applicant has applied for a string that is a geographical term, the

applicant is required to submit a statement of support or non-objection for its application from the relevant government(s) or public authorities. Refer to Section 2.1.1.4 for more information on the requirements for geographical names.

3. ***Documentation of outside funding commitments* –** If an applicant lists outside sources of funding in its application, it must provide evidence of commitment by the party committing the funds.

1.2.4 Notice Concerning Technical Acceptance Issues with New gTLDs

All applicants should be aware that acceptance of their applications by ICANN and entering into a registry agreement with ICANN does not guarantee that the new gTLD will immediately function throughout the Internet. Past experience indicates that ISPs and webhosters do not automatically allow passage of or access to new gTLD strings even when these strings are authorized by ICANN, since software modifications may be required that may not happen until there is a business case for doing so.

Similarly, web applications often validate namestrings on data entry and may filter out new or unknown strings. ICANN has no authority or ability to require acceptance of new gTLD namestrings although it does prominently publicize ICANN-authorized gTLD strings on its website. ICANN encourages applicants to familiarize themselves with these issues and account for them in startup and launch plans. Successful applicants may find themselves expending considerable efforts post-implementation in working with providers to achieve acceptance of their new gTLD namestring.

Applicants should review (Informational) RFC 3696 (see http://www.ietf.org/rfc/rfc3696.txt?number=3696) for background. IDN applicants should review the material concerning experiences with IDN test strings in the root zone (see http://idn.icann.org/).

1.2.5 Terms and Conditions

All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this RFP.

1.3 Information for Internationalized Domain Name Applicants

Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs) that require the insertion of IDN-encoded A-labels into the DNS root zone. IDNs are labels that contain one or more letters or characters other than LDH (letters a,…z; digits 0,…9; and the hyphen “-”).

If an applicant applies for such a string, it must provide accompanying information indicating compliance with the IDNA protocol and other requirements. The IDNA protocol is currently under revision and its documentation can be found at http://www.icann.org/en/topics/idn/rfcs.htm. Applicants must provide applied-for gTLD strings in the form of both a **U-label** and an **A-label**.

An A-label is the ASCII-Compatible Encoding form of an IDNA-valid string. Every A-label begins with the IDNA ACE prefix, “xn--”, followed by a string that is a valid output of the Punycode algorithm, and hence is a maximum of 59 ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123 and elsewhere.

A U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character, expressed in a standard Unicode Encoding Form, normally UTF-8 in an Internet transmission context.

For example, using the current IDN test string in Cyrillic script, the U-label is <**испытание**> and the A-label is <**xn—80akhbyknj4f>.** An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Short form of string (English). The applicant will provide a short description of what the string would mean in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for TLD string, both

according to the ISO's codes for the representation of names of languages, and in English.

3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO code for the presentation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Representation of label in phonetic alphabet. The applicant will provide its applied-for gTLD string notated according to the International Phonetic Alphabet (http://www.arts.gla.ac.uk/IPA/ipachart.html).
6. Its IDN table. This table provides the list of characters eligible for registration in domain names according to registry policy. It will contain any multiple characters that can be considered "the same" for the purposes of registrations at the second level. For examples, see http://iana.org/domains/idn-tables/.
7. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator. If an applicant were applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications.

1.4 Submitting an Application

Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the tool, applicants must first register as a TAS user, which involves paying a user registration fee of USD100.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

1.4.1 Accessing the TLD Application System

The TAS site is located at [URL to be inserted in final version of RFP].

TAS features include:

1.4.1.1 Sub-user Management

This feature allows applicants to create sub-users with varying permission levels to assist in completing the application. For example, if an applicant wishes to designate a user to complete the technical section of the application, the applicant can create a sub-user account with access only to that section.

1.4.1.2 Workflow Management

This feature allows applicants to check the status of their applications through TAS.

1.4.1.3 Security

ICANN uses all reasonable efforts to protect applicant information submitted through TAS. TAS uses advanced Internet security technology to protect applicant information against unauthorized access. This technology includes:

Secure Socket Layer (SSL) – To ensure that confidential information remains confidential, it is sent to TAS in a secure session using SSL technology. SSL technology scrambles or encrypts information as it moves between the user's browser and TAS.

Limited TAS Authorized Users and Permission Levels – TAS is a hierarchical system with defined user roles and permissions. ICANN-authorized personnel have access only to the portions of the system they need. For example, an accounting user may only need access to perform updates to the portion of a record indicating whether an applicant's evaluation fee has been received.

Although ICANN intends to follow the security precautions outlined here, it offers no assurances that these procedures will keep an applicant's data confidential and secure from access by unauthorized third parties.

1.4.2 Technical Support

TAS users can refer to the FAQ/knowledge base or contact [email address to be inserted in final version of RFP] for help using the system. Users can expect to receive a tracking ticket number and a response within 24 to 48 hours through the TAS submission tool.

1.4.3 Backup Application Process

If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

1.5 Fees and Payments

This section describes the fees to be paid by the applicant. Payment instructions are also included here.

1.5.1 Breakdown of Fees and Amounts

The following fees are required from all applicants:

- ***TAS User Registration Fee* –** USD 100. This fee enables a user to enter the online application system. This fee is nonrefundable.
- ***gTLD Evaluation fee* –** USD 185,000. ICANN will not begin its evaluation of an application unless it has received the gTLD evaluation fee by the due date. Refer to subsection 1.5.4. The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded, and doesn't take resources from other ICANN funding sources, including generic registries and registrars, cc TLD contributions and RIR contributions.

  In certain cases, refunds of a portion of this fee may be available for applications that are withdrawn before the evaluation process is complete. The amount of refund will depend on the point in the process at which the withdrawal is made. (Refer to subsection 1.5.5.) Details will be made available when the application process is launched.

Applicants may be required to pay additional fees in certain cases. Those possible additional fees include:

- ***Registry Services Review Fee* –** If applicable, this fee is payable for additional costs incurred in referring an application to the RSTEP for an extended review. Applicants will be notified if such a fee is due. The fee for a three member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. In every case, the applicant will be advised of the review cost before its initiation. Refer to Section 2.1.3 of Module 2 on Registry Services review.

- ***Dispute Resolution Filing Fee –*** This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable to the applicable dispute resolution service provider in accordance with the provider's payment instructions. ICANN estimates that non-refundable filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.

- ***Dispute Resolution Adjudication Fee –*** This fee is payable to the applicable dispute resolution service provider in accordance with that provider's procedures and schedule of costs. Both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding.

  ICANN estimates that a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please refer to the appropriate provider for the relevant amounts or fee structures. Refer also to Section 3.2 of Module 3 for further details.

- ***Comparative Evaluation Fee –*** This fee is payable to the provider appointed to handle comparative evaluations, in the event that the applicant participates in a comparative evaluation.

Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4.

This list does not include fees (that is, registry fees) that will be payable to ICANN following execution of a registry agreement. See http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf.

1.5.2 Payment Methods

Payments to ICANN may be submitted by wire transfer, ACH, money order, or check.

1.5.2.1 Wire Transfer Payment

Instructions for making a payment by **wire transfer** will be available in TAS.

1.5.2.2 ACH Payment

Instructions for making **ACH payments** will be available in TAS.

1.5.2.3 Credit Card Payment

To make a **credit card payment**, note:

ICANN accepts Visa, MasterCard/Maestro, American Express and Discover credit cards as forms of payment. The maximum amount accepted is USD 20,000 per invoice.

- Fill out and sign the Credit Card Payment Form at http://www.icann.org/en/financials/credit.pdf.
- Send the completed form to ICANN at fax: +1.310.823.8649

Or mail the form to:

Internet Corporation for Assigned Names and Numbers (ICANN)
Attention: Finance Department
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601 USA

1.5.2.4 Check or Money Order Payment

To make a **payment by check or money order** (USD only), mail or deliver by private carrier to:

Internet Corporation for Assigned Names and Numbers (ICANN)
Attention: Finance Department
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601 USA

1.5.3 Requesting an Invoice

The TAS interface allows applicants to request issuance of an invoice for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

1.5.4 Deadlines for Payments

The Evaluation Fee must be received by [time] UTC [date].

ICANN or its providers will notify the applicants of due dates for payment in respect of additional fees (if applicable).

1.5.5 Withdrawals and Refunds

Refunds may be available to applicants who choose to withdraw at certain stages of the process.

An applicant that wishes to withdraw an application must use the TAS interface to request a refund. ICANN will not consider any other form of request for refunds. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN will be deducted from the amount paid.

Further details on refund amounts will be available in the final version of the RFP.

1.6 Questions about this RFP

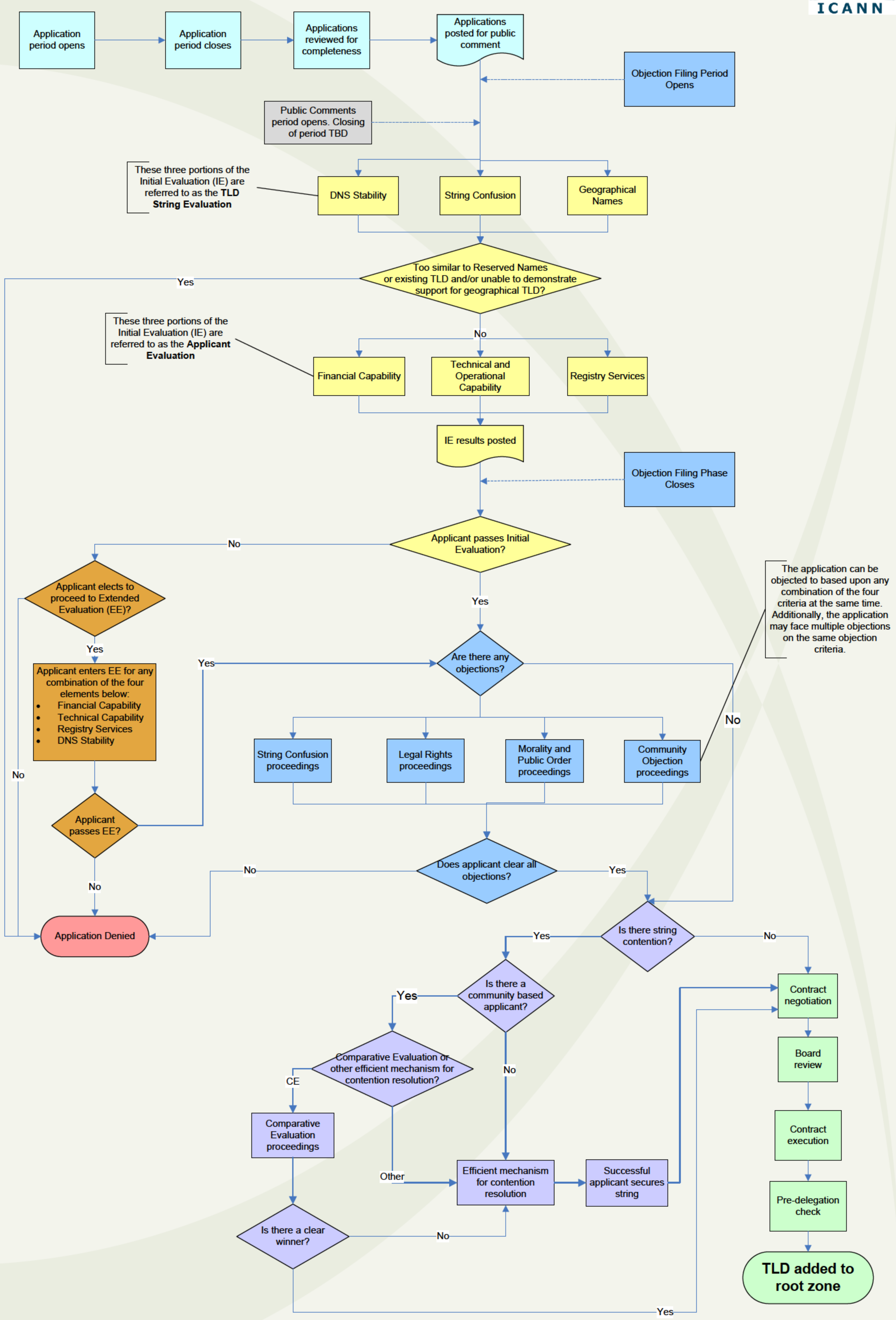
Applicants may submit questions about completing the application form to [email address to be inserted in final version of RFP]. To provide all applicants equitable access to information, ICANN will post all questions and answers in a centralized location on its website.

All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted in writing to the designated email address. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the dedicated online question and answer area.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.

New gTLD Program - Evaluation Process

DRAFT- For Discussion Purposes



Application period opens

Application period closes

Applications reviewed for completeness

Applications posted for public comment

Objection Filing Period Opens

Public Comments period opens. Closing of period TBD

These three portions of the Initial Evaluation (IE) are referred to as the **TLD String Evaluation**

DNS Stability

String Confusion

Geographical Names

Too similar to Reserved Names or existing TLD and/or unable to demonstrate support for geographical TLD?

Yes

No

These three portions of the Initial Evaluation (IE) are referred to as the **Applicant Evaluation**

Financial Capability

Technical and Operational Capability

Registry Services

IE results posted

Objection Filing Phase Closes

Applicant passes Initial Evaluation?

No

Yes

Applicant elects to proceed to Extended Evaluation (EE)?

Yes

No

Applicant enters EE for any combination of the four elements below:

- Financial Capability
- Technical Capability
- Registry Services
- DNS Stability

Applicant passes EE?

Yes

No

Are there any objections?

No

The application can be objected to based upon any combination of the four criteria at the same time. Additionally, the application may face multiple objections on the same objection criteria.

String Confusion proceedings

Legal Rights proceedings

Morality and Public Order proceedings

Community Objection proceedings

Does applicant clear all objections?

No

Yes

Application Denied

Is there string contention?

Yes

No

Is there a community based applicant?

Yes

No

Comparative Evaluation or other efficient mechanism for contention resolution?

CE

Other

Comparative Evaluation proceedings

Is there a clear winner?

No

Yes

Efficient mechanism for contention resolution

Successful applicant secures string

Contract negotiation

Board review

Contract execution

Pre-delegation check

TLD added to root zone

ICANN

Draft Applicant Guidebook

Module 2

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 2

Evaluation Procedures

This module describes the evaluation procedures and criteria used to determine whether applications are approved for delegation as a gTLD. All applicants will undergo an Initial Evaluation and those that do not pass all phases may enter into an Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN first assesses an applied-for gTLD string, an applicant's qualifications, and proposed registry services.

The following elements make up **Initial Evaluation**:

- String Reviews
    - String confusion
    - Reserved Names
    - DNS stability
    - Geographical names
- Applicant Reviews
    - Demonstration of technical and operational capability
    - Demonstration of financial capability
    - Registry services

These elements, which are described in greater detail later in this module, are intended to ensure applied-for gTLD strings do not negatively impact DNS security or stability, and to ensure that applicants are capable of operating the gTLD in a stable and secure manner, and that new services can be introduced without adverse effect on the security or stability of the DNS.

An applicant must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.

Extended Evaluation may be applicable in cases in which an applicant does not pass the Initial Evaluation or additional inquiry is required.

2.1 Initial Evaluation

The Initial Evaluation consists of two types of examination. Each type is composed of several elements.

The first examination focuses on the applied for string to test:

- Whether the applied-for gTLD string is similar to others and would cause user confusion;
- Whether the applied-for gTLD string might disrupt DNS security or stability; and
- Whether requisite government approval is given in the case of certain geographical names.

The second examination focuses on the applicant to test:

- Whether the applicant has the requisite technical and financial capability; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

2.1.1 String Reviews

In the Initial Evaluation, ICANN reviews every applied-for gTLD string for string confusion, potential to introduce instability into the DNS, and whether relevant government approval is required. Those reviews are described in greater detail in the following paragraphs.

2.1.1.1 String Confusion Review

The objective of this review is to prevent user confusion and loss of confidence in the DNS. This review involves a comparison of each applied-for gTLD string against existing TLDs and against other applied-for gTLD strings. The examination is to determine whether the applied-for gTLD string is so similar to one of the others that it would create a probability of detrimental user confusion if it were to be delegated to the root zone. ICANN will perform determinations of string similarity in accordance with the steps outlined here.

The similarity review will be conducted by a panel of String Similarity Examiners. This examination will be informed by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. The score will provide one objective measure for consideration by the panel.

The examiners' task is to identify string similarities that would create a probability of detrimental user confusion. The examiners will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – 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 standard will be applied in two sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names.
- Applied-for gTLD strings against other applied for gTLD strings or strings requested in ccTLD processes).

Existing String Similarity Examination – This review involves cross-checking between each applied-for string and the list of existing TLD strings to determine whether the two strings are so similar to one another that they create a probability of detrimental user confusion.

All TLDs currently in the root zone can be found at http://iana.org/domains/root/db/.

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

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

Such testing for identical strings also takes into consideration the code point variants listed in any relevant language reference table.

For example, protocols treat equivalent labels as alternative forms of the same label, just as “foo” and “Foo” are treated as alternate forms of the same label (RFC 3490).

An applied-for gTLD string that passes the string confusion review is still subject to challenge by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a specific objection be filed by an objector having the standing to make such an objection. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

String Contention Sets: Similarity with Other Applied-for gTLD Strings – All applied-for gTLD strings will be reviewed against one another to identify any strings that are so similar that they create a probability of detrimental user confusion would result if more than one is delegated into the root zone. In performing the string confusion review, the panel of String Similarity Examiners will create contention sets that may be used later in the process. A contention set contains at least two applied-for strings identical to one another or so similar that string confusion would result if more than one were delegated into the root zone. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution. ICANN will notify applicants who are part of a contention set by the conclusion of the Initial Evaluation period. These contention sets will also be published on ICANN's website.

Similarity to TLD strings applied for as ccTLDs -- Applied-for gTLD strings will also be reviewed for similarity to TLD strings applied for in the IDN ccTLD Fast Track process (see http://www.icann.org/en/topics/idn/fast-track/). Should conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take steps to resolve the conflict. (See process for Geographical Names in paragraph 2.1.1.4.)

String Similarity Algorithm – The String Similarity Algorithm (Algorithm) is a tool the examiners use to provide one objective measure as part of the process of identifying strings likely to result in confusion. The Algorithm is also available to applicants for testing and informational purposes. The Algorithm and user guidelines are available at http://80.124.160.66/icann-algorithm.

The Algorithm calculates scores for visual similarity between any two strings, using factors such as letters in sequence, number of similar letters, number of dissimilar letters, common prefixes, common suffixes, and string length.

2.1.1.2 Review for Reserved Names

The Reserved Names review involves comparison with the list of top-level Reserved Names to ensure that the applied-for gTLD string does not appear on that list.

Top-Level Reserved Names List

AFRINIC	*IANA-SERVERS*	*NRO*
ALAC	*ICANN*	*RFC-EDITOR*
APNIC	*IESG*	*RIPE*
ARIN	*IETF*	*ROOT-SERVERS*
ASO	*INTERNIC*	*RSSAC*
CCNSO	*INVALID*	*SSAC*
*EXAMPLE**	*IRTF*	*TEST**
GAC	*ISTF*	*TLD*
GNSO	*LACNIC*	*WHOIS*
GTLD-SERVERS	*LOCAL*	*WWW*
IAB	*LOCALHOST*	
IANA	*NIC*	
*Note that in addition to the above strings, ICANN will also reserve translations of the terms "test" and "example" in multiple languages.		

If an applicant enters a Reserved Name as its applied-for gTLD string, the application system will recognize the Reserved Name and not allow the application to be submitted.

In addition, applied-for gTLD strings are reviewed in a process identical to that described in the preceding section to determine whether they exceed a similarity threshold with a Reserved Name. An application for a gTLD string that is identified as too similar to a Reserved Name will not pass the Reserved Names review.

2.1.1.3 *Review for Potential DNS Instability*

This review determines whether an applied-for gTLD string might cause instability to the DNS. In all cases, this will involve a review for conformance with technical and other requirements for gTLD labels. In some exceptional cases, an extended review may be necessary to investigate possible technical stability problems with the applied-for gTLD string.

2.1.1.3.1 *String Stability Review*

New gTLD labels must not adversely affect on the security or stability of the DNS. Although no string complying with the requirements in paragraph 2.1.1.3.2 of this module is expected to adversely affect DNS security or stability, an extended review is possible if technical reviewers identify an issue with the applied-for gTLD string that requires further investigation.

String Stability Review Procedure – During the Initial Evaluation period, ICANN will conduct a preliminary review on the set of applied-for gTLD strings to ensure that proposed strings comply with relevant standards provided in the preceding section and determine whether any strings raise significant technical stability issues that may require an Extended Evaluation.

There is low probability that this review will be necessary for a string that fully complies with the string requirements in paragraph 2.1.1.3.2 of this module. However, the technical stability review process provides an additional safeguard if unanticipated security or stability issues arise concerning an applied-for gTLD string.

See Section 2.2 for further information on the Extended Evaluation process.

2.1.1.3.2 String Requirements

ICANN will review each applied-for gTLD string to ensure that it conforms with the requirements outlined in the following paragraphs.

If an applied-for gTLD string is found to violate any of these rules, the application will be denied. No further reviews are available.

Technical Requirements for all Labels (Strings) – The technical requirements for the selection of top-level domain labels follow.

- The ASCII label (that is, the label as transmitted on the wire) must be valid as specified in the technical standards *Domain Names: Implementation and Specification* (RFC 1035), and *Clarifications to the DNS Specification* (RFC 2181). This includes the following:
    - The label must have no more than 63 characters.
    - Upper and lower case characters are treated as identical.
- The ASCII label must be a valid host name, as specified in the technical standards *DOD Internet Host Table Specification* (RFC 952), *Requirements for Internet Hosts — Application and Support* (RFC 1123), and *Application Techniques for Checking and Transformation of Names (RFC 3696).* This includes the following:

    - The label must consist entirely of letters, digits and hyphens.
    - The label must not start or end with a hyphen.

- There must be no possibility for confusing an ASCII label for an IP address or other numerical identifier by application software. For example, representations such as “255”, “o377” or “0xff”representing decimal, octal, and hexadecimal strings, can be confused for IP addresses. As such, labels:
    - Must not be wholly composed of digits between “0” and “9”.
    - Must not commence with “0x” or “x”, and have the remainder of the label wholly composed of hexadecimal digits, “0” to “9” and “a” through “f”.
    - Must not commence with “0o” or “o”, and have the remainder of the label wholly composed of digits between “0” and “7”.
- The ASCII label may only include hyphens in the third and fourth position if it represents a valid Internationalized Domain Name in its A-label form (ASCII encoding).
- The presentation format of the domain (that is, either the label for ASCII domains, or the U-label for Internationalized Domain Names) must not begin or end with a digit.

Requirements for Internationalized Domain Names – These requirements apply only to prospective top-level domains that use non-ASCII characters. Applicants for these internationalized top-level domain labels are expected to be familiar with the IETF IDNA standards, Unicode standards, and the terminology associated with Internationalized Domain Names.

- The label must be a valid internationalized domain name, as specified in the technical standard *Internationalizing Domain Names in Applications* (RFC 3490). This includes the following nonexhaustive list of limitations:
    - Must only contain Unicode code points that are defined as “Valid” in *The Unicode Codepoints and IDNA* (http://www.ietf.org/internet-

drafts/draft-ietf-idnabis-tables-02.txt) and be accompanied by unambiguous contextual rules where necessary.

  - Must be fully compliant with Normalization Form C, as described in *Unicode Standard Annex #15: Unicode Normalization Forms*. See also examples in http://unicode.org/faq/normalization.html.

  - Must consist entirely of characters with the same directional property.

- The label must meet the relevant criteria of the ICANN *Guidelines for the Implementation of Internationalised Domain Names*. See http://www.icann.org/en/topics/idn/implementation-guidelines.htm. This includes the following nonexhaustive list of limitations:

  - All code points in a single label must be taken from the same script as determined by the Unicode Standard Annex #24: Unicode Script Property.

  - Exceptions are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. However, even with this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table is clearly defined.

The IDNA protocol used for internationalized labels is currently under revision through the Internet standardization process. As such, additional requirements may be specified that need to be adhered to as this revision is being completed. The current status of the protocol revision is documented at http://tools.ietf.org/wg/idnabis.

Policy Requirements for Generic Top-Level Domains – Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.

2.1.1.4 Geographical Names

ICANN will review all applied-for strings to ensure that appropriate consideration is given to the interests of governments or public authorities in country or territory names, as well as certain other types of sub-national place names. The requirements and procedure ICANN will follow is described in the following paragraphs.

2.1.1.4.1 *Requirements for Strings Intended to Represent Geographical Entities*

The following types of applications must be accompanied by documents of support or non-objection from the relevant government(s) or public authority(ies).

- Applications for any string that is a meaningful representation of a *country or territory name* listed in the ISO 3166-1 standard (see http://www.iso.org/iso/country_codes/iso_3166_databases.htm). This includes a representation of the country or territory name in any of the six official United Nations languages (French, Spanish, Chinese, Arabic, Russian and English) and the country or territory's local language.

- Applications for any string that represents a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard.

- Applications for a city name, where the applicant clearly intends to use the gTLD to leverage from the city name.

- 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 at http://unstats.un.org/unsd/methods/m49/m49regin.htm.

An applied-for gTLD string that falls into the above categories is considered to represent a geographical name. It is the applicant's responsibility to identify whether its applied-for gTLD string falls into the above categories and to determine the relevant government or governments, or the relevant public authority or authorities. In the case of an application for a string which represents a continent or UN region, evidence of support, or non-objection, will be required from a substantial number of the relevant governments and/or public authorities associated with the continent or the UN region.

The evidence of support or non-objection from the relevant government or public authority should include a signed letter of support or non-objection from the minister with the portfolio responsible for domain name administration, ICT, foreign affairs or the Office of the Prime Minister or President of the relevant jurisdiction. If there are reasons for doubt about the authenticity of the communication, ICANN will consult with the diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact with their administration for communications.

The letter must clearly express the government's or public authority's support or non-objection for the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and what it will be used for.

The requirement to include evidence of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to section 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

2.1.1.4.2 Review Procedure for Geographical Names

A Geographical Names Panel (GNP) will be established to evaluate applications and confirm whether each string represents a geographic term, and to verify the authenticity of the supporting documentation where necessary. The Geographic Names Panel may consult with additional experts as they consider appropriate.

The steps ICANN and the Geographical Names Panel intend to follow to ensure compliance with these requirements are described here.

1. During the Initial Evaluation period, ICANN evaluates each application for a geographical name to confirm that the applicant has provided a letter of support or nonobjection from the relevant government.

2. ICANN forwards applications considered complete to the GNP for confirmation that:

    - The strings are a meaningful representation of a country or territory name or a subnational place name, and

- The communication from the government or public authority is legitimate and contains the suggested content.

3. The GNP also reviews applications that are not self-identified as a geographical name to ensure that the applied-for string is not a meaningful representation of a country or territory name or a sub-national place name.

4. All applications determined to be geographical but without necessary supporting documents will be considered incomplete. The applicant will be notified and the application will not pass Initial Evaluation.

5. The GNP may consult additional expertise if uncertainty arises about the name the applied-for gTLD string is claimed to represent.

The results of the evaluation will be publicly posted on ICANN's website at the conclusion of the Initial Evaluation, and will also be available to applicants.

If there is more than one application for a string representing a certain geographical term as described in this section, and the applications are considered complete (that is, have requisite government approvals), the applications will be suspended pending resolution by the applicants. If there is contention between identical (or similar) applicants where one is identified as a geographical name, the string contention will be settled using the string contention methodology described in Module 4.

2.1.2 Applicant Reviews

Concurrent with the applied-for gTLD string reviews described in subsection 2.1.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

2.1.2.1 Information Sought

The questions provided for applicants in the application form are available at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf. Applicants answer questions which cover the following three areas in relation to themselves: general information, technical and operational capability, and financial capability.

Applicants should be aware that the application materials submitted in the online application system, as well as any evaluation materials and correspondence, will be publicly posted on ICANN's website. The sections in the application that are marked CONFIDENTIAL will not be posted. Any sections of the application that ICANN has not designated CONFIDENTIAL will be posted.

The applicant questions cover the following three areas:

General Information – These questions are intended to gather information about an applicant's legal identity, contact information, and applied-for gTLD string. Failure to provide any of this information will result in an application being considered incomplete. Under specific areas of questions under this category are: the identification of the applied-for string; selection of TLD type; and requests for certain documents.

Demonstration of Technical and Operational Capability – These questions are intended to gather information about an applicant's technical capabilities and plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual registry to complete the requirements for a successful application. It will be sufficient at application time for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of running a gTLD registry. Each applicant that passes the technical evaluation and all other steps will be required, following execution of a registry agreement, to complete a pre-delegation technical test before delegation of the applied-for gTLD. Refer to Module 5, Transition to Delegation, for additional information.

Demonstration of Financial Capability **–** These questions are intended to gather information about an applicant's financial capabilities to operate a gTLD registry business and its financial planning in preparation for long-term operation of a new gTLD.

2.1.2.2 Evaluation Methodology

Initial Evaluations are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the application form. ICANN and its evaluators are not obliged to take into account any information or evidence that is not made available in the application and submitted by the due date, unless explicitly requested by the evaluators.

Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and any such request will be made solely through TAS, rather than by direct means such as phone, letter, email, or other similar means. Only one exchange of information between the applicant and the evaluators may take place within the Initial Evaluation period.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans noting hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment.

2.1.3 Registry Services Review

Concurrent with the string reviews described in subsection 2.1.1, ICANN will review the applicant's proposed registry services. The applicant will be required to provide a list of proposed registry services in its application.

Registry services are defined as: (1) operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement; (2) other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and (3) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

A full definition of registry service can be found at http://www.icann.org/en/registries/rsep/rsep.html and in the draft registry agreement at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf. Registry services will be examined to determine if the proposed registry service might raise significant stability or security issues. Examples of services submitted to the registry services process by established registries can be found at http://www.icann.org/en/registries/rsep.

The registration of domain names, for example, is a registry service. Lists of registry services currently provided by registries can be found in registry agreement appendices. In general cases, these services successfully pass this inquiry. See http://www.icann.org/en/registries/agreements.htm.

Review of all applicants' proposed registry services will occur during the Initial Evaluation.

Procedure – ICANN's first review will be a preliminary determination of whether a proposed registry service requires further consideration based on whether the registry service may raise significant security or stability issues.

If ICANN's preliminary determination reveals that there may be significant security or stability issues surrounding the proposed service, the application will be flagged for an extended review by the RSTEP (see http://www.icann.org/en/registries/rsep/rstep.html). This review will occur during the Extended Evaluation phase (refer to section 2.2).

Definitions for security and stability applied in the registry services review are:

Security – an effect on security by the proposed registry service means (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

Stability – an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.

2.1.4 Applicant's Withdrawal of an Application

An applicant who does not pass the Initial Evaluation may be permitted to withdraw its application at this stage for a partial refund (refer to subsection 1.5.5 of Module 1, Introduction to gTLD Application Process).

2.2 Extended Evaluation

An applicant may request an Extended Evaluation if the application has failed to pass the Initial Evaluation elements concerning:

- Demonstration of technical and operational capability (refer to paragraph 2.1.2.1).
- Demonstration of financial capability (refer to paragraph 2.1.2.1).

An Extended Evaluation may also result if ICANN identifies a need for further review on the following elements:

- DNS stability (refer to paragraph 2.1.1.3).
- Registry services (refer to subsection 2.1.3). Note that this investigation incurs an additional fee (the Registry Services Review Fee) if the applicant wishes to proceed. See Section 1.5 of Module 1 for fee and payment information.

From the time an applicant receives notice of failure to pass the Initial Evaluation, it has 15 calendar days to submit to ICANN the Notice of Request for Extended Evaluation through the online application interface. If the applicant does not explicitly request the Extended Evaluation, and pay any additional fees as applicable, the application will not proceed.

2.2.1 Technical and Operational or Financial Extended Evaluation

This subsection applies to an Extended Evaluation of an applicant's technical and operational capability or financial capability, as described in paragraph 2.1.2.1.

The Extended Evaluation allows one additional round of inquiry and answer between the evaluators and the applicant to clarify information contained in the application. This supplemental information will become part of the application. Applicants may not change the information submitted in their original applications. Through the online system, the evaluators will provide the applicant a set of questions describing any deficiencies in the application and request clarification. Such communications will include a deadline for the applicant to respond.

The same panel that reviewed an application during Initial Evaluation will conduct the Extended Evaluation, using the same criteria as outlined at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf, to determine whether the application, now that certain information has been clarified, meets the criteria.

ICANN will notify applicants at the end of the Extended Evaluation period as to whether they have passed. If an applicant passes Extended Evaluation, its application continues to the next stage in the process. If an applicant does not pass Extended Evaluation, the application will proceed no further. No further reviews are available.

2.2.2 *String Stability Extended Evaluation*

This section applies to an Extended Evaluation of DNS security or stability issues with an applied-for gTLD string, as described in paragraph 2.1.1.3.

If the evaluators determine that a string poses stability issues that require further investigation, the applicant must either confirm that it intends to move forward with the application process or withdraw its application.

If an application is subject to such an Extended Evaluation, an independent 3-member panel will be formed to review the security or stability issues identified during the Initial Evaluation.

The panel will review the string and determine whether the string complies with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, and will communicate its findings to ICANN and to the applicant.

If the panel determines that the string does not comply with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, the application cannot proceed.

2.2.3 *Registry Services Extended Evaluation*

This section applies to an Extended Evaluation of Registry Services, as described in subsection 2.1.3.

If a proposed registry service has been referred to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review, the RSTEP will form a review team of members with the appropriate qualifications.

The review team will generally consist of 3 members, depending on the complexity of the registry service proposed. In a 3-member panel, the review could be conducted within 30 to 45 days. In cases where a 5-member panel is needed, this will be identified before the extended evaluation starts. In a 5-member panel, the review could be conducted in 45 days or fewer.

The cost of an RSTEP review will be covered by the applicant through payment of the Registry Services Review Fee. Refer to payment procedures in section 1.5 of Module 1. The RSTEP team review will not commence until payment has been received.

If the RSTEP finds that one or more of the applicant's proposed registry services may be introduced without risk of a meaningful adverse effect on security or stability, these services may be included in the applicant's contract with ICANN.

If the RSTEP finds that the proposed service would create a risk of a meaningful adverse effect on security or stability, the applicant may elect to proceed with its application without the proposed service, or withdraw its application for the gTLD.

2.3 Probity and Conflicts of Interest

ICANN staff and by various independent service providers will review all applications during **Initial Evaluation** and **Extended Evaluation**. During this entire evaluation process, applicants must not approach, or have any other person or entity approach on their behalf, any ICANN staff member, any ICANN Board member, or any person associated with the evaluation process, including any evaluators, experts, examiners, or reviewers retained by ICANN.

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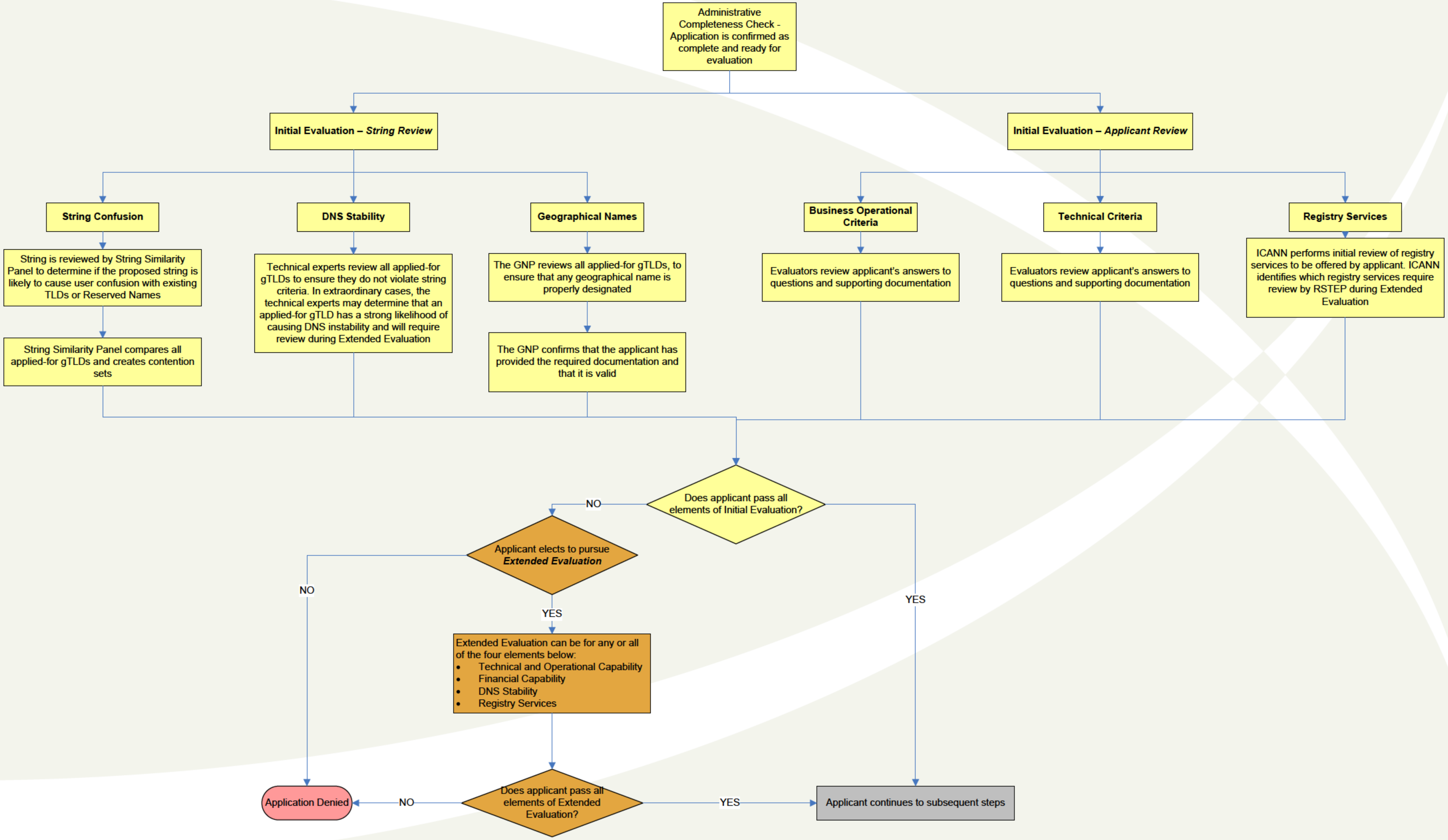


Administrative Completeness Check - Application is confirmed as complete and ready for evaluation

Initial Evaluation – *String Review*

String Confusion

String is reviewed by String Similarity Panel to determine if the proposed string is likely to cause user confusion with existing TLDs or Reserved Names

String Similarity Panel compares all applied-for gTLDs and creates contention sets

DNS Stability

Technical experts review all applied-for gTLDs to ensure they do not violate string criteria. In extraordinary cases, the technical experts may determine that an applied-for gTLD has a strong likelihood of causing DNS instability and will require review during Extended Evaluation

Geographical Names

The GNP reviews all applied-for gTLDs, to ensure that any geographical name is properly designated

The GNP confirms that the applicant has provided the required documentation and that it is valid

Initial Evaluation – *Applicant Review*

Business Operational Criteria

Evaluators review applicant's answers to questions and supporting documentation

Technical Criteria

Evaluators review applicant's answers to questions and supporting documentation

Registry Services

ICANN performs initial review of registry services to be offered by applicant. ICANN identifies which registry services require review by RSTEP during Extended Evaluation

Does applicant pass all elements of Initial Evaluation?

NO

Applicant elects to pursue ***Extended Evaluation***

NO

YES

Extended Evaluation can be for any or all of the four elements below:
- Technical and Operational Capability
- Financial Capability
- DNS Stability
- Registry Services

YES

Application Denied

NO

Does applicant pass all elements of Extended Evaluation?

YES

Applicant continues to subsequent steps

Draft Applicant Guidebook

Module 3

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 3

Dispute Resolution Procedures

This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging an objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each DRSP will apply in its decisions.

All applicants should be aware of the possibility that an objection may be filed against their applications, and of the options available in the event of such an objection.

3.1 Purpose and Overview of the Dispute Resolution Process

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows certain parties with standing to have their objections considered before a panel of qualified experts. A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept this gTLD dispute resolution process. Similarly, an objector accepts the gTLD dispute resolution process by filing its objection.

3.1.1 Grounds for Objection

An objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string.

Legal Rights Objection – The applied-for gTLD string infringes existing legal rights of the objector.

Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

3.1.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by panelists designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection Ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round
Legal rights	Rightsholders
Morality and Public Order	To be determined
Community	Established institution

3.1.2.1 String Confusion Objection

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may also file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4). If an objection by a gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.

3.1.2.2 Legal Rights Objection

Only a rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming are infringed by the applied-for gTLD must be included in the filing.

3.1.2.3 Morality and Public Order Objection

Standing requirements for morality and public order objections remain under study. In the case of morality and public order objections, it may be appropriate to grant standing only to parties who have recognized authority in the arena of morality or public order, such as governments, or it may be appropriate to make this option available to any interested parties who assert harm due to an applied-for gTLD string.

3.1.2.4 Community Objection

Established institutions associated with defined communities are eligible to file a community objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a defined community that consists of a restricted population – Factors that may be considered in making this determination include:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

3.1.3 Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can file a response to the objection and enter the dispute resolution process (refer to subsection 3.3); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2 Procedure for Filing an Objection

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date. Objections must be filed directly with the appropriate DRSP for each objection ground.

The **International Centre for Dispute Resolution** has agreed in principle to administer disputes brought pursuant to string confusion objections.

The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed in principle to administer disputes brought pursuant to legal rights objections.

The **International Chamber of Commerce** has agreed in principle to administer disputes brought pursuant to Morality and Public Order and Community Objections.

3.2.1 Objection Filing Procedures

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. These procedures are provided to applicants for reference and are intended to cover dispute resolution procedures generally. Each provider has its own rules and procedures that also must be followed when filing an objection.

Should an applicant wish to file a formal objection to another gTLD application, it would follow these procedures.

- All objections must be filed by the posted deadline date. Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. That is, if any objector wishes to object to several applications at the same time, the objector must file an objection and pay a filing fee for each application that is the subject of an objection. If an objector wishes to object to one application on different grounds, the objector must file an objection and pay a filing fee for each objection ground.
- All objections must be filed with the appropriate DRSP. If an objection is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the objector of the error. The objector then has 5 calendar days after receiving that notification to file its objection with the appropriate DRSP.
- Objections must be filed electronically and all interactions with the DRSPs during the objection process must be conducted online.

Each objection filed by an objector must include:

- The name and contact information, including address, phone, and email address, of all parties submitting an objection.
- The basis for standing; that is, why the objector believes it has the right to object.
- A statement of the nature of the dispute, which should include:
    - A statement giving the specific ground under which the objection is being filed.
    - A detailed explanation of how the objector's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
    - A detailed explanation of the validity of the objection and why the application should be denied.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 2500 words, excluding attachments.

The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.

Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another, and to ICANN.

ICANN will publish a document on its website identifying all objections shortly after the deadline for filing objections has passed (refer to Item 1 above). Objections will not be published before that deadline.

3.2.2 Objection Filing Fees

At the time an objection is filed, the objector is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

3.3 Filing a Response to an Objection

3.3.1 Filing Procedures

These procedures are intended to cover dispute resolution procedures generally. Each DRSP will have its own rules that also must be followed.

Upon notification that ICANN has published the list of objections filed (refer to subsection 3.2.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, if an applicant wishes to respond to several objections, the applicant must file a response and pay a filing fee to respond to each objection.
- All responses must be filed with the appropriate DRSP. If a response is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the applicant of the error. The applicant then has 5 calendar days after receiving the notification to file its objection with the appropriate DRSP.

- Responses must be filed electronically and all interactions with the DRSPs during the dispute resolution process must be conducted online.
- Each response filed by an applicant must include the name and contact information, including address, phone, and email address, of all parties submitting the response.
- Each responding applicant's response must contain a point-by-point confirmation or denial of the claims made by each objector. The applicant also should attach any copies of documents that it considers to be a basis for the response.
- Responses are limited to 2500, excluding attachments.
- The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.
- Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another and to ICANN.

3.3.2 Response Filing Fees

At the time an applicant files its response, it is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded.

3.4 Dispute Resolution Procedure

3.4.1 Preliminary Objection Processing

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's submission of a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for submitting an objection.

3.4.2 Consolidation of Objections

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.

An example of circumstances in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

3.4.3 Negotiation and Mediation

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in a cooling off period to determine whether the dispute can be resolved by the parties. Each DRSP has panelists who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel to resolve the objection.

There are no automatic extensions of time associated with any cooling off period. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. The parties must limit their requests for extension to 30 calendar days.

3.4.4 Selection and Number of Panelists

Appropriately qualified panelists will be appointed to each proceeding by the designated DRSP.

Panelists must be independent of the parties to an objection resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

There will be one panelist in proceedings involving a **string confusion objection**.

There will be one panelist with relevant experience in intellectual property rights disputes in proceedings involving an existing **legal rights objection**.

There will be three panelists recognized as eminent jurists of international reputation, in proceedings involving a **morality and public order objection**.

There will be one panelist in proceedings involving a **community objection**.

Neither the panelists, the DRSP, ICANN, nor their respective employees, Board members, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5 Adjudication

At its discretion, the panel appointed by the DRSP may request further statements or documents from the parties, although such requests will be limited and infrequent.

To keep costs down and limit delays, the panel will discourage and, if practicable, not permit any document production or other discovery-style requests from the parties.

Without its being requested by the parties, the panelists may appoint experts to be paid for by the parties, request live or written witness testimony, or request limited exchange of documents.

Any party may request a hearing; however, it is within the panel's discretion whether to allow such a hearing. The presumption is that the panel will render decisions based on written submissions and without a hearing.

If a request for a hearing is granted, videoconferences are to be used if possible. If not possible, then the DRSP panel will select a place for hearing if the parties cannot agree. The panel will determine whether the hearings are to be public or private. Hearings will last no more than one day, except in the most exceptional circumstances.

Typically, dispute resolution proceedings will be conducted in English, but may be conducted in another language in accordance with the rules of the provider.

3.4.6 Decision

The DRSPs' final decisions will be in writing and will include:

- A summary of the dispute and findings; and
- The reasoning upon which the decision is based.

Each DRSP will develop a single format for all final decisions that its panelists render. The DRSP will notify the parties of the decision via email.

ICANN will strongly encourage DRSPs to use reasonable efforts to issue all final decisions within 45 days of the panel appointment date unless, after both parties have completed their initial submissions, the parties jointly request a short postponement of their adjudication date to accommodate negotiation or mediation or to accommodate other aspects of the proceedings, and the panel agrees.

When the panel is composed of three panelists, the decision will be made by a majority of the panelists.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

A dispute resolution panel decision will be considered an expert determination, and will be considered by ICANN in making a final decision regarding the success of any application.

3.4.7 Dispute Resolution Fees

Before acceptance of objections, each DRSP will publish a schedule of costs for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while morality and public order and community objection proceedings will involve hourly rates charged by the panelists.

Within 7 business days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant.

Each party must make its advance payment within 15 calendar days of receiving the DRSP's request for payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DSRP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its decision, the DRSP will refund any costs paid in advance to the prevailing party.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion.

String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a 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.

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO 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"), a DRSP panel presiding over a legal rights objection will determine whether the potential use of the applied-for TLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's trademark or service mark ("mark"), or unjustifiably impairs the distinctive character or the reputation of the objector's mark, or otherwise creates an impermissible likelihood of confusion between the applied-for TLD and the objector's mark, by considering the following non-exclusive factors:

1. Whether the applied-for TLD is identical or similar, including in appearance, phonetic sound or meaning, to the objector's existing mark.

2. Whether the objector's acquisition and use of rights in the mark has been bona fide.

3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the TLD, as the mark of the objector, of the applicant or of a third party.

4. Applicant's intent in applying for the TLD, including whether the applicant, at the time of application for the TLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.

6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the TLD,

and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the TLD by the applicant is consistent with such acquisition or use.

7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the TLD, and if so, whether any purported or likely use of the TLD by the applicant is consistent therewith and bona fide.

8. Whether the applicant's intended-use of the TLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3 Morality and Public Order Objection

This section is under construction. ICANN expects to implement a standard for morality and public order objections in accordance with international legal principles. Accordingly, ICANN has reviewed legal systems in all ICANN regions. ICANN has also consulted with judges, attorneys, and legal experts in many jurisdictions. The general principles guiding ICANN in the establishment of dispute resolution standards are: (1) everyone has the right to freedom of expression; and (2) such freedom of expression may be subject to certain narrowly interpreted exceptions that are necessary to protect other important rights. See Articles 19 and 20 of the International Covenant on Civil and Political Rights. ICANN continues to address the challenge of identifying standards appropriate for the global namespace.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a defined community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and

- There is a likelihood of detriment to the community named by the objector if the gTLD application is approved.

Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a well-defined community. A panel could balance a number of factors to determine this, including:

- Level of public recognition of the group as a community at a local and / or global level;
- Level of formal boundaries around the community and what elements are considered to form the community;
- How long the community has been in existence;
- How globally distributed is the community (breadth, level of importance)(this may not apply if the community is territorial); and
- How many people make up the community.

If opposition by a number of people is found, but the group claiming opposition is not determined to be a distinct community, the objection will fail.

Substantial opposition – The objector must prove substantial opposition within the community it has identified. A panel could balance a number of factors to determine whether there is substantial opposition, including:

- Number of expressions of opposition relative to the composition of the community;
- Distribution or diversity among sources of expressions of opposition, including:
    - Regional
    - Subsectors of community
    - Leadership of community
    - Membership of community
- Nature/intensity of opposition; and
- Costs incurred by objector in expressing opposition, including what other channels they have used to convey their opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove an association between the applied-for gTLD string and the community expressing opposition. Factors that could be balanced by a panel to determine this include:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

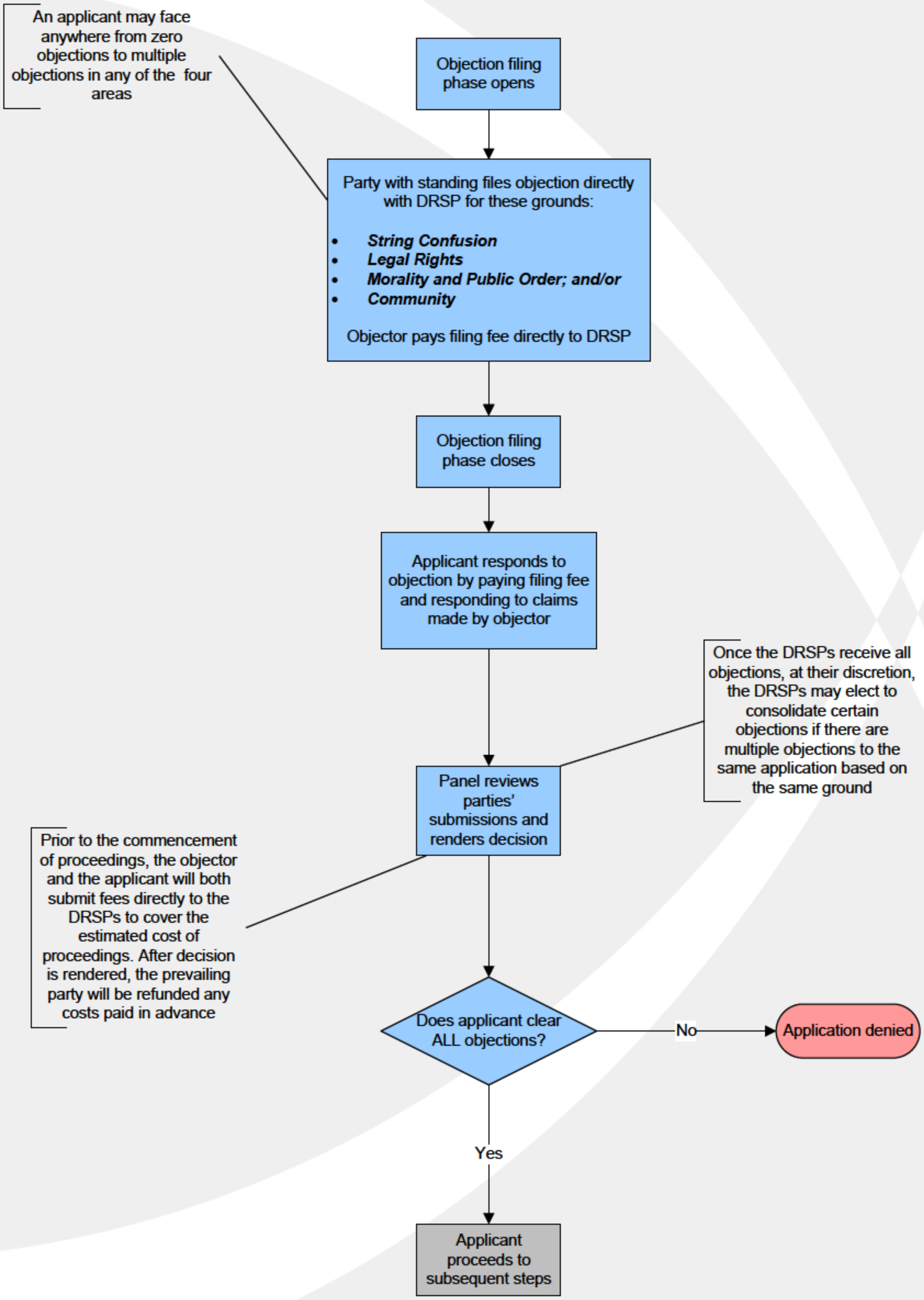
If opposition by a community is determined, but there is no clear connection between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community. Factors that could be used by a panel in making this determination include:

- Damage to the reputation of the community that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; and
- Dependence of the community on the DNS for its core activities.

Defenses – Satisfaction of the standing requirements for filing a Community Objection (refer to paragraph 3.1.2.4) by the applicant is a complete defense to an objection filed on community grounds.

DRAFT - New gTLD Program – Objection and Dispute Resolution



An applicant may face anywhere from zero objections to multiple objections in any of the four areas

Objection filing phase opens

Party with standing files objection directly with DRSP for these grounds:

- ***String Confusion***
- ***Legal Rights***
- ***Morality and Public Order; and/or***
- ***Community***

Objector pays filing fee directly to DRSP

Objection filing phase closes

Applicant responds to objection by paying filing fee and responding to claims made by objector

Once the DRSPs receive all objections, at their discretion, the DRSPs may elect to consolidate certain objections if there are multiple objections to the same application based on the same ground

Panel reviews parties' submissions and renders decision

Prior to the commencement of proceedings, the objector and the applicant will both submit fees directly to the DRSPs to cover the estimated cost of proceedings. After decision is rendered, the prevailing party will be refunded any costs paid in advance

Does applicant clear ALL objections?

No

Application denied

Yes

Applicant proceeds to subsequent steps

Draft Applicant Guidebook

Module 4

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the two methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in string confusion, called contending strings. If either situation 1 or 2 above occurs, such applications will proceed to contention resolution through either comparative evaluation or an efficient mechanism for contention resolution, both of which are described in this module. A group of applications for contending strings is referred to as a contention set.

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. (In this RFP, “similar” means strings so similar that it is probable that detrimental user confusion would result if the two similar gTLDs are delegated into the root zone.) Contention sets are identified during Initial Evaluation from review of all applied-for TLD strings by the panel of String Similarity Examiners. ICANN will publish contention sets by the close of the Initial Evaluation period.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant language reference table.

The String Similarity Examiners will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Confusion Review described in subsection 2.1.1 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or so similar that there is a probability of user confusion if both were to be delegated as TLDs in the root zone. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. Direct and indirect contention are explained in greater detail in the example that follows.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

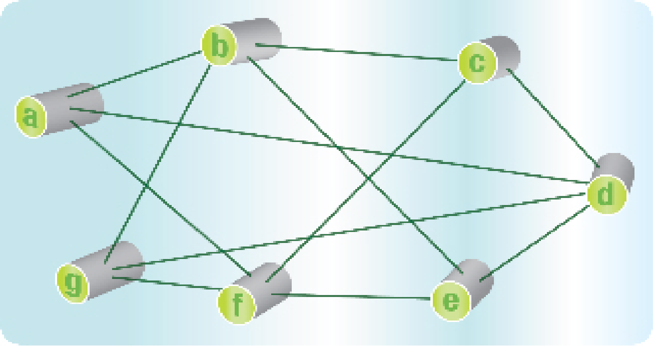


Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process steps have concluded. This is because any application excluded through those steps might modify a contention set identified earlier. A contention set may be split it into two sets or it may be eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

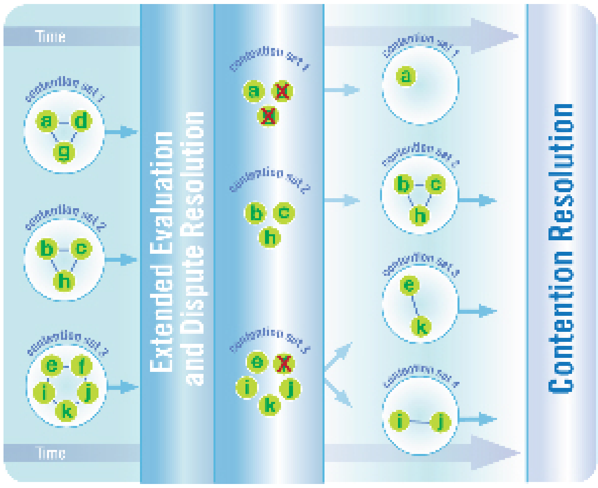


Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through comparative evaluation or an efficient mechanism for contention resolution, depending on the circumstances. In this process, ICANN addresses each contention set to achieve an unambiguous resolution.

In their policy advice, the GNSO called for an efficient process to resolve cases of contention where there was no claim of community representation to be used as a factor for resolving the contention. While not settled, candidate means for this process are discussed below and in more detail in a companion paper to the Draft Applicant Guidebook called "Resolving string contention—a complete lifecycle including string contention resolution."

4.1.2 Impact of Dispute Resolution Proceedings on Contention Sets

If an applicant files a string confusion objection against another applicant (refer to Module 3), and the panel does find that string confusion exists; that is, rules in favor of the objector, the two applicants will be placed in direct contention with each other. Thus, the outcome of a proceeding based on a string confusion objection would result in a new contention set structure for the relevant applications.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention may elect to reach a settlement or agreement among themselves whereby one or more applicants withdraws its application. This may occur at any stage of the process, once ICANN publicly posts the applications received on its website.

Applicants may not resolve a case of string contention by changing their applications by, for instance, selecting a new TLD string or creating a joint venture as a means to resolve the contention case.

4.1.4 Possible Contention Resolution Outcomes

Any application with no contention situation left to resolve is allowed to proceed to the next step. In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

There may be more than one application that passes contention resolution within a contention set. If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, if string A is in contention with B, B is in contention with C, but C is not in contention with A. If A wins the contention, B is eliminated but C can go on since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Comparative Evaluation

Comparative evaluation can begin once all applicants in the contention set have completed all previous stages of the process.

The comparative evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the comparative evaluation. Each applicant participating in the comparative evaluation begins with a score of zero.

4.2.1 Eligibility for Comparative Evaluation

As described in subsection 1.2.2 of Module 1, all applicants are required to identify whether their application type is:

- Open; or
- Community-based.

Only community-based applicants may elect a comparative evaluation. ICANN policy states that if there is contention for strings, a claim to support a community by one party will be a reason to award priority to that application. If one community-based applicant within a contention set makes this election, all other community-based applicants in the same contention set will be part of the comparative evaluation.

Applicants designating their applications as community-based will also be asked to respond to a set of questions in the application form that would provide relevant information if a comparative evaluation occurs.

Before the comparative evaluation begins, all community-based applicants in the contention set may be asked to provide additional information relevant to the comparative evaluation. Additionally, the community-based applicants will be required to pay a Comparative Evaluation Fee (refer to Section 1.5 of Module 1) to participate in the comparative evaluation.

4.2.2 Comparative Evaluation Procedure

Comparative evaluations for each contention set will be performed by a comparative evaluation provider appointed by ICANN to review all applications for contending gTLD strings. The panel's charter is to determine whether one of the community-based applications clearly and demonstrably would add more value to the Internet's Domain Name System. Open applicants within the contention set will not participate in the comparative evaluation.

If no single community-based applicant emerges as one that clearly and demonstrably adds more value to the namespace than all the competing contending applications, then all of the parties in the contention set (both open and community-based applicants) will proceed to an alternate mechanism for efficient contention resolution.

4.2.3 Comparative Evaluation Criteria

A panel appointed by the comparative evaluation provider will review and score the one or more community-based applicants who elected comparative evaluation against the criteria in the following table:

Criteria	Score		
	3	2	1
Nexus between Proposed String and Community	String is name or well-known abbreviation of community institution.	String is relevant to applicant's area of interest but also has other well-known associations.	No connection.
Dedicated Registration Policies	Registration eligibility is strictly limited to members of the pre-established community identified in the application. Registration policies also include name selection and use requirements consistent with the articulated scope and community-based nature of the TLD. Proposed policies include specific enforcement measures including investigation practices, penalties, takedown procedures and appeal mechanisms.	Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups informally associated with the community to register. Policies include some elements of the above but one or more elements are missing.	No dedicated registration policies.
Community Establishment	Clearly identified, organized and pre-established community of considerable size and longevity.	The community addressed fulfills some but not all the requirements for a score of 3.	No community addressed.
Community Endorsement	Endorsement by a recognized institution or by member organizations.	Endorsement by some groups with apparent relevance, but also some opposition by groups with apparent relevance.	Assorted endorsements from individuals or groups of unknown relevance – or – no endorsement by any community.

If no applicant scores 11 or more, there is no clear winner. If only one applicant scores 11 or more, that applicant will be declared the winner.

If more than one applicant scores 11 or more, the evaluators will consider what portion of the community is represented by the application. *If one applicant represents* *a much larger share of the relevant community than another, that will be a basis for awarding priority.*

Following the comparative evaluation, ICANN will review the results and reconfigure the contention set as needed. The same procedure will occur for remaining contention sets involving any community-based application that has elected comparative evaluation. If no community-based applicant that has elected comparative evaluation is left in the contention set, any applications remaining in contention will proceed to a subsequent contention resolution process. Applications not in contention will proceed toward delegation.

4.3 Efficient Mechanism for Contention Resolution

A tie-breaker mechanism will be developed for resolving string contention among the applicants within a contention set, if the contention has not been resolved by other means. Unless the specific conditions for comparative evaluation outlined in Section 4.2 apply, this mechanism will be used to resolve the contention. This mechanism may also be used if no clear winner is identified during the comparative evaluation process.

The GNSO policy recommendations call for an efficient means of resolution. Continued investigation regarding the availability of alternative methods will guide ICANN's development of this mechanism.

The first efficient means of resolution that will be employed is a settlement arrived at by contending parties. Applicants for identical or similar TLDs can arrive at an accommodation where all in direct contention withdraw except for one. As described earlier, those withdrawing cannot apply for a new string. Nor can contending parties combine to form a new applicant. It is expected that many cases of contention will be resolved in this manner as it will be the most efficient and economical for the contending parties.

Failing to arrive at accommodation of the type described just above, auctions are one means of last resort that is being explored to resolve the contention. The purpose of an auction is to resolve contention in a clear, objective manner.

Auction proceeds – The purpose of an auction is to resolve contention in a clear, objective manner. It is not to raise revenue. While there may be significant proceeds from auctions in the event they occur, it is important to understand that this in no way the purpose of the auction. The annual budget process sets ICANN's funding and spending limits. ICANN has no authorization to spend beyond the budget. ICANN already has precedent of returning revenue to the community when last year and in 2006 ICANN reduced registration fees from 25¢ to 20¢ over two years as a result of an unforeseen growth in revenue. Proceeds from auctions will be reserved until the uses of the proceeds are determined through a community consultation. The proceeds will not go into ICANN's general expense budget but will be separately earmarked for projects or uses identified by the community. This important aspect of the auction process and its result will be an important part of the communications plan for the new gTLD program.

The new gTLD application fee is designed to be cost/revenue neutral. It factors in costs already forgone, future processing costs and legal expenses that are significant and would be a large drain on the Corporation's established budget.

See further details on the exploration of an auction model in the contention lifecycle at http://www.icann.org/en/topics/string-contention-22oct08.pdf.

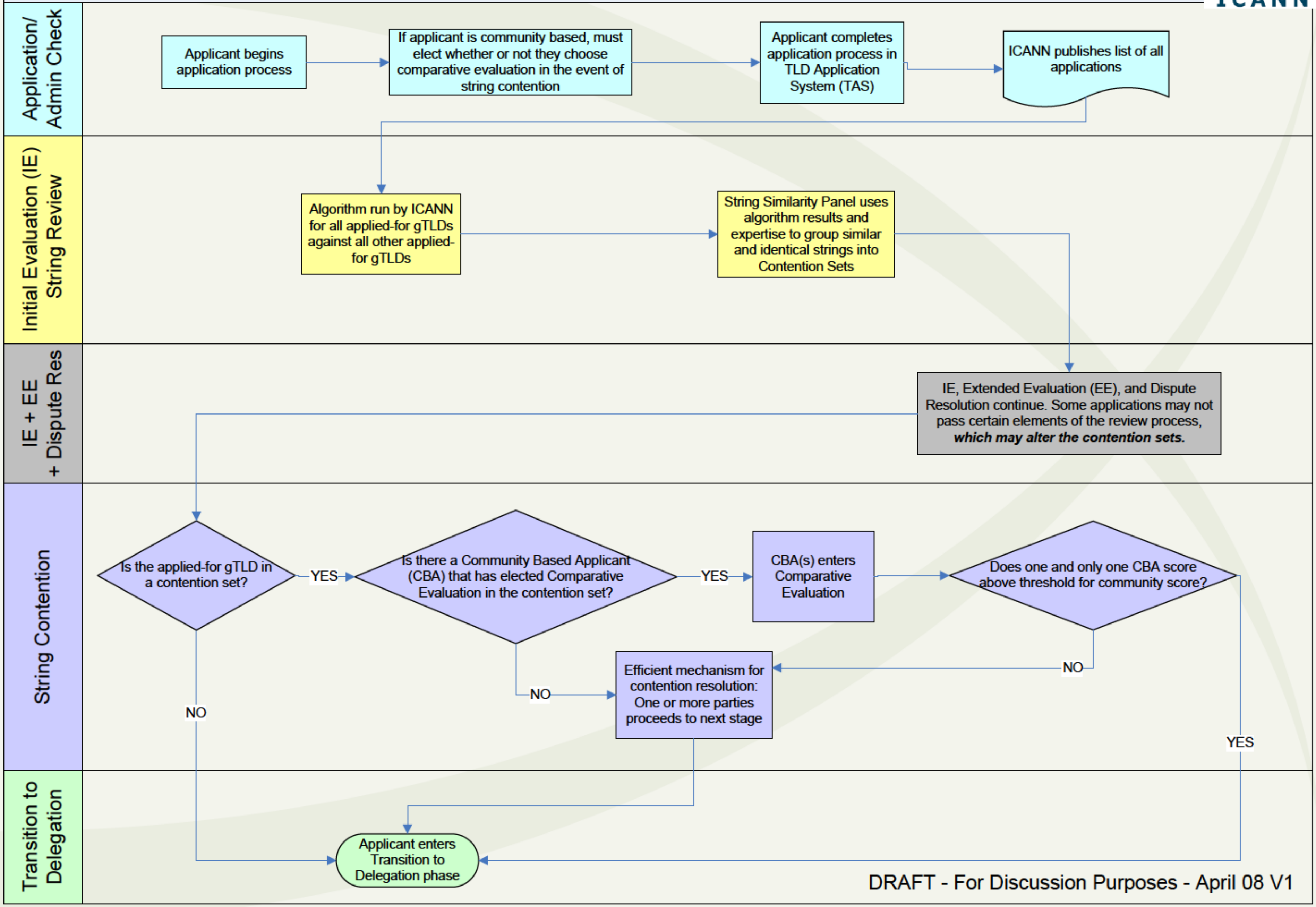
In practice, ICANN expects that most contention cases will be resolved through other means before reaching this stage.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared winner of a contention resolution process will proceed by entering into the contract execution phase. (Refer to section 5.1 of Module 5.)

If the winner of the contention resolution has not executed a contract within 90 days of the decision, ICANN has the right to extend an offer to the runner-up applicant to proceed with its application. For example, in a comparative evaluation, the applicant with the second-highest score (if equal to or greater than eleven, might be selected to go on to the next step, delegation. (Refer to Module 5.) Similarly, in an efficient mechanism for contention resolution, another applicant who would be considered the runner-up applicant might proceed to the delegation step. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time.

DRAFT - New gTLD Program - String Contention



Application/ Admin Check

Applicant begins application process

If applicant is community based, must elect whether or not they choose comparative evaluation in the event of string contention

Applicant completes application process in TLD Application System (TAS)

ICANN publishes list of all applications

Initial Evaluation (IE) String Review

Algorithm run by ICANN for all applied-for gTLDs against all other applied-for gTLDs

String Similarity Panel uses algorithm results and expertise to group similar and identical strings into Contention Sets

IE + EE + Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, ***which may alter the contention sets.***

String Contention

Is the applied-for gTLD in a contention set?

YES

Is there a Community Based Applicant (CBA) that has elected Comparative Evaluation in the contention set?

YES

CBA(s) enters Comparative Evaluation

Does one and only one CBA score above threshold for community score?

NO

NO

Efficient mechanism for contention resolution: One or more parties proceeds to next stage

NO

YES

Transition to Delegation

Applicant enters Transition to Delegation phase

DRAFT - For Discussion Purposes - April 08 V1

ICANN

Draft Applicant Guidebook

Module 5

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 5

Transition to Delegation

This module describes the final steps required of an applicant, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD string into the root zone.

5.1 Registry Agreement

All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN in order to proceed to delegation.

It is important to note that the agreement referred to below does not constitute a formal position by ICANN and has not been approved by the ICANN Board of Directors. The agreement is set out here for review and community discussion purposes and as a means to improve the effectiveness of the agreement in providing for increased competition and choice for consumers in a stable, secure DNS.

The contract terms can be reviewed at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf. All successful applicants are expected to enter into the agreement substantially as written. The terms of the contract and, in particular, differences with existing registry agreements are explained in a companion paper to the agreement, *Summary of Changes to Base Agreement for New gTLDs,* http://www.icann.org/en/topics/new-gtld-draft-summary-changes-24oct08-en.pdf.

After an applicant has successfully completed the application process, ICANN may conduct a pre-contract review. To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit updated documentation and information before entering into the registry agreement.

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN and submit updated information. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

5.2 Pre-Delegation Testing

Following completion of the Board review, each applicant will be required to complete pre-delegation steps as a prerequisite to entering the IANA process for delegation into the root zone. The pre-delegation check must be completed within the time period specified in the registry agreement.

5.2.1 Technical Testing

The purpose of the pre-delegation technical test is to verify the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described, along with the applicant questions. (Refer to Module 2.) The checks are also intended to ensure that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the questions and criteria that follow.

Question		Criteria
1	**IDN (variant) tables**	
	If applicant will be supporting IDNs, was the IDN table attached to the application when originally submitted and does it fulfill IDN and IANA guidelines and requirements?	IDN tables must be developed and provided by the IDN string applicant at the time the application was submitted. The table must fulfill the requirements from the IDN Guidelines as well as the IANA repository requirements in order to be considered valid (see http://iana.org/procedures/idn-repository.html).
2	**DNSSEC keys, materials**	
	If DNSSEC is offered as part of registry services at time of application, can applicant comply with requirements?	Trust anchor for the registry will be published in the IANA Interim Trust Anchor Repository. Validity will be determined by verifying that DNS resolvers that support DNSSEC can successfully retrieve and DNSSEC validate information from that zone when configured with the published trust anchor for the zone.
3	**Architecture load requirements**	
	Has the applicant implemented a network architecture necessary to support load characteristics, as outlined in its application?	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to a network/system diagram of the as-built network system (demonstrating correspondence to documentation in initial application), results of load testing performed by the applicant, and actual performance of the configuration in use for other registries. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.

Question		**Criteria**
4	**IPv6 for registrants**	
	Does registry support provisioning of IPv6 services for its registrants?	Registry must support provisioning of IPv6 services on behalf of its registrants. This means that registrar systems will allow entry of IPv6 addresses in all relevant address fields, that the SRS system is set up to support the communication of IPv6 addresses, and that registry name servers can be provisioned with IPv6 addresses. Applicant will demonstrate successful provisioning of a test account with IPv6 name server entries.
5	**IPv6 reachability**	***Note:*** *This requirement is under consideration and the community is urged to provide feedback on this requirement.*
	Does registry support access to DNS servers over an IPv6 network?	IANA currently has a minimum set of technical requirements for IPv4 name service. These include two nameservers separated by geography and by network topology, which each serve a consistent set of data, and are reachable from multiple locations across the globe. The registry will meet this same criterion for IPv6, requiring IPv6 transport to their network. Applicant will identify IPv6-reachable name servers that meet these requirements, and reachability will be verified by ICANN.
6	**Escrow deposit sample**	
	Has the applicant demonstrated the ability to conform to registry escrow requirements? See http://www.icann.org/en/topics/new-gtld-draft-escrow-spec-24oct-08-en.pdf.	The applicant will provide a conforming sample of a dummy data deposit showing correct type and formatting of content. The applicant will also provide evidence of an agreement with an escrow provider complying with Part B of the Data Escrow Requirements.
7	**System monitoring**	
	Has the applicant implemented the system monitoring described by the applicant in the initial application?	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to: diagrams of monitoring systems (demonstrating correspondence to documentation provided in the application), output of periodic monitoring runs performed by the applicant demonstrating capability claimed in the application, and actual performance of this monitoring set up in use for other registries. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.
8	**Registry continuity planning**	
	Has applicant demonstrated capability to comply with ICANN's Registry Continuity Plan? See http://www.icann.org/registries/failover/icann-registry-failover-plan-15jul08.pdf	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples include identification of appropriate contact points and evidence of the registry's own continuity plan, and identification of a registry services continuity provider.
9	**System performance requirements**	
	Has applicant demonstrated capability to comply with the performance specifications? See http://www.icann.org/en/topics/new-gtld-draft-performance-spec-24oct08-en.pdf	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to performance and availability results that demonstrate DNS availability at stated levels for at least one month, and Whois service availability for at least one month. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.

5.2.2 Additional Requirements

At the pre-delegation stage, an applicant must also provide documentary evidence of its ability to fund ongoing basic registry operations for then-existing registrants for a period of three to five years in the event of registry failure, default or until a successor operator can be designated. This obligation can be met by securing a financial instrument such as a bond or letter of credit (i.e., evidence of ability to provide financial security guaranteed by a creditworthy financial institution); contracting with and funding a services provider to extend services; segregating funding; or other means.

Once an applicant has met the requirements in 5.2.1 and 5.2.2 above, it is eligible to proceed to delegation of its applied-for gTLD string by IANA.

If an applicant does not complete the pre-delegation steps within the time period specified in the registry agreement, ICANN reserves the right to terminate the registry agreement.

5.3 IANA Delegation Process

Upon notice of successful completion of the ICANN pre-delegation testing, applicants may initiate the process for delegation of the new gTLD into the root zone database. Information about the delegation process is available at http://iana.org/domains/root/.

5.4 Ongoing Operations

ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

The registry agreement contains a provision for ICANN to perform audits to ensure that the registry operators remain in compliance with agreement obligations.

Draft Applicant Guidebook

Module 6

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) will reflect negatively on this application and may cause ICANN and the evaluators to reject the application.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to reject any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to proceed with review and consideration of an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering for a gTLD under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled.

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's reliance on information provided by applicant in the application.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND

ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER START-UP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other materials prepared in connection with the evaluation of the application; provided, however, that information will not be published to the extent that the application specifically identifies such information as confidential. A general statement as the confidentiality of the application will not be sufficient for these purposes. Except for information that ICANN determines to treat as confidential, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion.

9. Applicant gives ICANN permission to use applicant's name and/or logo in ICANN's public announcements (including informational web pages) relating to top-level domain space expansion.

10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in

connection with the application materials. Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11. Applicant authorizes ICANN to:
    a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
    b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession.
12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

Glossary

Terms Applicable to this RFP and to the New gTLD Application Process

A-Label	The ASCII-Compatible Encoding (ACE) form of an IDNA-valid string.
Applicant	An entity that has applied to ICANN for a new gTLD by submitting its application form through the online application system.
Application	An application for a new gTLD lodged in response to this RFP. An application includes the completed Application Form any supporting documents, and any other information that may be submitted by the applicant at ICANN's request.
Application form	The set of questions to which applicants provide responses, as at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf.
Application interface	The web-based interface operated by ICANN, available at [URL to be inserted in final version of RFP]
Application round	The complete succession of stages for processing the applications received during one application submission period for gTLDs. This RFP is for one application round. Any subsequent application rounds will be the subject of subsequent RFPs.
Application submission period	The period during which applicants may submit applications through the application interface.
Applied for gTLD string	A gTLD string that is subject of an application.
American Standard Code for Information Interchange (ASCII)	A character encoding based on the English alphabet. ASCII codes represent text in computers, communications equipment, and other devices that work with text. Most modern character encodings—which support many more characters than did the original—have a historical basis in ASCII.
AXFR	Asynchronous full transfer, a DNS protocol mechanism through which a DNS zone can be replicated to a remote DNS server.
Business ID	A number such as a federal tax ID number or employer information number.

ccTLD	Two-letter top-level domains corresponding with the ISO 3166-1 country code list. See http://iana.org/domains/root/db/.
Community-based TLD	A community-based gTLD is a gTLD that is operated for the benefit of a defined community consisting of a restricted population. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application
Community objection	An objection based on the grounds that there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.
Comparative evaluation	A process to resolve string contention, which may be elected by a community-based applicant.
Consensus policy	A policy created through the GNSO policy development process listed in Annex A of the ICANN Bylaws. See http://www.icann.org/en/general/bylaws.htm#AnnexA. A list of current consensus policies is available at http://www.icann.org/en/general/consensus-policies.htm.
Contention sets	A group of applications containing identical or similar applied-for gTLD strings.
Country-code TLD	See ccTLD.
Delegation	The process through which the root zone is edited to include a new TLD, and the management of domain name registrations under such TLD is turned over to the registry operator.
Digit	Any digit between “0” and “9” (Unicode code points U+0030 to U+0039).
Dispute Resolution Service Provider (DRSP)	An entity engaged by ICANN to adjudicate dispute resolution proceedings in response to formally filed objections.
Domain name	A name consisting of two or more (for example, john.smith.name) levels, maintained in a registry database.
Domain Name System Security Extensions (DNSSEC)	DNSSEC secures domain name look-ups on the Internet by incorporating a chain of digital signatures into the DNS hierarchy.
Existing TLD	A string included on the list at http://iana.org/domains/root/db

Extended Evaluation	The second stage of evaluation applicable for applications that do not pass the Initial Evaluation, but are eligible for further review.
Extended Evaluation period	The period that may follow the Initial Evaluation period, for eligible applications which do not pass the Initial Evaluation.
Evaluator	The individuals or organization(s) appointed by ICANN to perform review tasks within Initial Evaluation and Extended Evaluation under ICANN direction
Evaluation fee	The fee due from each applicant to obtain consideration of its application.
Geographical Names Panel (GNP)	A panel of experts charged by ICANN with reviewing applied-for TLD strings that relate to geographical names.
Generic Names Supporting Organization (GNSO)	ICANN's policy-development body for generic TLDs and the lead in developing the policy recommendations for the introduction of new gTLDs.
Generic top-level domain	See gTLD
gTLD	A TLD with three or more characters that does not correspond to any country code.
Hyphen	The hyphen "-" (Unicode code point U+0029).
Internet Assigned Numbers Authority (IANA)	IANA is the authority originally responsible for overseeing IP address allocation, coordinating the assignment of protocol parameters provided for in Internet technical standards, and managing the DNS, including delegating top-level domains and overseeing the root name server system. Under ICANN, IANA distributes addresses to the Regional Internet Registries, coordinate with the IETF and other technical bodies to assign protocol parameters, and oversees DNS operation.
ICANN	Internet Corporation for Assigned Names and Numbers
ICANN-accredited registrar	A company that registers domain names for Internet users. There are more than 900 ICANN-accredited registrars who provide domains to Internet users. The list of ICANN-accredited registrars is available at http://www.icann.org/en/registrars/accredited-list.html
Internationalized Domain Name (IDN)	A domain name including at least one character other than those in letters (a,…,z), digits (0,…,9) and the hyphen (-).
Internationalizing Domain Names in Applications (IDNA)	The technical protocol used for processing domain names containing non-ASCII characters in the DNS.

IDN ccTLD Fast Track	The process for introducing a limited number of IDN ccTLDs associated with the ISO-3166 two-letter codes. See http://www.icann.org/en/topics/idn/fast-track/.
IDN table	A table listing all those characters that a particular TLD registry supports. If one or more of these characters are considered a variant this is indicated next to that/those characters. It is also indicated which character a particular character is a variant to. The IDN tables usually hold characters representing a specific language, or they can be characters from a specific script. Therefore the IDN table is sometimes referred to as “language variant table”, “language table”, “script table” or something similar.
IGO	Inter-governmental organization.
Internet Engineering Task Force (IETF)	The IETF is a large, open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet.
Initial Evaluation period	The period during which ICANN will review an applied-for gTLD string, an applicant’s technical and financial capabilities, and an applicant’s proposed registry services.
International Phonetic Alphabet	A notational standard for phonetic representation in multiple languages. See http://www.arts.gla.ac.uk/IPA/IPA_chart_(C)2005.pdf.
IXFR	Incremental Zone Transfer, a DNS protocol mechanism through which a partial copy of a DNS zone can be replicated to a remote DNS server.
LDH (Letter Digit Hyphen)	The hostname convention defined in RFC 952, as modified by RFC 1123.
Legal Rights objection	An objection on the grounds that the applied-for gTLD string infringes existing legal rights of the objector.
Letter	Any character between “a” and “z” (in either case) (Unicode code points U+0061 to U+007A or U+0041 to U+005A).
LLC	Limited liability corporation.
Morality and public order objection	An objection made on the grounds that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.
Objection	A formal objection filed with a Dispute Resolution Service Provider in accordance with that provider’s procedures.
Objection filing period	The period during which formal objections may be filed

	concerning a gTLD application submitted to ICANN
Objector	One or more persons or entities that have filed a formal objection against a new gTLD application with the appropriate DRSP.
Open TLD	An open TLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. An open TLD may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions.
Pre-delegation test	A technical test and other steps required of applicants before delegation of the applied-for gTLD string into the root zone.
Primary contact	The person named by the applicant as the main contact for the application, and having authority to execute decisions concerning the application.
Principal place of business	The location of the head office of a business or organization.
Registrar	See ICANN-accredited registrar.
Registry	A registry is the authoritative, master database of all domain names registered in each top-level domain. The registry operator keeps the master database and also generates the zone file that allows computers to route Internet traffic to and from top-level domains anywhere in the world.
Registry Agreement	The agreement executed between ICANN and successful gTLD applicants, which appears in draft form at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf.
Registry operator	The entity entering into the Registry Agreement with ICANN, responsible for setting up and maintaining the operation of the registry.
Registry services	(1) Operations of the registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement; and (2) other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and (3) any other products or services that only a registry operator is capable of providing, by reason of its

	designation as the registry operator.
Registry Services Technical Evaluation Panel (RSTEP)	The Registry Services Technical Evaluation Panel is a group of experts in the design, management, and implementation of the complex systems and standards-protocols used in the Internet infrastructure and DNS. RSTEP members are selected by its chair. All RSTEP members and the chair have executed an agreement requiring that they consider the issues before the panel neutrally and according to the definitions of security and stability.
Reserved Name	A string included on the Top-Level Reserved Names List (Refer to paragraph 2.1.1.2 of Module 2.)
Request for Comments (RFC)	The RFC document series is the official publication channel for Internet standards documents and other publications of the IESG, IAB, and Internet community.
Rightsholder	The person or entity that maintains a set of rights to a certain piece of property.
Root Zone	The root zone database represents the delegation details of top-level domains, including gTLDs and country-code TLDs. As manager of the DNS root zone, IANA is responsible for coordinating these delegations in accordance with its policies and procedures.
Round	See application round.
Script	A collection of symbols used for writing a language. There are three basic kinds of script. One is the alphabetic (e.g. Arabic, Cyrillic, Latin), with individual elements termed “letters”. A second is ideographic (e.g. Chinese), the elements of which are “ideographs”. The third is termed a syllabary (e.g. Hangul), with its individual elements represent syllables. The writing systems of most languages use only one script but there are exceptions such as for example, Japanese, which uses four different scripts, representing all three of the categories listed here. It is important to note that scripts which do not appear in the Unicode Code Chart are completely unavailable for inclusion in IDNs.
Security	In relation to a proposed registry service, an effect on security by the proposed Registry Service means (1) unauthorized disclosure, alteration, insertion, or destruction of registry data, or (2) unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.
Shared Registry System (SRS)	A system that allows multiple registrars to make changes

	to a registry simultaneously.
Stability	In relation to a proposed registry service, an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF; or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.
String	The string of characters comprising an applied-for gTLD.
String confusion objection	An objection filed on the grounds that the applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD.
String Similarity Algorithm	An algorithmic tool used to identify applied-for gTLD strings that may result in string confusion.
String Similarity Examiners	A panel charged with identifying applied-for gTLD strings that may result in string confusion.
String contention	The scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are so similar that detrimental user confusion would be the probable result if more than one were to be delegated to the root zone.
TLD Application System (TAS)	The online interface for submission of applications to ICANN.
Top-level domain (TLD)	TLDs are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (right-most) dot, such as "net" in www.example.net. The TLD administrator controls what second-level names are recognized in that TLD. The administrators of the root domain or root zone control what TLDs are recognized by the DNS.
U-Label	A "U-label" is an IDNA-valid string of Unicode characters, including at least one non-ASCII character, expressed in a standard Unicode Encoding Form, normally UTF-8 in an Internet transmission context.
Uniform Domain Name Dispute Resolution Policy	A policy for resolving disputes arising from alleged abusive registrations of domain names (for example, cybersquatting), allowing expedited administrative

(UDRP)	proceedings that a trademark rights holder initiates by filing a complaint with an approved dispute resolution service provider.
User registration fee	The fee paid by prospective applicants for new TLDs to obtain access to the TLD Application System (TAS).
Whois	Records containing registration information about registered domain names.

Forrest-017

Forrest-017

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Governmental Advisory Committee

GAC Early Warnings

☐ If you are an applicant who has received an Early Warning, you can contact gacearlywarning@icann.org to request further information.

Early Warnings received from GAC Member(s) after the EW Deadline

Additional Correspondence Related to Early Warnings

Application	ID Number	Applicant	Filing GAC Member	Early Warning
roma	1-927-80477	Top Level Domain Holdings Limited	Italy	Roma-IT-80477.pdf
africa	1-1165-42560	DotConnectAfrica Trust	African Union Commission	Africa-AUC-42560.pdf
swiss	1-1831-36248	Swiss International Air Lines Ltd.	Switzerland	Swiss-CH-36248.pdf
date	1-1247-30301	dot Date Limited	Japan	Date-JP-30301.pdf
persiangulf	1-2128-55439	Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.	Bahrain, Oman, UAE, Qatar	Persiangulf-AE-55439.pdf
patagonia	1-1084-78254	Patagonia, Inc.	Argentina	Patagonia-AR-78254.pdf **Updated:** GAC EW Submission PATAGONIA 2.pdf
gcc	1-1936-21010	GCCIX WLL	Bahrain, Oman, UAE, Qatar	GCC-AE-21010.pdf
capital	1-1375-20218	Delta Mill, LLC	Australia	Capital-AU-20218.pdf

city	1-1066-67099	DotCity Inc.	Australia	City-AU-67099.pdf
city	1-1389-12139	Snow Sky, LLC	Australia	City-AU-12139.pdf
town	1-1655-79604	Koko Moon, LLC	Australia	Town-AU-79604.pdf
fail	1-1448-73190	Atomic Pipe, LLC	Australia	Fail-AU-73190.pdf
gripe	1-1486-63504	Corn Sunset, LLC	Australia	Gripe-AU-63504.pdf
sucks	1-1596-35125	Dog Bloom, LLC	Australia	Sucks-AU-35125.pdf
sucks	1-1279-43617	Top Level Spectrum, Inc.	Australia	Sucks-AU-43617.pdf
sucks	1-2080-92776	Vox Populi Registry Inc.	Australia	Sucks-AU-92776.pdf
wtf	1-1508-57100	Hidden Way, LLC	Australia	WTF-AU-57100.pdf
africa	1-1165-42560	DotConnectAfrica Trust	Comoros	Africa-KM-42560.pdf
accountant	1-1240-93305	dot Accountant Limited	Australia	Accountant-AU-93305.pdf
accountants	1-1340-40734	Knob Town, LLC	Australia	Accountants-AU-40734.pdf
architect	1-1342-7920	Spring Frostbite, LLC	Australia	Architect-AU-7920.pdf
attorney	1-1348-99321	Victor North, LLC	Australia	Attorney-AU-99321.pdf
casino	1-1382-33633	Binky Sky, LLC	Australia	Casino-AU-33633.pdf

casino	1-1203-44541	dot Casino Limited	Australia	Casino-AU-44541.pdf
casino	1-907-62211	dotBeauty LLC	Australia	Casino-AU-62211.pdf
casino	1-868-87246	Afilias Limited	Australia	Casino-AU-87246.pdf
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delta	1-1259-75287	Delta Airlines	Nigeria	Delta-NG-75287.pdf
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bible	1-994-57975	American Bible Society	India	Bible-IN-57975.pdf
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Restat 3d of the Foreign Relations Law of the U.S., § 201

Restatement 3d, Foreign Relations - Rule Sections > Part 2- Persons in International Law > Chapter 1- States

§ 201 State Defined

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

COMMENTS & ILLUSTRATIONS

Comment:

a. Definition of state. While the definition in this section is generally accepted, each of its elements may present significant problems in unusual situations. In the absence of judicial or other means for authoritative and consistent determination, issues of statehood have been resolved by the practice of states reflecting political expediency as much as logical consistency. The definition in this section is well-established in international law; it is nearly identical to that in Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, *49 Stat. 3097,* T.S. No. 881, 165 L.N.T.S. 19.

b. Defined territory. An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state. An entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily. See § 202, Reporters' Note 5.

c. Permanent population. To be a state an entity must have a population that is significant and permanent. Antarctica, for example, would not now qualify as a state even if it satisfied the other requirements of this section. An entity that has a significant number of permanent inhabitants in its territory satisfies the requirement even if large numbers of nomads move in and out of the territory.

d. Government. A state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations.

e. Capacity to conduct international relations. An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so. An entity that has the capacity to conduct foreign relations does not cease to be a state because it voluntarily turns over to another state control of its foreign relations, as in the "protectorates" of the period of colonialism, the case of Liechtenstein, or the "associated states" of today. See Reporters' Note 4. States do not cease to be states because they have agreed not to engage in certain international activities or have delegated authority to do so to a "supranational" entity, *e.g.*, the European Communities. Clearly, a state does not cease to be a state if it joins a common market. See § 809.

f. Claiming statehood. While the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state. For example, Taiwan might satisfy the elements of the definition in this section, but its authorities have not claimed it to be a state, but rather part of the state of China. See Reporters' Note 8, and § 203, Comment *f*.

g. States of the United States. A State of the United States is not a state under international law since under the Constituton of the United States foreign relations are the exclusive responsibility of the Federal Government. A State may not make treaties (Article I, section 10) or otherwise engage in or intrude upon foreign relations to any substantial extent. See § 1, Reporters' Note 5.

h. Determination of statehood. Whether an entity satisfies the requirements for statehood is ordinarily determined by other states when they decide whether to treat that entity as a state. Ordinarily, a new state is formally recognized by other states, see § 202, but a decision to treat an entity as a state may be manifested in other ways. Since membership in the principal international organizations is constitutionally open only to states, admission to membership in an international organization such as the United Nations is an acknowledgment by the organization, and by those members who vote for admission, that the entity has satisfied the requirements of statehood. See § 222.

REPORTER'S NOTES

1. *Defined territory*. The requirement of a defined territory does not deny statehood to entities that at their creation were involved in substantial controversies about their boundaries -- *e.g.*, Israel in 1948; Kuwait in 1963; Estonia, Latvia, and Albania, in 1919. See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), [1969] I.C.J. Rep. 3, 32; see generally Crawford, The Creation of States in International Law 36-49 (1979).

2. *Government*. Some entities have been assumed to be states when they could satisfy only a very loose standard for having an effective government, *e.g.*, the Congo (Zaire) in 1960. Crawford, Reporters' Note 1, at 42-47. A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time.

3. *Military occupation*. Military occupation, whether during war or after an armistice, does not terminate statehood, *e.g.*, Germany's occupation of European states during World War II, or the allies' occupation of Germany and Japan after that war. An entity's statehood would be terminated if all of its territory were lawfully annexed, but not where annexation is in violation of the United Nations Charter. See § 202, Comment *e* and Reporters' Note 6. Compare the policy of the United States in the case of Estonia, Latvia, and Lithuania, occupied and annexed before the United Nations Charter was adopted. See § 202 and Reporters' Note 6 thereto.

4. *Assignment of control over foreign relations*. In the past, one state sometimes turned over to another some or all control of its foreign relations, retaining the right to reassert such control. Some such arrangements persist, largely for reasons of convenience and economy, *e.g.*, Liechtenstein. Liechtenstein was admitted as a party to the Statute of the International Court of Justice for which only states are eligible, and its capacity to participate in the Nottebohm Case (Liechtenstein v. Guatemala), [1955] I.C.J. Rep. 4, was not contested.

Relationships characterized as "protectorate," "suzerainty," etc., were characteristic of the French and British empires. See, *e.g.*, Nationality Decrees Issued in Tunis and Morocco, P.C.I.J. ser. B, No. 4 (1923); Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), [1952] I.C.J. Rep. 176, 188. Most such arrangements were terminated during the period of decolonization after World War II. See § 311, Reporters' Note 1.

Since World War II there have been United Nations trusteeships and "associated territories" that have not had full control over their foreign relations. See Clark, "Self-determination and Free Association -- Should the United States Terminate the Pacific Island Trust?," 21 Harv.J.Int'l L. 1 (1980).

5. *Independence*. Some writers add independence to the criteria required for statehood. Compare the Austro-German Customs Union case, P.C.I.J. ser. A/B, No. 41 (1931), in which the court advised that a proposed customs union violated Austria's obligation under the Treaty of St. Germain to retain its independence.

6. *The European Community*. "The European Community," or "The European Communities," are sometimes used to refer collectively to the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EURATOM). The creation of the European Community did not terminate the statehood of its constituent members, although the Community assumed international responsibility for a number of matters previously in the control of the individual states. The Community is not a

state, but it has become party to some international agreements in its own right, *e.g.*, the EEC is a party to the Wheat Trade Convention of 1971, 22 U.S.T. 820, T.I.A.S. No. 7144; see also 9 Official Records of Third U.N. Conf. on Law of the Sea 29-30, 187 (1978); Division of Powers between the European Communities and their Member States in the Field of External Relations (Timmermans and Voelker eds. 1981); Stein, "Towards a European Foreign Policy: The European Foreign Affairs System from the Perspective of the United States Constitution" in 1(3) Integration Through Law 3 (Cappelletti, Seccombe and Weiler eds. 1986).

7. *The Vatican and the Holy See*. The Vatican (an entity whose territory is surrounded by Italy) is generally accepted as a state, and the Holy See (the central administration of the Catholic Church) as its government. Nearly 90 states maintain diplomatic relations with the Vatican, and the Vatican (or the Holy See) is a party to many international agreements on subjects ranging from arbitration to nuclear nonproliferation. The Vatican is a member of several international organizations open only to states. On the other hand, it has the smallest population (less than 1000) of any entity claiming to be a state, and Italy performs for it many of the functions normally assumed by states. See Crawford, Reporters' Note 1, 152-60.

8. *Taiwan*. After the Second World War Japan renounced claims to Taiwan (Formosa). Both the regime governing Taiwan and the regime governing the mainland of China have claimed Taiwan as part of China, and other states have either confirmed or acquiesced in that claim. The Nationalist authorities on Taiwan continued to claim Taiwan was part of China (and that they were the government of China), even after the regime in Peking was generally recognized as the government of China. See § 203, Comment *f* and Reporters' Note 3. As of 1986, since the authorities on Taiwan do not claim that Taiwan is a state of which they are the government, the issue of its statehood has not arisen. See Comment *f*. If Taiwan should claim statehood, it would in effect be purporting to secede from China.

9. *States of the United States*. Under the United States Constitution, a State of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, Section 10, clause 2), but such agreements are limited in scope and subject matter. In international terms, a State makes such agreements by permission of the United States. § 302, Comment *f*. A State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority or the foreign relations of the United States. Compare *Virginia v. Tennessee, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893).* A State cannot exchange ambassadors and engage generally in relations with a foreign government, but States send commercial representatives to other countries. See, *e.g.*, Dempsey, "Legal and Economic Incentives for Foreign Direct Investment in the Southeastern United States," 9 Vand.J.Trans.L. 247, 250 (1976). For limitations on the powers of the States to make international agreements under the Articles of Confederation, see *Oneida Indian Nation v. State of New York, 691 F.2d 1070 (2d Cir.1982).*

Foreign compacts or agreements made by States with the consent of Congress might be international agreements under Part III of this Restatement. See § 301, Comment *g*; DiMarzo, "The Legal Status of Agreements Concluded by Component Units of Federal States with Foreign Entities," 16 Can.Y.B.Int'l L. 197 (1978). For a review of the foreign relations power in other federal states, see Sohn and Shafer, "Foreign Affairs" in Bowie and Friedrich, eds., Studies in Federalism 236 (1954).

10. *United States territories*. The United States conducts foreign relations for various territories linked to it by special arrangements which allow these entities substantially more authority in international matters than States have under the Constitution. See, for example, § 904 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, 1976, *90 Stat. 263,* *48 U.S.C. after § 1681,* contemplating participation by the Marianas in international organizations. Puerto Rico has been permitted by Act of Congress *(88 Stat. 818,* § 52) to become a member of regional institutions such as the Caribbean Development Bank. [1974] Digest of U.S. Practice in Int'l L. 31-33.

11. *Previous Restatement*. The definition in this section follows that in § 4 of the previous Restatement, except that the present definition includes an entity that has the capacity to engage in foreign relations but refrains from doing so. The previous Restatement did not indicate that population must be "permanent." See also the minimum

requirements for recognition of a new state in previous Restatement § 100, which paralleled § 4 but added the requirement that there be reasonable indication that the requirements would continue to be met. Compare this Restatement, § 202, Comment *d*.

Cross Reference

Digest System Key Numbers:

International Law 3

Forrest-019

Forrest-019

Convention on Rights and Duties of States
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Article 4

To secure the immediate organization of the commissions mentioned in the first article hereof, the high contracting parties engage themselves to notify the Pan American Union at the time of the deposit of the ratification of the present Additional Protocol in the Ministry of Foreign Relations of the Republic of Chile, the names of the two members whose designation they are empowered to make by Article 4 of the Convention at Santiago, Chile, and said members, so named, shall constitute the members of the commissions which are to be organized with bilateral character in accordance with this protocol.

Article 5

It shall be left to the Governing Board of the Pan American Union to initiate measures for bringing about the nomination of the fifth member of each Commission of Investigation and Conciliation in accordance with the stipulation established in Article 4 of the Convention at Santiago, Chile.

Article 6

In view of the character which this protocol has as an addition to the Convention of Conciliation of Washington, of January 5, 1929, the provision of Article 16 of said convention shall be applied thereto.

In witness whereof, the plenipotentiaries hereinafter indicated, have set their hands and their seals to this Additional Protocol in English, Spanish, Portuguese and French, in the City of Montevideo, Republic of Uruguay, this twenty-sixth day of the month of December in the year nineteen hundred and thirty-three.

[Signatures omitted from this provisional edition.]

CONVENTION ON RIGHTS AND DUTIES OF STATES

The governments represented in the Seventh International Conference of American States:

Wishing to conclude a Convention on Rights and Duties of States, have appointed the following plenipotentiaries:

[For names of the plenipotentiaries, see Final Act, pp. 52, *supra.*]

Who, after having exhibited their full powers, which were found to be in good and due order, have agreed upon the following:

Article 1

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Article 2

The federal state shall constitute a sole person in the eyes of international law.

Article 3

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

Article 4

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Article 5

The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

Article 6

The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

Article 7

The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.

Article 8

No state has the right to intervene in the internal or external affairs of another.

Article 9

The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

Article 10

The primary interest of states is the conservation of peace. Differences of any claims which arise between them should be settled by recognized pacific methods.

Article 11

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consist in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Article 12

The present convention shall not affect obligations previously entered into by the high contracting parties by virtue of international agreements.

Article 13

The present convention shall be ratified by the high contracting parties in conformity with their respective constitutional procedures. The Minister of Foreign Affairs of the Republic of Uruguay shall transmit authentic certified copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, which shall notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications.

Article 14

The present convention will enter into force between the high contracting parties in the order in which they deposit their respective ratifications.

Article 15

The present convention shall remain in force indefinitely but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the convention shall cease in its effects as regards the party which denounces but shall remain in effect for the remaining high contracting parties.

Article 16

The present convention shall be open for the adherence and accession of the states which are not signatories. The corresponding instruments shall be deposited in the archives of the Pan American Union which shall communicate them to the other high contracting parties.

In witness whereof, the following plenipotentiaries have signed this convention in Spanish, English, Portuguese and French and hereunto affix their respective seals in the City of Montevideo, Republic of Uruguay, this 26th day of December, 1933.

[Signatures omitted from this provisional edition.]

RESERVATIONS

The delegation of the United States of America, in signing the Convention on the Rights and Duties of States, does so with the express reservation presented to the plenary session of the Conference on December 22, 1933, which reservation reads as follows:

The delegation of the United States, in voting "yes" on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven articles of the project or proposal that the United States delegation made to the first ten articles during the final vote in the full commission, which reservation is in words as follows:

"The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt administration the United States Government is as much opposed as any other government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations.

"In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every government I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4 which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted."

The delegates of Brazil and Peru recorded the following private vote with regard to Article 11: "That they accept the doctrine in principle but that they do not consider it codifiable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification."

Forrest-020

INTERNATIONAL COURT
OF JUSTICE

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Rules of Court

Article 30 of the Statute of the International Court of Justice provides that "the Court shall frame rules for carrying out its functions". These Rules are intended to supplement the general rules set forth in the Statute and to make detailed provision for the steps to be taken to comply with them.

RULES OF COURT (1978)

ADOPTED ON 14 APRIL 1978 AND ENTERED
INTO FORCE ON 1 JULY 1978[1]

PREAMBLE[*]

The Court,
Having regard to Chapter XIV of the Charter of the United Nations;
Having regard to the Statute of the Court annexed thereto;
Acting in pursuance of Article 30 of the Statute;
Adopts the following Rules.

---

[*] Amendment entered into force on 14 April 2005.

[1] Any amendments to the Rules of Court, following their adoption by the Court, are now posted on the Court's website, with an indication of the date of their entry into force and a note of any temporal reservations relating to their applicability (for example, whether the application of the amended rule is limited to cases instituted after the date of entry into force of the amendment); they are also published in the Court's *Yearbook*. Articles amended since 1 July 1978 are marked with an asterisk and appear in their amended form.

PART I

THE COURT

SECTION A. JUDGES AND ASSESSORS

Subsection 1. The Members of the Court

Article 1

1. The Members of the Court are the judges elected in accordance with Articles 2 to 15 of the Statute.

2. For the purposes of a particular case, the Court may also include upon the Bench one or more persons chosen under Article 31 of the Statute to sit as judges *ad hoc*.

3. In the following Rules, the term "Member of the Court" denotes any elected judge; the term "judge" denotes any Member of the Court, and any judge *ad hoc*.

Article 2

1. The term of office of Members of the Court elected at a triennial election shall begin to run from the sixth of February[1] in the year in which the vacancies to which they are elected occur.

2. The term of office of a Member of the Court elected to replace a Member whose term of office has not expired shall begin to run from the date of the election.

---

[1] This is the date on which the terms of office of the Members of the Court elected at the first election began in 1946.

Article 3

1. The Members of the Court, in the exercise of their functions, are of equal status, irrespective of age, priority of election or length of service.

2. The Members of the Court shall, except as provided in paragraphs 4 and 5 of this Article, take precedence according to the date on which their terms of office respectively began, as provided for by Article 2 of these Rules.

3. Members of the Court whose terms of office began on the same date shall take precedence in relation to one another according to seniority of age.

4. A Member of the Court who is re-elected to a new term of office which is continuous with his previous term shall retain his precedence.

5. The President and the Vice-President of the Court, while holding these offices, shall take precedence before all other Members of the Court.

6. The Member of the Court who, in accordance with the foregoing paragraphs, takes precedence next after the President and the Vice-President is in these Rules designated the "senior judge". If that Member is unable to act, the Member of the Court who is next after him in precedence and able to act is considered as senior judge.

Article 4

1. The declaration to be made by every Member of the Court in accordance with Article 20 of the Statute shall be as follows:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

2. This declaration shall be made at the first public sitting at which the Member of the Court is present. Such sitting shall be held as soon as practicable after his term of office begins and, if necessary, a special sitting shall be held for the purpose.

3. A Member of the Court who is re-elected shall make a new declaration only if his new term is not continuous with his previous one.

Article 5

1. A Member of the Court deciding to resign shall communicate his decision to the President, and the resignation shall take effect as provided in Article 13, paragraph 4, of the Statute.

2. If the Member of the Court deciding to resign from the Court is the President, he shall communicate his decision to the Court, and the resignation shall take effect as provided in Article 13, paragraph 4, of the Statute.

Article 6

In any case in which the application of Article 18 of the Statute is under consideration, the Member of the Court concerned shall be so informed by the President or, if the circumstances so require, by the Vice-President, in a written statement which shall include the grounds therefor and any relevant evidence. He shall subsequently, at a private meeting of the Court specially convened for the purpose, be afforded an opportunity of making a statement, of furnishing any information or explanations he wishes to give, and of supplying answers, orally or in writing, to any questions put to him. At a further private meeting, at which the Member of the Court concerned shall not be present, the matter shall be discussed; each Member of the Court shall state his opinion, and if requested a vote shall be taken.

Subsection 2. Judges ad hoc

Article 7

1. Judges *ad hoc*, chosen under Article 31 of the Statute for the purposes of particular cases, shall be admitted to sit on the Bench of the Court in the circumstances and according to the procedure indicated in Article 17, paragraph 2, Articles 35, 36, 37, Article 91, paragraph 2, and Article 102, paragraph 3, of these Rules.

2. They shall participate in the case in which they sit on terms of complete equality with the other judges on the Bench.

3. Judges *ad hoc* shall take precedence after the Members of the Court and in order of seniority of age.

Article 8

1. The solemn declaration to be made by every judge *ad hoc* in accordance with Articles 20 and 31, paragraph 6, of the Statute shall be as set out in Article 4, paragraph 1, of these Rules.

2. This declaration shall be made at a public sitting in the case in which the judge *ad hoc* is participating. If the case is being dealt with by a chamber of the Court, the declaration shall be made in the same manner in that chamber.

3. Judges *ad hoc* shall make the declaration in relation to any case in which they are participating, even if they have already done so in a previous case, but shall not make a new declaration for a later phase of the same case.

Subsection 3. Assessors

Article 9

1. The Court may, either *proprio motu* or upon a request made not later than the closure of the written proceedings, decide, for the purpose of a contentious case or request for advisory opinion, to appoint assessors to sit with it without the right to vote.

2. When the Court so decides, the President shall take steps to obtain all the information relevant to the choice of the assessors.

3. The assessors shall be appointed by secret ballot and by a majority of the votes of the judges composing the Court for the case.

4. The same powers shall belong to the chambers provided for by Articles 26 and 29 of the Statute and to the presidents thereof, and may be exercised in the same manner.

5. Before entering upon their duties, assessors shall make the following declaration at a public sitting:

"I solemnly declare that I will perform my duties as an assessor honourably, impartially and conscientiously, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court."

SECTION B. THE PRESIDENCY

Article 10

1. The term of office of the President and that of the Vice-President shall begin to run from the date on which the terms of office of the Members of the Court elected at a triennial election begin in accordance with Article 2 of these Rules.

2. The elections to the presidency and vice-presidency shall be held on that date or shortly thereafter. The former President, if still a Member of the Court, shall continue to exercise his functions until the election to the presidency has taken place.

Article 11

1. If, on the date of the election to the presidency, the former President is still a Member of the Court, he shall conduct the election. If he has ceased to be a Member of the Court, or is unable to act, the election shall be conducted by the Member of the Court exercising the functions of the

presidency by virtue of Article 13, paragraph 1, of these Rules.

2. The election shall take place by secret ballot, after the presiding Member of the Court has declared the number of affirmative votes necessary for election; there shall be no nominations. The Member of the Court obtaining the votes of a majority of the Members composing it at the time of the election shall be declared elected, and shall enter forthwith upon his functions.

3. The new President shall conduct the election of the Vice-President either at the same or at the following meeting. The provisions of paragraph 2 of this Article shall apply equally to this election.

Article 12

The President shall preside at all meetings of the Court; he shall direct the work and supervise the administration of the Court.

Article 13

1. In the event of a vacancy in the presidency or of the inability of the President to exercise the functions of the presidency, these shall be exercised by the Vice-President, or failing him, by the senior judge.

2. When the President is precluded by a provision of the Statute or of these Rules either from sitting or from presiding in a particular case, he shall continue to exercise the functions of the presidency for all purposes save in respect of that case.

3. The President shall take the measures necessary in order to ensure the continuous exercise of the functions of the presidency at the seat of the Court. In the event of his absence, he may, so far as is compatible with the Statute and these Rules, arrange for these functions to be exercised by the Vice-President, or failing him, by the senior judge.

4. If the President decides to resign the presidency, he shall communicate his decision in writing to the Court through the Vice-President, or failing him, the senior judge. If the Vice-President decides to resign his office, he shall communicate his decision to the President.

Article 14

If a vacancy in the presidency or the vice-presidency occurs before the date when the current term is due to expire under Article 21, paragraph 1, of the Statute and Article 10, paragraph 1, of these Rules, the Court shall decide whether or not the vacancy shall be filled during the remainder of the term.

SECTION C. THE CHAMBERS

Article 15

1. The Chamber of Summary Procedure to be formed annually under Article 29 of the Statute shall be composed of five Members of the Court, comprising the President and Vice-President of the Court, acting ex officio, and three other members elected in accordance with Article 18, paragraph 1, of these Rules. In addition, two Members of the Court shall be elected annually to act as substitutes.

2. The election referred to in paragraph 1 of this Article shall be held as soon as possible after the sixth of February in each year. The members of the Chamber shall enter upon their functions on election and continue to serve until the next election; they may be re-elected.

3. If a member of the Chamber is unable, for whatever reason, to sit in a given case, he shall be replaced for the purposes of that case by the senior in precedence of the two substitutes.

4. If a member of the Chamber resigns or otherwise ceases to be a member, his place shall be taken by the senior in precedence of the two substitutes, who shall thereupon become a full member of the Chamber and be replaced by the election of another substitute. Should vacancies exceed the number of available substitutes, elections shall be held as soon as possible in respect of the vacancies still existing after the substitutes have assumed full membership and in respect of the vacancies in the substitutes.

Article 16

1. When the Court decides to form one or more of the Chambers provided for in Article 26, paragraph 1, of the Statute, it shall determine the particular category of cases for which each Chamber is formed, the number of its members, the period for which they will serve, and the date at which they will enter upon their duties.

2. The members of the Chamber shall be elected in accordance with Article 18, paragraph 1, of these Rules from among the Members of the Court, having regard to any special knowledge, expertise or previous experience which any of the Members of the Court may have in relation to the category of case the Chamber is being formed to deal with.

3. The Court may decide upon the dissolution of a Chamber, but without prejudice to the duty of the Chamber concerned to finish any cases pending before it.

Article 17

1. A request for the formation of a Chamber to deal with a particular case, as provided for in Article 26, paragraph 2, of the Statute, may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.

2. When the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute.

3. When the Court has determined, with the approval of the parties, the number of its Members who are to constitute the Chamber, it shall proceed to their election, in accordance with the provisions of Article 18, paragraph 1, of these Rules. The same procedure shall be followed as regards the filling of any vacancy that may occur on the Chamber.

4. Members of a Chamber formed under this Article who have been replaced, in accordance with Article 13 of the Statute following the expiration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached.

Article 18

1. Elections to all Chambers shall take place by secret ballot. The Members of the Court obtaining the largest number of votes constituting a majority of the Members of the Court composing it at the time of the election shall be declared elected. If necessary to fill vacancies, more than one ballot shall take place, such ballot being limited to the number of vacancies that remain to be filled.

2. If a Chamber when formed includes the President or Vice-President of the Court, or both of them, the President or Vice-President, as the case may be, shall preside over that Chamber. In any other event, the Chamber shall elect its own president by secret ballot and by a majority of votes of its members. The Member of the Court who, under this paragraph, presides over the Chamber at the time of its formation shall continue to

preside so long as he remains a member of that Chamber.

3. The president of a Chamber shall exercise, in relation to cases being dealt with by that Chamber, all the functions of the President of the Court in relation to cases before the Court.

4. If the president of a Chamber is prevented from sitting or from acting as president, the functions of the presidency shall be assumed by the member of the Chamber who is the senior in precedence and able to act.

SECTION D. INTERNAL FUNCTIONING OF THE COURT

Article 19

The internal judicial practice of the Court shall, subject to the provisions of the Statute and these Rules, be governed by any resolutions on the subject adopted by the Court[1].

Article 20

1. The quorum specified by Article 25, paragraph 3, of the Statute applies to all meetings of the Court.

2. The obligation of Members of the Court under Article 23, paragraph 3, of the Statute, to hold themselves permanently at the disposal of the Court, entails attendance at all such meetings, unless they are prevented from attending by illness or for other serious reasons duly explained to the President, who shall inform the Court.

3. Judges *ad hoc* are likewise bound to hold themselves at the disposal of the Court and to attend all meetings held in the case in which they are participating. They shall not be taken into account for the calculation of the quorum.

4. The Court shall fix the dates and duration of the judicial vacations and the periods and conditions of leave to be accorded to individual Members of the Court under Article 23, paragraph 2, of the Statute, having regard in both cases to the state of its General List and to the requirements of its current work.

5. Subject to the same considerations, the Court shall observe the public holidays customary at the place where the Court is sitting.

6. In case of urgency the President may convene the Court at any time.

Article 21

1. The deliberations of the Court shall take place in private and remain secret. The Court may however at any time decide in respect of its deliberations on other than judicial matters to publish or allow publication of any part of them.

2. Only judges, and the assessors, if any, take part in the Court's judicial deliberations. The Registrar, or his deputy, and other members of the staff of the Registry as may be required shall be present. No other person shall be present except by permission of the Court.

3. The minutes of the Court's judicial deliberations shall record only the title or nature of the subjects or matters discussed, and the results of any vote taken. They shall not record any details of the discussions nor the views expressed, provided however that any judge is entitled to require that a statement made by him be inserted in the minutes.

PART II

THE REGISTRY

Article 22

1. The Court shall elect its Registrar by secret ballot from amongst candidates proposed by Members of the Court. The Registrar shall be elected for a term of seven years. He may be re-elected.

2. The President shall give notice of a vacancy or impending vacancy to Members of the Court, either forthwith upon the vacancy arising, or, where the vacancy will arise on the expiration of the term of office of the Registrar, not less than three months prior thereto. The President shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received in sufficient time.

3. Nominations shall indicate the relevant information concerning the candidate, and in particular information as to his age, nationality, and present occupation, university qualifications, knowledge of languages, and any previous experience in law, diplomacy or the work of international organizations.

4. The candidate obtaining the votes of the majority of the Members of the Court composing it at the time of the election shall be declared elected.

Article 23

The Court shall elect a Deputy-Registrar: the provisions of Article 22 of these Rules shall apply to his election and term of office.

Article 24

1. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the Court:

"I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Court of Justice in all loyalty, discretion and good conscience, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court."

2. The Deputy-Registrar shall make a similar declaration at a meeting of the Court before taking up his duties.

Article 25

1. The staff-members of the Registry shall be appointed by the Court on proposals submitted by the Registrar. Appointments to such posts as the Court shall determine may however be made by the Registrar with the approval of the President.

2. Before taking up his duties, every staff-member shall make the following declaration before the President, the Registrar being present:

"I solemnly declare that I will perform the duties incumbent upon me as an official of the International Court of Justice in all loyalty, discretion

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[1] The resolution now in force was adopted on 12 April 1976.

and good conscience, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court."

Article 26

1. The Registrar, in the discharge of his functions, shall:

(a) be the regular channel of communications to and from the Court, and in particular shall effect all communications, notifications and transmission of documents required by the Statute or by these Rules and ensure that the date of despatch and receipt thereof may be readily verified;

(b) keep, under the supervision of the President, and in such form as may be laid down by the Court, a General List of all cases, entered and numbered in the order in which the documents instituting proceedings or requesting an advisory opinion are received in the Registry;

(c) have the custody of the declarations accepting the jurisdiction of the Court made by States not parties to the Statute in accordance with any resolution adopted by the Security Council under Article 35, paragraph 2, of the Statute, and transmit certified copies thereof to all States parties to the Statute, to such other States as shall have deposited declarations, and to the Secretary-General of the United Nations;

(d) transmit to the parties copies of all pleadings and documents annexed upon receipt thereof in the Registry;

(e) communicate to the government of the country in which the Court or a Chamber is sitting, and any other governments which may be concerned, the necessary information as to the persons from time to time entitled, under the Statute and relevant agreements, to privileges, immunities, or facilities;

(f) be present, in person or by his deputy, at meetings of the Court, and of the Chambers, and be responsible for the preparation of minutes of such meetings;

(g) make arrangements for such provision or verification of translations and interpretations into the Court's official languages as the Court may require;

(h) sign all judgments, advisory opinions and orders of the Court, and the minutes referred to in subparagraph *(f)*;

(i) be responsible for the printing and publication of the Court's judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in cases, and of such other documents as the Court may direct to be published;

(j) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with the financial procedures of the United Nations;

(k) deal with enquiries concerning the Court and its work;

(l) assist in maintaining relations between the Court and other organs of the United Nations, the specialized agencies, and international bodies and conferences concerned with the codification and progressive development of international law;

(m) ensure that information concerning the Court and its activities is made accessible to governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law, and public information media;

(n) have custody of the seals and stamps of the Court, of the archives of the Court, and of such other archives as may be entrusted to the Court[1].

2. The Court may at any time entrust additional functions to the Registrar.

3. In the discharge of his functions the Registrar shall be responsible to the Court.

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[1] The Registrar also keeps the Archives of the Permanent Court of International Justice, entrusted to the present Court by decision of the Permanent Court of October 1945 (*I.C.J. Yearbook 1946-1947*, p. 26). and the Archives of the Trial of the Major War Criminals before the International Military Tribunal at Nuremberg (1945-1946), entrusted to the Court by decision of that Tribunal of 1 October 1946; the Court authorized the Registrar to accept the latter Archives by decision of 19 November 1949.

Article 27

1. The Deputy-Registrar shall assist the Registrar, act as Registrar in the latter's absence and, in the event of the office becoming vacant, exercise the functions of Registrar until the office has been filled.

2. If both the Registrar and the Deputy-Registrar are unable to carry out the duties of Registrar, the President shall appoint an official of the Registry to discharge those duties for such time as may be necessary. If both offices are vacant at the same time, the President, after consulting the Members of the Court, shall appoint an official of the Registry to discharge the duties of Registrar pending an election to that office.

Article 28

1. The Registry shall comprise the Registrar, the Deputy-Registrar, and such other staff as the Registrar shall require for the efficient discharge of his functions.

2. The Court shall prescribe the organization of the Registry, and shall for this purpose request the Registrar to make proposals.

3. Instructions for the Registry shall be drawn up by the Registrar and approved by the Court.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar, so far as possible in conformity with the United Nations Staff Regulations and Staff Rules, and approved by the Court.

Article 29

1. The Registrar may be removed from office only if, in the opinion of two-thirds of the Members of the Court, he has either become permanently incapacitated from exercising his functions, or has committed a serious breach of his duties.

2. Before a decision is taken under this Article, the Registrar shall be informed by the President of the action contemplated, in a written statement which shall include the grounds therefor and any relevant evidence. He shall subsequently, at a private meeting of the Court, be afforded an opportunity of making a statement, of furnishing any information or explanations he wishes to give, and of supplying answers, orally or in writing, to any questions put to him.

3. The Deputy-Registrar may be removed from office only on the same grounds and by the same procedure.

PART III

PROCEEDINGS IN CONTENTIOUS CASES

SECTION A. COMMUNICATIONS TO THE COURT AND CONSULTATIONS

Article 30

All communications to the Court under these Rules shall be addressed to the Registrar unless otherwise stated. Any request made by a party shall likewise be addressed to the Registrar unless made in open court in the course of the oral proceedings.

Article 31

In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter.

SECTION B. THE COMPOSITION OF THE COURT FOR PARTICULAR CASES

Article 32

1. If the President of the Court is a national of one of the parties in a case he shall not exercise the functions of the presidency in respect of that case. The same rule applies to the Vice-President, or to the senior judge, when called on to act as President.

2. The Member of the Court who is presiding in a case on the date on which the Court convenes for the oral proceedings shall continue to preside in that case until completion of the current phase of the case, notwithstanding the election in the meantime of a new President or Vice-President. If he should become unable to act, the presidency for the case shall be determined in accordance with Article 13 of these Rules, and on the basis of the composition of the Court on the date on which it convened for the oral proceedings.

Article 33

Except as provided in Article 17 of these Rules, Members of the Court who have been replaced, in accordance with Article 13, paragraph 3, of the Statute following the expiration of their terms of office, shall discharge the duty imposed upon them by that paragraph by continuing to sit until the completion of any phase of a case in respect of which the Court convenes for the oral proceedings prior to the date of such replacement.

Article 34

1. In case of any doubt arising as to the application of Article 17, paragraph 2, of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, with whom the decision lies.

2. If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous paragraph, but which it believes may not be known to the Court, that party shall communicate confidentially such facts to the President in writing.

Article 35

1. If a party proposes to exercise the power conferred by Article 31 of the Statute to choose a judge *ad hoc* in a case, it shall notify the Court of its intention as soon as possible. If the name and nationality of the judge selected are not indicated at the same time, the party shall, not later than two months before the time-limit fixed for the filing of the Counter-Memorial, inform the Court of the name and nationality of the person chosen and supply brief biographical details. The judge *ad hoc* may be of a nationality other than that of the party which chooses him.

2. If a party proposes to abstain from choosing a judge *ad hoc*, on condition of a like abstention by the other party, it shall so notify the Court which shall inform the other party. If the other party thereafter gives notice of its intention to choose, or chooses, a judge *ad hoc*, the time-limit for the party which has previously abstained from choosing a judge may be extended by the President.

3. A copy of any notification relating to the choice of a judge *ad hoc* shall be communicated by the Registrar to the other party, which shall be requested to furnish, within a time-limit to be fixed by the President, such observations as it may wish to make. If within the said time-limit no objection is raised by the other party, and if none appears to the Court itself, the parties shall be so informed.

4. In the event of any objection or doubt, the matter shall be decided by the Court, if necessary after hearing the parties.

5. A judge *ad hoc* who has accepted appointment but who becomes unable to sit may be replaced.

6. If and when the reasons for the participation of a judge *ad hoc* are found no longer to exist, he shall cease to sit on the Bench.

Article 36

1. If the Court finds that two or more parties are in the same interest, and therefore are to be reckoned as one party only, and that there is no Member of the Court of the nationality of any one of those parties upon the Bench, the Court shall fix a time-limit within which they may jointly choose a judge *ad hoc*.

2. Should any party amongst those found by the Court to be in the same interest allege the existence of a separate interest of its own, or put forward any other objection, the matter shall be decided by the Court, if necessary after hearing the parties.

Article 37

1. If a Member of the Court having the nationality of one of the parties is or becomes unable to sit in any phase of a case, that party shall thereupon become entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

2. Parties in the same interest shall be deemed not to have a judge of one of their nationalities upon the Bench if the Member of the Court having one of their nationalities is or becomes unable to sit in any phase of the case.

3. If the Member of the Court having the nationality of a party becomes able to sit not later than the closure of the written proceedings in that

phase of the case, that Member of the Court shall resume his seat on the Bench in the case.

SECTION C. PROCEEDINGS BEFORE THE COURT

Subsection 1. Institution of Proceedings

Article 38

1. When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.

2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

3. The original of the application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party in the country in which the Court has its seat, or by some other duly authorized person. If the application bears the signature of someone other than such diplomatic representative, the signature must be authenticated by the latter or by the competent authority of the applicant's foreign ministry.

4. The Registrar shall forthwith transmit to the respondent a certified copy of the application.

5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

Article 39

1. When proceedings are brought before the Court by the notification of a special agreement, in conformity with Article 40, paragraph 1, of the Statute, the notification may be effected by the parties jointly or by any one or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to the other party.

2. In each case the notification shall be accompanied by an original or certified copy of the special agreement. The notification shall also, in so far as this is not already apparent from the agreement, indicate the precise subject of the dispute and identify the parties to it.

Article 40

1. Except in the circumstances contemplated by Article 38, paragraph 5, of these Rules, all steps on behalf of the parties after proceedings have been instituted shall be taken by agents. Agents shall have an address for service at the seat of the Court to which all communications concerning the case are to be sent. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves.

2. When proceedings are instituted by means of an application, the name of the agent for the applicant shall be stated. The respondent, upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Court of the name of its agent.

3. When proceedings are brought by notification of a special agreement, the party making the notification shall state the name of its agent. Any other party to the special agreement, upon receiving from the Registrar a certified copy of such notification, or as soon as possible thereafter, shall inform the Court of the name of its agent if it has not already done so.

Article 41

The institution of proceedings by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article[1], shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar. If any question of the validity or effect of such declaration arises, the Court shall decide.

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[1] The resolution now in force was adopted on 15 October 1946.

Article 42

The Registrar shall transmit copies of any application or notification of a special agreement instituting proceedings before the Court to: *(a)* the Secretary-General of the United Nations; *(b)* the Members of the United Nations; *(c)* other States entitled to appear before the Court.

Article 43[*][1]

1. Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter.

2. Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall so notify the public international organization concerned. Every public international organization notified by the Registrar may submit its observations on the particular provisions of the convention the construction of which is in question in the case.

3. If a public international organization sees fit to furnish its observations under paragraph 2 of this Article, the procedure to be followed shall be that provided for in Article 69, paragraph 2, of these Rules.

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[*] Amendment entered into force on 29 September 2005.

[1] Article 43, paragraph 1, as amended, repeats unchanged the text of Article 43, as adopted on 14 April 1978.

Paragraphs 2 and 3 of the amended Article 43 are new.

Subsection 2. The Written Proceedings

Article 44

1. In the light of the information obtained by the President under Article 31 of these Rules, the Court shall make the necessary orders to determine, *inter alia*, the number and the order of filing of the pleadings and the time-limits within which they must be filed.

2. In making an order under paragraph 1 of this Article, any agreement between the parties which does not cause unjustified delay shall be taken into account.

3. The Court may, at the request of the party concerned, extend any time-limit, or decide that any step taken after the expiration of the time-limit fixed therefor shall be considered as valid, if it is satisfied that there is adequate justification for the request. In either case the other party shall be given an opportunity to state its views.

4. If the Court is not sitting, its powers under this Article shall be exercised by the President, but without prejudice to any subsequent decision of the Court. If the consultation referred to in Article 31 reveals persistent disagreement between the parties as to the application of Article 45, paragraph 2, or Article 46, paragraph 2, of these Rules, the Court shall be convened to decide the matter.

Article 45

1. The pleadings in a case begun by means of an application shall consist, in the following order, of: a Memorial by the applicant; a Counter-Memorial by the respondent.

2. The Court may authorize or direct that there shall be a Reply by the applicant and a Rejoinder by the respondent if the parties are so agreed, or if the Court decides, *proprio motu* or at the request of one of the parties, that these pleadings are necessary.

Article 46

1. In a case begun by the notification of a special agreement, the number and order of the pleadings shall be governed by the provisions of the agreement, unless the Court, after ascertaining the views of the parties, decides otherwise.

2. If the special agreement contains no such provision, and if the parties have not subsequently agreed on the number and order of pleadings, they shall each file a Memorial and Counter-Memorial, within the same time-limits. The Court shall not authorize the presentation of Replies unless it finds them to be necessary.

Article 47

The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects.

Article 48

Time-limits for the completion of steps in the proceedings may be fixed by assigning a specified period but shall always indicate definite dates. Such time-limits shall be as short as the character of the case permits.

Article 49

1. A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.

2. A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions.

3. The Reply and Rejoinder, whenever authorized by the Court, shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them.

4. Every pleading shall set out the party's submissions at the relevant stage of the case, distinctly from the arguments presented, or shall confirm the submissions previously made.

Article 50

1. There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading.

2. If only parts of a document are relevant, only such extracts as are necessary for the purpose of the pleading in question need be annexed. A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available.

3. A list of all documents annexed to a pleading shall be furnished at the time the pleading is filed.

Article 51

1. If the parties are agreed that the written proceedings shall be conducted wholly in one of the two official languages of the Court, the pleadings shall be submitted only in that language. If the parties are not so agreed, any pleading or any part of a pleading shall be submitted in one or other of the official languages.

2. If in pursuance of Article 39, paragraph 3, of the Statute a language other than French or English is used, a translation into French or English certified as accurate by the party submitting it, shall be attached to the original of each pleading.

3. When a document annexed to a pleading is not in one of the official languages of the Court, it shall be accompanied by a translation into one of these languages certified by the party submitting it as accurate. The translation may be confined to part of an annex, or to extracts therefrom, but in this case it must be accompanied by an explanatory note indicating what passages are translated. The Court may however require a more extensive or a complete translation to be furnished.

Article 52[*1] [2]

1. The original of every pleading shall be signed by the agent and filed in the Registry. It shall be accompanied by a certified copy of the pleading, documents annexed, and any translations, for communication to the other party in accordance with Article 43, paragraph 4, of the Statute, and by the number of additional copies required by the Registry, but without prejudice to an increase in that number should the need arise later.

2. All pleadings shall be dated. When a pleading has to be filed by a certain date, it is the date of the receipt of the pleading in the Registry which will be regarded by the Court as the material date.

3. The correction of a slip or error in any document which has been filed may be made at any time with the consent of the other party or by leave of the President. Any correction so effected shall be notified to the other party in the same manner as the pleading to which it relates.

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[*] Amendment entered into force on 14 April 2005.

[1] The agents of the parties are requested to ascertain from the Registry the usual format of the pleadings.

[2] The text of Article 52, as adopted on 14 April 1978, contained a paragraph 3 concerning the procedure to be followed where the Registrar arranges for the printing of a pleading; this paragraph has been deleted and the footnote to the Article has been amended. Former paragraph 4 has been renumbered and is now paragraph 3.

Article 53

1. The Court, or the President if the Court is not sitting, may at any time decide, after ascertaining the views of the parties, that copies of the pleadings and documents annexed shall be made available to a State entitled to appear before it which has asked to be furnished with such copies.

2. The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings.

Subsection 3. The Oral Proceedings

Article 54

1. Upon the closure of the written proceedings, the case is ready for hearing. The date for the opening of the oral proceedings shall be fixed by the Court, which may also decide, if occasion should arise, that the opening or the continuance of the oral proceedings be postponed.

2. When fixing the date for, or postponing, the opening of the oral proceedings the Court shall have regard to the priority required by Article 74 of these Rules and to any other special circumstances, including the urgency of a particular case.

3. When the Court is not sitting, its powers under this Article shall be exercised by the President.

Article 55

The Court may, if it considers it desirable, decide pursuant to Article 22, paragraph 1, of the Statute that all or part of the further proceedings in a case shall be held at a place other than the seat of the Court. Before so deciding, it shall ascertain the views of the parties.

Article 56

1. After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article. The party desiring to produce a new document shall file the original or a certified copy thereof, together with the number of copies required by the Registry, which shall be responsible for communicating it to the other party and shall inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

2. In the absence of consent, the Court, after hearing the parties, may, if it considers the document necessary, authorize its production.

3. If a new document is produced under paragraph 1 or paragraph 2 of this Article, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.

4. No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available.

5. The application of the provisions of this Article shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings.

Article 57

Without prejudice to the provisions of the Rules concerning the production of documents, each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party.

Article 58

1. The Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

2. The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained in accordance with Article 31 of these Rules.

Article 59

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted. Such a decision or demand may concern either the whole or part of the hearing, and may be made at any time.

Article 60

1. The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.

2. At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Court and transmitted to the other party.

Article 61

1. The Court may at any time prior to or during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.

2. The Court may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations.

3. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing.

4. The agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President.

Article 62

1. The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.

2. The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.

Article 63

1. The parties may call any witnesses or experts appearing on the list communicated to the Court pursuant to Article 57 of these Rules. If at any time during the hearing a party wishes to call a witness or expert whose name was not included in that list, it shall so inform the Court and the other party, and shall supply the information required by Article 57. The witness or expert may be called either if the other party makes no objection or if the Court is satisfied that his evidence seems likely to prove relevant.

2. The Court, or the President if the Court is not sitting, shall, at the request of one of the parties or *proprio motu*, take the necessary steps for the examination of witnesses otherwise than before the Court itself.

Article 64

Unless on account of special circumstances the Court decides on a different form of words,

(a) every witness shall make the following declaration before giving any evidence:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth";

(b) every expert shall make the following declaration before making any statement:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief."

Article 65

Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges. Before testifying, witnesses shall remain out of court.

Article 66

The Court may at any time decide, either *proprio motu* or at the request of a party, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates, subject to such conditions as the Court may decide upon after ascertaining the views of the parties. The necessary arrangements shall be made in accordance with Article 44 of the Statute.

Article 67

1. If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration.

2. Every report or record of an enquiry and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it.

Article 68

Witnesses and experts who appear at the instance of the Court under Article 62, paragraph 2, and persons appointed under Article 67, paragraph 1, of these Rules, to carry out an enquiry or to give an expert opinion, shall, where appropriate, be paid out of the funds of the Court.

Article 69

1. The Court may, at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties communicated as provided in Article 57 of these Rules, request a public international organization, pursuant to Article 34 of the Statute, to furnish information relevant to a case before it. The Court, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing, and the time-limits for its presentation.

2. When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also to authorize the parties to comment, either orally or in writing, on the information thus furnished.

3. In the circumstances contemplated by Article 34, paragraph 3, of the Statute, the Registrar, on the instructions of the Court, or of the President if the Court is not sitting, shall proceed as prescribed in that paragraph. The Court, or the President if the Court is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the public international organization concerned, fix a time-limit within which the organization may submit to the Court its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings.

4. In the foregoing paragraph, the term "public international organization" denotes an international organization of States.

Article 70

1. In the absence of any decision to the contrary by the Court, all speeches and statements made and evidence given at the hearing in one of the official languages of the Court shall be interpreted into the other official language. If they are made or given in any other language, they shall be interpreted into the two official languages of the Court.

2. Whenever, in accordance with Article 39, paragraph 3, of the Statute, a language other than French or English is used, the necessary arrangements for interpretation into one of the two official languages shall be made by the party concerned; however, the Registrar shall make

arrangements for the verification of the interpretation provided by a party of evidence given on the party's behalf. In the case of witnesses or experts who appear at the instance of the Court, arrangements for interpretation shall be made by the Registry.

3. A party on behalf of which speeches or statements are to be made, or evidence given, in a language which is not one of the official languages of the Court, shall so notify the Registrar in sufficient time for him to make the necessary arrangements.

4. Before first interpreting in the case, interpreters provided by a party shall make the following declaration in open court:

"I solemnly declare upon my honour and conscience that my interpretation will be faithful and complete."

Article 71

1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used. When the language used is not one of the two official languages of the Court, the verbatim record shall be prepared in one of the Court's official languages.

2. When speeches or statements are made in a language which is not one of the official languages of the Court, the party on behalf of which they are made shall supply to the Registry in advance a text thereof in one of the official languages, and this text shall constitute the relevant part of the verbatim record.

3. The transcript of the verbatim record shall be preceded by the names of the judges present, and those of the agents, counsel and advocates of the parties.

4. Copies of the transcript shall be circulated to the judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof. The judges may likewise make corrections in the transcript of anything they may have said.

5. Witnesses and experts shall be shown that part of the transcript which relates to the evidence given, or the statements made by them, and may correct it in like manner as the parties.

6. One certified true copy of the eventual corrected transcript, signed by the President and the Registrar, shall constitute the authentic minutes of the sitting for the purpose of Article 47 of the Statute. The minutes of public hearings shall be printed and published by the Court.

Article 72

Any written reply by a party to a question put under Article 61, or any evidence or explanation supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it. If necessary the oral proceedings may be reopened for that purpose.

SECTION D. INCIDENTAL PROCEEDINGS

Subsection 1. Interim Protection

Article 73

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

Article 74

1. A request for the indication of provisional measures shall have priority over all other cases.

2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

Article 75

1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

Article 76

1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.

2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject.

Article 77

Any measures indicated by the Court under Articles 73 and 75 of these Rules, and any decision taken by the Court under Article 76, paragraph 1, of these Rules, shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2, of the Statute.

Article 78

The Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated.

Subsection 2. Preliminary Objections

Article 79[*] [1]

1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party's first pleading.

2. Notwithstanding paragraph 1 above, following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately.

3. Where the Court so decides, the parties shall submit any pleadings as to jurisdiction and admissibility within the time-limits fixed by the Court and in the order determined by it, notwithstanding Article 45, paragraph 1.

4. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.

5. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

6. Unless otherwise decided by the Court, the further proceedings shall be oral.

7. The statements of facts and law in the pleadings referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters that are relevant to the objection.

8. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.

9. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

10. Any agreement between the parties that an objection submitted under paragraph 1 of this Article be heard and determined within the framework of the merits shall be given effect by the Court.

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[*] Amendment entered into force on 1 February 2001. Article 79 of the Rules of Court as adopted on 14 April 1978 has continued to apply to all cases submitted to the Court prior to 1 February 2001.

[1] In Article 79, paragraph 1, as amended, the words “as soon as possible, and not later than three months after the delivery of the Memorial” have been substituted for the words “within the time-limit fixed for the delivery of the Counter-Memorial” contained in the text of this paragraph as adopted on 14 April 1978.

Paragraphs 2 and 3 of the amended Article 79 are new.

The former paragraphs 2 to 8 have been renumbered, respectively, as paragraphs 4 to 10.

Subsection 3. Counter-Claims

Article 80[*] [1]

1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.

2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.

3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties.

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[*] Amendment entered into force on 1 February 2001. Article 80 of the Rules of Court as adopted on 14 April 1978 has continued to apply to all cases submitted to the Court prior to 1 February 2001.

[1] Article 80 of the Rules of Court as adopted on 14 April 1978 read as follows:

> “*Article 80*
>
> 1. A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.
>
> 2. A counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party.

3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings."

Subsection 4. Intervention

Article 81

1. An application for permission to intervene under the terms of Article 62 of the Statute, signed in the manner provided for in Article 38, paragraph 3, of these Rules, shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted.

2. The application shall state the name of an agent. It shall specify the case to which it relates, and shall set out:

(a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

(b) the precise object of the intervention;

(c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

3. The application shall contain a list of the documents in support, which documents shall be attached.

Article 82

1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

(a) particulars of the basis on which the declarant State considers itself a party to the convention;

(b) identification of the particular provisions of the convention the construction of which it considers to be in question;

(c) a statement of the construction of those provisions for which it contends;

(d) a list of the documents in support, which documents shall be attached.

3. Such a declaration may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute.

Article 83

1. Certified copies of the application for permission to intervene under Article 62 of the Statute, or of the declaration of intervention under Article 63 of the Statute, shall be communicated forthwith to the parties to the case, which shall be invited to furnish their written observations within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

2. The Registrar shall also transmit copies to: *(a)* the Secretary-General of the United Nations; *(b)* the Members of the United Nations; *(c)* other States entitled to appear before the Court; *(d)* any other States which have been notified under Article 63 of the Statute.

Article 84

1. The Court shall decide whether an application for permission to intervene under Article 62 of the Statute should be granted, and whether an intervention under Article 63 of the Statute is admissible, as a matter of priority unless in view of the circumstances of the case the Court shall otherwise determine.

2. If, within the time-limit fixed under Article 83 of these Rules, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding.

Article 85

1. If an application for permission to intervene under Article 62 of the Statute is granted, the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court. A further time-limit shall be fixed within which the parties may, if they so desire, furnish their written observations on that statement prior to the oral proceedings. If the Court is not sitting, these time-limits shall be fixed by the President.

2. The time-limits fixed according to the preceding paragraph shall, so far as possible, coincide with those already fixed for the pleadings in the case.

3. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

Article 86

1. If an intervention under Article 63 of the Statute is admitted, the intervening State shall be furnished with copies of the pleadings and documents annexed, and shall be entitled, within a time-limit to be fixed by the Court, or by the President if the Court is not sitting, to submit its

written observations on the subject-matter of the intervention.

2. These observations shall be communicated to the parties and to any other State admitted to intervene. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

Subsection 5. Special Reference to the Court

Article 87

1. When in accordance with a treaty or convention in force a contentious case is brought before the Court concerning a matter which has been the subject of proceedings before some other international body, the provisions of the Statute and of the Rules governing contentious cases shall apply.

2. The application instituting proceedings shall identify the decision or other act of the international body concerned and a copy thereof shall be annexed; it shall contain a precise statement of the questions raised in regard to that decision or act, which constitute the subject of the dispute referred to the Court.

Subsection 6. Discontinuance

Article 88

1. If at any time before the final judgment on the merits has been delivered the parties, either jointly or separately, notify the Court in writing that they have agreed to discontinue the proceedings, the Court shall make an order recording the discontinuance and directing that the case be removed from the list.

2. If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Court may record this fact in the order for the removal of the case from the list, or indicate in, or annex to, the order, the terms of the settlement.

3. If the Court is not sitting, any order under this Article may be made by the President.

Article 89

1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court shall fix a time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

3. If the Court is not sitting, its powers under this Article may be exercised by the President.

SECTION E. PROCEEDINGS BEFORE THE CHAMBERS

Article 90

Proceedings before the Chambers mentioned in Articles 26 and 29 of the Statute shall, subject to the provisions of the Statute and of these Rules relating specifically to the Chambers, be governed by the provisions of Parts I to III of these Rules applicable in contentious cases before the Court.

Article 91

1. When it is desired that a case should be dealt with by one of the Chambers which has been formed in pursuance of Article 26, paragraph 1, or Article 29 of the Statute, a request to this effect shall either be made in the document instituting the proceedings or accompany it. Effect will be given to the request if the parties are in agreement.

2. Upon receipt by the Registry of this request, the President of the Court shall communicate it to the members of the Chamber concerned. He shall take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute.

3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.

Article 92

1. Written proceedings in a case before a Chamber shall consist of a single pleading by each side. In proceedings begun by means of an application, the pleadings shall be delivered within successive time-limits. In proceedings begun by the notification of a special agreement, the pleadings shall be delivered within the same time-limits, unless the parties have agreed on successive delivery of their pleadings. The time-limits referred to in this paragraph shall be fixed by the Court, or by the President if the Court is not sitting, in consultation with the Chamber concerned if it is already constituted.

2. The Chamber may authorize or direct that further pleadings be filed if the parties are so agreed, or if the Chamber decides, *proprio motu* or at the request of one of the parties, that such pleadings are necessary.

3. Oral proceedings shall take place unless the parties agree to dispense with them, and the Chamber consents. Even when no oral proceedings take place, the Chamber may call upon the parties to supply information or furnish explanations orally.

Article 93

Judgments given by a Chamber shall be read at a public sitting of that Chamber.

SECTION F. JUDGMENTS, INTERPRETATION AND REVISION

Subsection 1. Judgments

Article 94

1. When the Court has completed its deliberations and adopted its judgment, the parties shall be notified of the date on which it will be read.

2. The judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading.

Article 95

1. The judgment, which shall state whether it is given by the Court or by a Chamber, shall contain:

the date on which it is read;
the names of the judges participating in it;
the names of the parties;
the names of the agents, counsel and advocates of the parties;
a summary of the proceedings;
the submissions of the parties;
a statement of the facts;
the reasons in point of law;
the operative provisions of the judgment;
the decision, if any, in regard to costs;
the number and names of the judges constituting the majority;
a statement as to the text of the judgment which is authoritative.

2. Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.

3. One copy of the judgment duly signed and sealed, shall be placed in the archives of the Court and another shall be transmitted to each of the parties. Copies shall be sent by the Registrar to: *(a)* the Secretary-General of the United Nations; *(b)* the Members of the United Nations; *(c)* other Sates entitled to appear before the Court.

Article 96

When by reason of an agreement reached between the parties, the written and oral proceedings have been conducted in one of the Court's two official languages, and pursuant to Article 39, paragraph 1, of the Statute the judgment is to be delivered in that language, the text of the judgment in that language shall be the authoritative text.

Article 97

If the Court, under Article 64 of the Statute, decides that all or part of a party's costs shall be paid by the other party, it may make an order for the purpose of giving effect to that decision.

Subsection 2. Requests for the Interpretation or Revision of a Judgment

Article 98

1. In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation, whether the original proceedings were begun by an application or by the notification of a special agreement.

2. A request for the interpretation of a judgment may be made either by an application or by the notification of a special agreement to that effect between the parties; the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated.

3. If the request for interpretation is made by an application, the requesting party's contentions shall be set out therein, and the other party shall be entitled to file written observations thereon within a time-limit fixed by the Court, or by the President if the Court is not sitting.

4. Whether the request is made by an application or by notification of a special agreement, the Court may, if necessary, afford the parties the opportunity of furnishing further written or oral explanations.

Article 99

1. A request for the revision of a judgment shall be made by an application containing the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled. Any documents in support of the application shall be annexed to it.

2. The other party shall be entitled to file written observations on the admissibility of the application within a time-limit fixed by the Court, or by the President if the Court is not sitting. These observations shall be communicated to the party making the application.

3. The Court, before giving its judgment on the admissibility of the application may afford the parties a further opportunity of presenting their views thereon.

4. If the Court finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary.

5. If the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.

Article 100

1. If the judgment to be revised or to be interpreted was given by the Court, the request for its revision or interpretation shall be dealt with by the Court. If the judgment was given by a Chamber, the request for its revision or interpretation shall be dealt with by that Chamber.

2. The decision of the Court, or of the Chamber, on a request for interpretation or revision of a judgment shall itself be given in the form of a judgment.

SECTION G. MODIFICATIONS PROPOSED BY THE PARTIES

Article 101

The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or by a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.

PART IV

ADVISORY PROCEEDINGS

Article 102

1. In the exercise of its advisory functions under Article 65 of the Statute, the Court shall apply, in addition to the provisions of Article 96 of the Charter and Chapter IV of the Statute, the provisions of the present Part of the Rules.

2. The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.

3. When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article.

Article 103

When the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.

Article 104

All requests for advisory opinions shall be transmitted to the Court by the Secretary-General of the United Nations or, as the case may be, the chief administrative officer of the body authorized to make the request. The documents referred to in Article 65, paragraph 2, of the Statute shall be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry.

Article 105

1. Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements.

2. The Court, or the President if the Court is not sitting, shall:

(a) determine the form in which, and the extent to which, comments permitted under Article 66, paragraph 4, of the Statute shall be received, and fix the time-limit for the submission of any such comments in writing;

(b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of Article 66 of the Statute, and fix the date for the opening of such oral proceedings.

Article 106

The Court, or the President if the Court is not sitting, may decide that the written statements and annexed documents shall be made accessible to the public on or after the opening of the oral proceedings. If the request for advisory opinion relates to a legal question actually pending between two or more States, the views of those States shall first be ascertained.

Article 107

1. When the Court has completed its deliberations and adopted its advisory opinion, the opinion shall be read at a public sitting of the Court.

2. The advisory opinion shall contain:

the date on which it is delivered;
the names of the judges participating;
a summary of the proceedings;
a statement of the facts;
the reasons in point of law;
the reply to the question put to the Court;

the number and names of the judges constituting the majority;
a statement as to the text of the opinion which is authoritative.

3. Any judge may, if he so desires, attach his individual opinion to the advisory opinion of the Court, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.

Article 108

The Registrar shall inform the Secretary-General of the United Nations, and, where appropriate, the chief administrative officer of the body which requested the advisory opinion, as to the date and the hour fixed for the public sitting to be held for the reading of the opinion. He shall also inform the representatives of the Members of the United Nations and other States, specialized agencies and public international organizations immediately concerned.

Article 109

One copy of the advisory opinion, duly signed and sealed, shall be placed in the archives of the Court, another shall be sent to the Secretary-General of the United Nations and, where appropriate, a third to the chief administrative officer of the body which requested the opinion of the Court. Copies shall be sent by the Registrar to the Members of the United Nations and to any other States, specialized agencies and public international organizations immediately concerned.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Ph. COUVREUR,
Registrar.

Forrest-021

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Island of Palmas case (Netherlands, USA)

4 April 1928

VOLUME II pp. 829-871

XX.

ISLAND OF PALMAS CASE [1].

PARTIES: Netherlands, U.S.A.

SPECIAL AGREEMENT: January 23, 1925.

ARBITRATOR: Max Huber (Switzerland).

AWARD: The Hague, April, 1928.

Territorial sovereignty.—Contiguity and title to territory.—Continuous and peaceful display of sovereignty.—The "intertemporal" law.—Rules of evidence in international proceedings.—Maps as evidence.—Inchoate title.—Passivity in relation to occupation.—Dutch East India Company as subject of international law.—Treaties with native princes.—Subsequent practice as an element of interpretation.

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[1] For bibliography, index and tables, see Volume III.

Special Agreement.

[*See beginning of Award below.*]

AWARD OF THE TRIBUNAL.

Award of the tribunal of arbitration rendered in conformity with the special agreement concluded on January 23, 1925, *between the United States of America and the Netherlands relating to the arbitration of differences respecting sovereignty over the Island of Palmas* (*or Miangas*).—*The Hague, April* 4, 1928.

An agreement relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas) was signed by the United States of America and the Netherlands on January 23rd, 1925. The text of the agreement runs as follows :

> The United States of America and Her Majesty the Queen of the Netherlands,
>
> Desiring to terminate in accordance with the principles of International Law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas (or Miangas) situated approximately fifty miles south-east from Cape San Augustin, Island of Mindanao, at about five degrees and thirty-five minutes (5° 35′) north latitude, one hundred and twenty-six degrees and thirty-six minutes (126° 36′) longitude east from Greenwich;
>
> Considering that these differences belong to those which, pursuant to Article I of the Arbitration Convention concluded by the two high contracting parties on May 2, 1908, and renewed by agreements, dated May 9, 1914, March 8, 1919, and February 13, 1924, respectively, might well be submitted to arbitration,
>
> Have appointed as their respective plenipotentiaries for the purpose of concluding the following special agreement:
>
> The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States of America, and
>
> Her Majesty the Queen of the Netherlands: Jonkheer Dr. A. C. D. de Graeff, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at Washington,
>
> Who, after exhibiting to each other their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:
>
> ### Article I.
>
> The United States of America and Her Majesty the Queen of the Netherlands hereby agree to refer the decision of the above-mentioned

differences to the Permanent Court of Arbitration at The Hague. The arbitral tribunal shall consist of one arbitrator.

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.

The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

Article II.

Within six months after the exchange of ratifications of this special agreement, each Government shall present to the other party two printed copies of a memorandum containing a statement of its contentions and the documents in support thereof. It shall be sufficient for this purpose if the copies aforesaid are delivered by the Government of the United States at the Netherlands Legation at Washington and by the Netherlands Government at the American Legation at The Hague, for transmission. As soon thereafter as possible and within thirty days, each party shall transmit two printed copies of its memorandum to the International Bureau of the Permanent Court of Arbitration for delivery to the Arbitrator.

Within six months after the expiration of the period above fixed for the delivery of the memoranda to the parties, each party may, if it is deemed advisable, transmit to the other two printed copies of a counter-memorandum and any documents in support thereof in answer to the memorandum of the other party. The copies of the counter-memorandum shall be delivered to the parties, and within thirty days thereafter to the Arbitrator, in the manner provided for in the foregoing paragraph respecting the delivery of memoranda.

At the instance of one or both of the parties, the Arbitrator shall have authority, after hearing both parties and for good cause shown, to extend the above-mentioned periods.

Article III.

After the exchange of the counter-memoranda, the case shall be deemed closed unless the Arbitrator applies to either or both of the parties for further written explanations.

In case the Arbitrator makes such a request on either party, he shall do so through the International Bureau of the Permanent Court of Arbitration which shall communicate a copy of his request to the other party. The party addressed shall be allowed for reply three months from the date of the receipt of the Arbitrator's request, which date shall be at once communicated to the other party and to the International Bureau. Such reply shall be communicated to the other party and within thirty days thereafter to the Arbitrator in the manner provided for above for the delivery of memoranda, and the opposite party may if it is deemed advisable, have a further period of three months to make rejoinder thereto, which shall be communicated in like manner.

The Arbitrator shall notify both parties through the International Bureau of the date upon which, in accordance with the foregoing provisions, the case is closed, so far as the presentation of memoranda and evidence by either party is concerned.

Article IV.

The parties shall be at liberty to use, in the course of arbitration, the English or Netherlands language or the native language of the Arbitrator. If either party uses the English or Netherlands language, a translation into the native language of the Arbitrator shall be furnished if desired by him.

The Arbitrator shall be at liberty to use his native language or the English or Netherlands language in the course of the arbitration and the award and opinion accompanying it may be in any one of those languages.

Article V.

The Arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.

Article VI.

Immediately after the exchange of ratifications of this special agreement each party shall place in the hands of the Arbitrator the sum of one hundred pounds sterling by way of advance of costs.

Article VII.

The Arbitrator shall, within three months after the date upon which he declares the case closed for the presentation of memoranda and evidence, render his award in writing and deposit three signed copies thereof with the International Bureau at The Hague, one copy to be retained by the Bureau and one to be transmitted to each party, as soon as this may be done.

The award shall be accompanied by a statement of the grounds upon which it is based.

The Arbitrator shall fix the amount of the costs of procedure in his award. Each party shall defray its own expenses and half of said costs of procedure and of the honorarium of the Arbitrator.

Article VIII.

The parties undertake to accept the award rendered by the Arbitrator within the limitations of this special agreement, as final and conclusive and without appeal.

All disputes connected with the interpretation and execution of the award shall be submitted to the decision of the Arbitrator.

Article IX.

This special agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place as soon as possible at Washington.

In witness whereof the respective plenipotentiaries have signed this special agreement and have hereunto affixed their seals.

Done in duplicate in the City of Washington in the English and Netherlands languages this 23rd day of January, 1925.

(*L. S.*) CHARLES EVANS HUGHES.
(*L. S.*) DE GRAEFF.

I.

The *ratifications of the above agreement* (hereafter called the Special Agreement) were exchanged at Washington on April 1st, 1925. By letters dated September 29th, 1925, the Ministry of Foreign Affairs of Her Majesty the Queen of the Netherlands and the Minister of the United States of America at The Hague asked the undersigned, Max Huber, of Zurich (Switzerland), member of the Permanent Court of Arbitration, whether he would be disposed to accept the mandate to act as sole arbitrator under the Special Agreement of January 23rd, 1925. The undersigned informed the Minister of Foreign Affairs of the Netherlands and the Minister of the United States of America at The Hague that he was willing to accept the task.

On October 16th and 23rd, 1925, the International Bureau of the Permanent Court of Arbitration transmitted to the Arbitrator the *Memoranda* of the United States of America [1] and the Netherlands [2] with the documents in support thereof. On April 23rd and 24th, 1926, the *Counter-Memoranda* of the Netherlands [3] and the United States of America [4] with documents in support thereof were transmitted to the Arbitrator through the International Bureau.

Availing himself of the authority given him under Article III of the Special Agreement, the Arbitrator transmitted through the intermediary of the International Bureau of the Permanent Court of Arbitration to each party a list of points upon which he was desirous to obtain *further written Explanations*. This request was obtained by the Netherlands on December 24th, 1926, and by the United States of America on January 6th, 1927. The Arbitrator received through the intermediary of the International Bureau the Explanations of the Netherlands [5], with documents in support thereof, on March 24th, 1927, and those of the United States of America [6] on April 22nd, 1927.

On May 19th, 1927, the Arbitrator received through the International Bureau a memorandum of the American Government, dated May 2nd, 1927.

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[1] Memorandum of the United States, with appendix, 219 pages and 12 maps in folder.

[2] Memorandum of the Netherlands, with appendices, 83 pages, 4 maps and sketches and reproduction of photos in folder, British Admiralty Chart 2575, with inscriptions, six copies of diplomatic correspondence between the United States Department of State and the Netherlands Legation in Washington.

[3] Counter-Memorandum of the Netherlands, with appendices, 95 pages and 1 map.

[4] Counter-Memorandum of the United States, with appendix, 121 pages, 3 photos and 3 maps.

[5] Explanations of the Netherlands, 146 pages and XX annexes (25 maps and sketches, reproduction of Dampiers' Journal, copies of entries of log-books and biographical notice concerning the late Dr. Adriani).

[6] Explanations of the United States, with appendix, 68 pages.

The United States expressed the desire to make a *Rejoinder* as provided for in Article III of the Special Agreement "unless the Arbitrator prefers not to receive it, in which case none will be filed, unless one is filed by the Netherlands Government". At the same time the United States Government made an application for an extension of three months beyond the period mentioned in Article III for the filing of a Rejoinder, and invoked in support of this application the fact that the Explanations of the Netherlands were considerably more voluminous than the Memorandum, and contained a large mass of untranslated Dutch documents, and more than 25 maps.

The Netherlands Government had already on May 9th, 1927, declared that they renounced the right to submit a Rejoinder, making however the express reservation that they maintained the points of view which the American Explanations contested.

The Arbitrator, on the analogy of the rule laid down in the last paragraph of Article II, invited the Netherlands Government by a letter dated May 13th, 1927, and addressed to the International Bureau, to state their point of view in regard to the American application.

The Netherlands Government having declared that they had no objection to the extension of the time-limit in conformity with the American application, the Arbitrator, in a letter to the International Bureau dated May 23rd, 1927, informed the Parties that the extension of three months beyond the period provided for in Article III for the filing of a Rejoinder was granted.

On October 21st, 1927, the Rejoinder of the United States[1] was transmitted by the International Bureau to the Arbitrator.

No observation by either Party was made during the proceedings in regard to the fact that one of the documents provided for in the Agreement of January 23rd, 1925, was not filed within the time-limits fixed in the said Agreement.

On March 3rd, 1928, the Arbitrator informed the Parties through the International Bureau of the Permanent Court of Arbitration, that, in conformity with the last paragraph of Article III, *the case was closed.*

On this fourth day of April 1928, i.e. within the period fixed by Article VII, the three copies of the award are deposited with the International Bureau of the Permanent Court of Arbitration, at The Hague.

In conformity with the second paragraph of Article IV of the Special Agreement, the Arbitrator selected the *English language*. Having regard to the fact that geographical names are differently spelt in different documents and on different maps, the Arbitrator gives geographical names as shown on the British Admiralty Chart 2575, as being the most modern of the large scale maps laid before him. Other names and, if necessary, their variations, are given in bracket or parenthesis.

In accordance with Article VIII, paragraph 3, the costs of procedure are fixed at £140.

II.

The *subject of the dispute* is the sovereignty over the Island of Palmas (or Miangas). The Island in question is indicated with precision in the preamble to the Special Agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the "Island of Palmas" and the Netherlands to the

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[1] Rejoinder of the United States, with appendix, 126 pages and 8 maps.

"Island of Miangas", does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the Special Agreement or another island or group of islands which might be designated by the name of Miangas or a similar name.

It results from the evidence produced by either side that Palmas (or Miangas) is a single, isolated island, not one of several islands clustered together. It lies about half way between Cape San Augustin (Mindanao, Philippine Islands) and the most northerly island of the Nanusa (Nanoesa) group (Netherlands East Indies).

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The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21st, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General Wood had already visited the island "about the year 1903", but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 21st, 1906, is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26th, 1906, and the certificate delivered on January 21st by First Lieutenant Gordon Johnston to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the "archipelago known as the Philippine Islands", as delimited by Article III of the Treaty of Peace between the United States and Spain, dated December 10th, 1898 (hereinafter also called "Treaty of Paris"), and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31st, 1906, and leading up to the conclusion of the Special Agreement of January 23rd, 1925.

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Before beginning to consider the arguments of the Parties, we may at the outset take as established certain *facts which, according to the pleadings, are not contested.*

1. The Treaty of Peace of December 10th, 1898, and the Special Agreement of January 23rd, 1925, are the only international instruments laid before the Arbitrator which refer precisely, that is, by mathematical location or by express and unequivocal mention, to the island in dispute, or include it in or exclude it from a zone delimited by a geographical frontier-line. The scope of the international treaties which relate to the "Philippines" and of conventions entered into with native Princes will be considered in connection with the arguments of the Party relying on a particular act.
2. Before 1906 no dispute had arisen between the United States or Spain, on the one hand, and the Netherlands, on the other, in regard specifically to the Island of Palmas (or Miangas), on the ground that these Powers put forward conflicting claims to sovereignty over the said island.

3. The two Parties claim the island in question as a territory attached for a very long period to territories relatively close at hand which are incontestably under the sovereignty of the one or the other of them.

4. It results from the terms of the Special Agreement (Article I) that the Parties adopt the view that for the purposes of the present arbitration the island in question can belong only to one or the other of them. Rights of third Powers only come into account in so far as the rights of the Parties to the dispute may be derived from them.

* * *

The dispute having been submitted to arbitration by Special Agreement, each Party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute. As regards the *order in which the Parties' arguments should be considered*, it appears right to examine first the title put forward by the United States, arising out of a treaty and itself derived, according to the American arguments, from an original title which would date back to a period prior to the birth of the title put forward by the Netherlands; in the second place, the arguments invoked by the Netherlands in favour of their title to sovereignty will be considered; finally the result of the examination of the titles alleged by the two Parties must be judged in the light of the mandate conferred on the Arbitrator by Article I, paragraph 2, of the Special Agreement.

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In the absence of an international instrument recognized by both Parties and explicitly determining the legal position of the Island of Palmas (or Miangas), *the arguments of the Parties* may in a general way be summed up as follows:

The *United States*, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Münster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested.

The Netherlands Government's main argument endeavours to show that the Netherlands, represented for this purpose in the first period of colonisation by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with native princes of the Island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

* * *

Before considering the Parties' arguments, two points of a general character are to be dealt with, one relating to the substantive law to be applied, namely the rules on territorial sovereignty which underly the present case, and the other relating to the rules of procedure, namely the conditions under which the Parties may, under the Special Agreement, substantiate their claims.

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In the first place the Arbitrator deems it necessary to make some general remarks on *sovereignty in its relation to territory.*

The Arbitrator will as far as possible keep to the terminology employed in the Special Agreement. The preamble refers to "sovereignty over the Island of Palmas (or Miangas)", and under Article I, paragraph 2, the Arbitrator's task is to "determine whether the Island of Palmas (or Miangas) in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America". It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty".

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is. on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title—cession conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non dissimilar decisions of the Supreme Court of the United States of America that in the case of the State of Indiana *v.* State of Kentucky (136 U.S. 479) 1890, where the precedent of the case of Rhode Island *v.* Massachusetts (4 How. 591, 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty.

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The United States in their Counter-Memorandum and their Rejoinder maintain the view that statements without *evidence* to support them cannot be taken into consideration in an international arbitration, and that evidence is not only to be referred to, but is to be laid before the tribunal. The United States further hold that, since the Memorandum is the only document necessarily to be filed by the Parties under the Special Agreement, evidence in support of the statements therein made should have been filed at the same time. The Netherlands Government, particularly in the Explanations furnished at the request of the Arbitrator, maintains that no formal rules of evidence exist in international arbitrations and that no rule limiting the freedom of the tribunal in forming its conclusions has been established by the Special Agreement of January 23rd, 1925. They hold further that statements made by a government in regard to its own acts are evidence in themselves and have no need of supplementary corroboration.

Since a divergence of view between the Parties as to the necessity and admissibility of evidence is a question of procedure, it is for the Arbitrator to decide it under Article V of the Special Agreement.

The provisions of Article II of the Special Agreement to the effect that documents in support of the Parties' arguments are to be annexed to the Memoranda and Counter-Memoranda, refers rather to the time and place at which each Party should inform the other of the evidence it is producing, but does not establish a necessary connection between any argument and a document or other piece or evidence corresponding therewith. However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure.

The provisions of the Hague Convention of 1907 for the peaceful settlement of international disputes are, under Article 51, to be applied, as the case may be, as subsidiary law in proceedings falling within the scope of that convention, or should serve at least to construe such arbitral agreements. Now, Articles 67, 68 and 69 of this convention admit the production of documents apart from that provided for in Article 63 in connection with the filing of cases, counter-cases and replies, with the consent, or at the request of the tribunal. This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant in its opinion.

The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinary limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. The limitation to written explanations excluded oral procedure; but it is not to be construed as excluding documentary evidence of any kind. It is for the Arbitrator to decide both whether allegations do or— as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated.

Failing express provision, an arbitral tribunal must have entire freedom to estimate the value of assertions made by the Parties. For the same reason, it is entirely free to appreciate the value of assertions made during proceedings at law by a government in regard to its own acts. Such assertions are not properly speaking legal instruments, as would be declarations creating rights; they are statements concerning historical facts. The value and the weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal.

For the reasons stated above the Arbitrator is unable to construe the Special Agreement of January 23rd, 1925, as excluding the subsidiary application of the above-mentioned articles of the Hague Convention or the taking into consideration of allegations not supported by evidence filed at the same time. No documents which are not on record have been relied upon, with the exception of the Treaty of Utrecht—invoked however in the Netherlands Counter-Memorandum—the text of which is of public notoriety and accessible to the Parties, and no allegation not supported by evidence is taken as foundation for the award. The possibility to make Rejoinder to the Explanations furnished at the request of the Arbitrator on points contained in the Memoranda and Counter-Memoranda and the extension of the time-limits for filing a Rejoinder has put both Parties in a position to state—under fair conditions—their point of view in regard to that evidence which came forth only at a subsequent stage of the proceedings.

III.

The *title alleged by the United States of America* as constituting the immediate foundation of its claim is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the Explanations of the United States Government, contains the following passage:

> The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none."

Whilst there existed a divergence of views as to the extension of the cession to certain Spanish islands outside the treaty limits, it would seem that the cessionary Power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.

One observation, however, is to be made. Article III of the Treaty of Paris, which is drafted differently from the preceding Article concerning Porto

Rico, is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty. As already stated the Island of Palmas lies within the lines traced by the Treaty. Article III may therefore be considered as an affirmation of sovereignty on the part of Spain as regards the Island of Palmas (or Miangas), and this right or claim of right would have been ceded to the United States, though the negotiations of 1898, as far as they are on the record of the present case, do not disclose that the situation of Palmas had been specifically examined.

It is recognized that the United States communicated, on February 3rd, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question arise whether—and, if so, how—the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

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As pointed out above, the United States bases its claim, as successor of Spain, in the first place on *discovery*. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonised by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

The documents supplied to the Arbitrator with regard to the discovery of the island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the "Talaos" Islands, the Palaos Islands and the Marianes. The United States Government, in its Rejoinder, however states that it does not specifically rely on the papers mentioned in the Spanish note.

It is probable that the island seen when the Palaos Islands were discovered, and reported as situated at latitude 5° 48′ North, to the East of Sarangani and Cape San Augustin, was identical with the Island of Palmas (or Miangas). The Island "Meanguis" mentioned by the Spanish Government and presumed by them to be identical with the Talaos—probably Talautse or Talauer Islands—seems in reality to be an island lying more to the south, to which, perhaps by error, the name of another island has been transferred or which may be identified with the island Tangulandang (Tangulanda or Tahoelandang) just south of Siau (Siaoe), the latter island being probably identical with "Suar" mentioned in the same report as lying close by. Tangulandang is almost the southernmost of the islands situated between Celebes and Mindanao, whilst Palmas (or Miangas) is the northernmost. On Tangulandang there is a place called Minangan, the only name, as it would seem, to be found on maps of the region in question which is closely similar to Miangas and the different variations of this word. The name of "Mananga" appears as that of a place on "Tagulanda" in official documents of 1678, 1779, 1896 and 1905, but is never applied to the island itself; it is therefore not probable that there exists a confusion between Palmas (Miangas) and Minangan (Manangan) in spite of the fact that both islands belonged to Tabukan. However there may exist some connection between Minangan and the island "Meanguis", reported by the Spanish navigators.

The above-mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

In its Rejoinder the United States Government gives quotations (translations) from a report of the voyages of Garcia de Loaisa which point to the fact that the Spanish explorer saw the Island of Palmas (Miangas) in October 1526.

The fact that an island marked as "I (Ilha) de (or das) Palmeiras", or by similar names (Polanas, Palmas), appears on maps at any rate as early as 1595 (or 1596) (the date of the earliest map filed in the dossier), approximately on the site of the Island of Palmas (or Miangas), shows that that island was known and therefore already discovered in the 16th century. According to the Netherlands memorandum, the same indications are found already on maps of 1554, 1558 and 1590. The Portuguese name (Ilha das Palmeiras) could not in itself decide the question whether the discovery was made on behalf or Portugal or of Spain; Linschoten's map, on which the name "I. das Palmeiras" appears, also employs Portuguese names for most of the Philippine Islands, which from the beginning were discovered and occupied by Spain.

It does not seem that the discovery of the Island of Palmas (or Miangas) would have been made on behalf of a Power other than Spain; or Portugal. In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain; for the relations between Spain and Portugal in the Celebes Sea during the first three quarters of the 16th century may be disregarded for the following reasons: In 1581, i.e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognized the separation when it concluded in 1648 with the Netherlands the Treaty of Münster—the earliest Treaty, as will be seen hereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations *inter se* of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese. This conclusion is corroborated by the wording of Article X of the Treaty of Utrecht of June 26th, 1714, which expressly maintains Article V of the Treaty of Münster, but only as far as Spain and the Netherlands are concerned. It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible effects of subsequent conquests and cessions may have been on such title before 1648.

The fact that the island was originally called, not, as customarily, by a native name, but by a name borrowed from a European language, and referring to the vegetation, serves perhaps to show that no landing was made or that the island was uninhabited at the time of discovery. Indeed, the reports on record which concern the discovery of the Island of Palmas state only that an island was "seen", which island, according to the geographical data, is probably identical with that in dispute. No mention is made of landing or of contact with the natives. And in any case no signs of taking possession or of administration by Spain have been shown or even alleged to exist until the very recent date to which the reports of Captain Malone and M. Alvarez, of 1919, contained in the United States Memorandum, relate.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an "inchoate title", a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjets the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore imcompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.

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In the second place the United States claim sovereignty over the Island of Palmas on the ground of recognition by Treaty. The Treaty of Peace of January 30th, 1648, called hereafter, in accordance with the practice of the Parties, the "Treaty of Münster", which established a state of peace between Spain and the States General of the United Provinces of the Netherlands, in Article V, deals with territorial relations between the two Powers as regards the East and West Indies (Article VI concerns solely the latter).

Article V, quoted in the French text published in the "Corps Universel Diplomatique du Droit des Gens", by J. Du Mont, Volume VI, Part I, 1728, page 430, runs as follows[1]:

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[1] The English translation given in the Memorandum of the United States runs as follows: "Treaty of Peace between Philip IV, Catholic King of Spain, and their Lordships the States General of the United Provinces of the Netherlands. Anno 1648, January 30th.

. . . .

Article V.

The navigation and trade to the East and West Indies shall be kept up and conformably to the grants made or to be made for that effect; for the security

La Navigation & Trafique des Indes Orientales & Occidentales sera maintenuë, selon & en conformité des Octroys sur ce donnés, ou à donner cy-aprés; pour seureté de quoy servira le present Traicté & la Ratification d'iceluy, qui de part & d'autre en sera procurée; Et seront compris sous ledit Traicté tous Potentats, Nations & Peuples, avec lesquels lesdits Seigneurs Estats, ou ceux de la Société des Indes Orientales & Occidentales en leur nom, entre les limites de leursdits Octroys sont en Amitié et Alliance; Et un chacun, sçavoir les susdits Seigneurs Roy & Estats respectivement demeureront en possession et jouiront de telles Seigneuries, Villes, Chasteaux, Forteresses, Commerce & Pays és Indes Orientales & Occidentales, comme aussi au Bresil & sur les costes d'Asie, Afrique & Amérique respectivement, que lesdits Seigneurs Roy & Estats respectivement tiennent et possedent, en ce compris specialement les Lieux & Places que les Portugais depuis l'an mil six cent quarante & un, ont pris & occupé sur lesdits Seigneurs Estats; compris aussi les Lieux & Places qu'iceux Seigneurs Estats cy-aprés sans infraction du present Traicté viendront à conquerir & posseder; Et les Directeurs de la Société des Indes tant Orientales que Occidentales des Provinces-Unies, comme aussi les Ministres, Officiers hauts & bas, Soldats & Matelots, estans en service actuel de l'une ou de l'autre desdites Compagnies, ou aiants esté en leur service, comme aussi ceux qui hors leur service respectivement, tant en ce Pays qu'au District, desdites deux Compagnies, continuent encor, ou pourront cy-aprés estre employés, seront & demeureront libres & sans estre molestez en tous les Pays estans sous l'obeïssance dudit Seigneur Roy en l'Europe, pourront voyager, trafiquer & frequenter, comme tous autres Habitans des Pays desdits Seigneurs Estats. En outre a esté conditionné & stipulé, que les Espagnols retiendront leur Navigation en telle manière qu'ils la tiennent pour le present és Indes Orientales, sans se pouvoir estendre

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whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people, with whom the said Lords the States, or members of the East and West India Companies in their name, within the limits of their said grants, are in friendship and alliance. And each one, that is to say, the said Lords the King and States, respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess. And the directors of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in the service of either of the said Companies, or such as have been in their service, as also such who in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said Lord the King in Europe; and may sail, traffic and resort, like all the other inhabitants of the countries of the said Lord and States. Moreover it has been agreed and stipulated, that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of those Low Countries shall not frequent the places which the Castilians have in the East Indies."

> plus avant, comme aussi les Habitans de ce Pays-Bas s'abstiendront de la frequentation des Places, que les Castillans ont és Indes Orientales.

This article prescribes no frontiers and appoints no definite regions as belonging to one Power or the other. On the other hand, it establishes as a criterion the principle of possession ("demeureront en possession et jouiront de telles seigneuries . . . . que lesdits Seigneurs Roy et Estats tiennent et possedent").

However liberal be the interpretation given, for the period in question, to the notions of "tenir" (hold) and "posséder" (possess), it is hardly possible to comprise within these terms the right arising out of mere discovery; i.e. out of the fact that the island had been sighted. If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms. The view here taken appears to be supported by other provisions in the same article. It is stipulated therein that "les Lieux & Places qu'iceux Seigneurs Estats cy-aprés sans infraction du present Traicté viendront à conquerir et posseder" shall be placed on the same footing as those which they possessed at the moment the treaty was concluded. In view of the interpretation given by Spain and Portugal to the right of discovery, and to the Bull *Inter Caetera* of Alexander VI, 1493, it seems that the regions which the Treaty of Münster does not consider as definitely acquired by the two Powers in the East and West Indies, and which may in certain circumstances be capable of subsequent acquisition by the Netherlands, cannot fail to include regions claimed as discovered, but not possessed. It must further be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the *status quo*. Whilst Spain may not extend the limits of her navigation in the East Indies, nationals of the Netherlands are only excluded from "places" which the Spaniards hold in the East Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish "places" of Netherlands navigation and commerce does not admit of an extensive interpretation; a "place", which moreover in the French of that period often means a fortified place, is in any case an actual settlement implying an actual radius of activity; Article VI, for instance, of the same treaty speaks of "lieux et places garnies de Forts, Loges et Chasteaux" (harbours, places, forts, lodgements or castles). For these reasons a title based on mere discovery cannot apply to the situation considered in Article V as already established.

Since the Treaty of Münster does not divide up the territories by means of a geographical distribution, and since it indirectly refuses to recognize title based on discovery as such, the bearing of the treaty on the present case is to be determined by the proof of possession at the critical epoch.

In connection herewith no precise elements of proof based on historical facts as to the display or even the mere affirmation of sovereignty by Spain over the Island of Palmas have been put forward by the United States. There is, however, one point to be considered in connection with the Treaty of Münster. According to a report, reproduced in the United States Explanations and made on February 7th, 1927, by the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines, the "Islands Miangis" ("Las Islas Miangis"), situated to the north-east of the "Island of Karekelan" (most likely identical with the

Nanusa N.E. of Karakelang, one of the Talauer Islands), after having been first in Portuguese, and then in Dutch possession, were taken by the Spaniards in 1606. The Spanish rule under which the Spanish Franciscan Fathers of the Philippines exercised the spiritual administration in the said islands, ended in 1666, when the Captain general of the Spanish Royal Armada dismantled all the fortified places in the Moluccas, making however before the "Dutch Governor of Malayo" a formal declaration as to the continuance of all the rights of the Spanish Crown over the places, forts and fortifications from which the Spaniards withdrew. There are further allegations as to historical facts in regard to the same region contained in a report of the Dutch Resident of Menado, dated August 12th, 1857, concerning the Talauer Islands (Talaud Islands). According to this report, in 1677 the Spaniards were driven by the Dutch from Tabukan, on the Talautse or Sangi Islands, and at that time—even "long before the coming of the Dutch to the Archipelago of the Moluccas"—the Talauer Islands (Karakelang) had been conquered by the Radjas of Tabukan.

According to the Dutch argument, considered hereafter, the Island of Palmas (or Miangas) together with the Nanusa and Talauer Islands (Talaud Islands) belonged to Tabukan. If this be exact, it may be considered as not unlikely that Miangas, in consequence of its ancient connection with the native State of Tabukan, was in 1648 in at least indirect possession of Spain. However this point has not been established by any specific proof.

But the question whether the Dutch took possession of Tabukan in 1677 in conformity with or in violation of the Treaty of Münster can be disregarded, even if—in spite of the incompleteness of the evidence laid before the Arbitrator—it were admitted that the Talautse (Sangi) Islands with their dependencies in the Talauer- and Nanusa-Islands, Palmas (or Miangas) possibly included, were "held and possessed" by Spain in 1648. For on June 26th, 1714, a new Treaty of Peace was concluded at Utrecht, which, in its Article X, stipulates that the Treaty of Münster is maintained as far as not modified and that the above-quoted Article V remains in force as far as it concerns Spain and the Netherlands.

Article X, quoted in the French text published in "Actes, Mémoires et autres pièces authentiques concernant la Paix d'Utrecht", Vol. 5, Utrecht, 1715, runs as follows:

> Le Traité de Munster du 30 janvier 1648 fait entre le feu Roi Philippe 4 & les Seigneurs Etats Generaux, servira de base au présent Traité, & aura lieu en tout, autant qu'il ne sera pas changé par les Articles suivans, & pour autant qu'il est applicable, & pour ce qui regarde les Articles 5 & 16 de ladite Paix de Munster, ils n'auront lieu qu'en ce qui concerne seulement lesdites deux hautes Puissances contractantes & leurs Sujets [1].

If—quite apart from the influence of an intervening state of war on treaty rights—this clause had not simply meant the confirmation of the principle of actual possession—at the time of the conclusion of the Treaty of Utrecht—as regulating the territorial status of the Contracting Powers in the East

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[1] *Translation.* The Treaty of Münster of January 30th, 1648, concluded between the late King Philip IV and the States General, shall form the basis of the present Treaty and shall hold good in every respect in so far as it is not modified by the following articles, and in so far as it is applicable, and, as regards Articles 5 and 16 of the said Peace of Münster, these Articles shall only hold good in so far as concerns the aforesaid High Contracting Parties and their subjects.

and West Indies and if, on the contrary, a restitution of any territories acquired before the war in violation of the Treaty of Münster had been envisaged, specific provisions would no doubt have been inserted.

There is further no trace of evidence that Spain ever claimed at a later opportunity, for instance in connection with the territorial rearrangements at the end of the Napoleonic Wars, the restitution of territories taken or withheld from her in violation of the Treaties of Münster or Utrecht.

As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty of Utrecht a title to sovereignty over the island which, in accordance with the said Treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.

It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said Treaties may have conferred upon her in regard to Palmas (or Miangas). Moreover even if she had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the "Philippines" could not be binding upon the Netherlands and, as such Treaties do not mention the island in dispute, they are not available even as indirect evidence.

We thus come back to the question whether, failing any Treaty which, as between the States concerned, decides unequivocally what is the situation as regards the island, the existence of territorial sovereignty is established with sufficient soundness by other facts.

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Although the United States Government does not take up the position that Spanish sovereignty must be recognized because it was actually exercised, the American Counter-Case none the less states that "there is at least some evidence of Spanish activities in the island". In these circumstances it is necessary to consider *whether and to what extent the territorial sovereignty of Spain was manifested* in or in regard to the Island of Palmas (or Miangas). Here it may be well to refer to a passage taken from information supplied by the Spanish to the American Government and communicated by the latter to the Netherlands Legation at Washington, in a note dated April 25th, 1914. The passage in question is reproduced in the text and in the annex of the United States' Memorandum, and runs as follows:

> It appears, therefore, that this Island of Palmas or Miangas, being within the limits marked by the Bull of Alexander the Sixth, and the agreement celebrated between Spain and Portugal regarding the possession of the Maluco, must have been seen by the Spaniards on the different voyages of discovery which were made in these parts, and that it belonged to Spain, at least by right, until the Philippine Archipelago was ceded by the Treaty of Paris; but precise data of acts of dominion which Spain may have exercised in this island have not been found.
>
> This is the data and information which we have been able to find referring to said island, with which without doubt, because of the small importance it had, the discoverers did not occupy themselves, neither

> afterwards the governors of the Philippines, nor the historians and chroniclers, such as Herrera and Navarrette and the fathers Colin and Pastelle of the Society of Jesus, who refer in their works to the above-mentioned data without detailing any information about the said island.

It further results from the Explanations furnished by the Government of the United States at the request of the Arbitrator that an exhaustive examination of the records which were handed over to the American authorities under Article VIII of the Treaty of Paris, namely such as pertain to judicial, notarial and administrative matters, has revealed nothing bearing on the allegations made by natives of Palmas in 1919 to Captain Malone and Mr. Alvarez on the subject of regular visits of Spanish ships, even gunboats, and on the collection of the "Cedula"-tax. This being so, no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times—quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute.

Apart from the facts already referred to concerning the period of discovery, and the mention of a letter which was sent on July 31st, 1604, by the Spanish pilot Bartolome Pérez from the Island of Palmas and the contents of which are not known, and apart from certain allegations as to commercial relations between Palmas and Mindanao, the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas.

Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government in the Philippines. In a letter emanating from the Provincial Prelacy of the Franciscan Order of Minors mentioned above, it is said that the Islands of "Mata and Palmas should belong (deben pertenecer) to the group of Islands of Sarangani and consequently to the District of Dávao in the Island of Mindanao". It is further said in this letter that "the Island of Palmas, as it was near to Mindanao, must have been administered (debió ser administrada) spiritually in the last years of Spanish dominion by the fathers who resided in the District of Dávao". It results from the very terms of this letter, which places the "Islands Miangis" to the north-east of the Island Karakelang ("Karekelan"), that these statements, which suppose the existence of Mata, are not based immediately on information taken on the spot, but are rather conjectures of the author as to what seems probable.

In the Rejoinder filed by the United States Government there is an extract from a letter of the Dutch missionary Steller, dated December 9th, 1895. It appears from this letter that the Resident of Menado, at the same time as he set up the Netherlands coat of arms at Palmas (or Miangas), had had the intention to present a medal to the native Chief of the island, "because the said chief, recently detained in Mindanao on business, would not let the commanding officer of a Spanish warship force the Spanish flag upon him". These facts, supposing they are correct, are no proof of a display of sovereignty over Palmas (or Miangas); rather the contrary. If the Spanish naval authorities to whom the administrative inspection of the southern Philippine Islands belonged, were convinced that the Island of Palmas was Spanish territory, the refusal of the native chief to accept the Spanish flag would naturally have led either to direct action on the Island in order to affirm Spanish sovereignty, or, if the Netherlands rights had been invoked, to negotiations such as were the sequel to General Wood's visit in 1906.

As regards the information concerning the native language or knowledge of Spanish, even if sufficiently established, it is too vague to indicate the existence of a political and administrative connection between Palmas (or Miangas) and Mindanao.

In a telegram from General Leonard Wood to the Bureau of Insular Affairs, reproduced in the American Explanations, it is stated that "the administrative inspection of the islands in the south (i.e. of the Philippines), especially round their coasts, belonged absolutely to the naval Spanish authorities". As papers pertaining to military and naval matters were not handed over to the American authorities under the Treaty of Paris, the files relating to the said administrative inspection are not in the possession of the United States. The fact that not the ordinary provincial agencies but the navy were in charge of the inspection of the islands in the south, together with another incidentally mentioned by Major General E. S. Otis; in a report of August 31st, 1899, namely the existence of a state of war or at least of subdued hostility amongst the Moros against Spanish rule, leads to the very probable—though not necessary—conclusion that the complete absence of evidence as to display of Spanish sovereignty over the Island of Palmas is not due to mere chance, but is to be explained by the absence of interest of Spain in the establishment or the maintenance of her rule over a small island lying far off the coast of a distant and only incompletely subdued province.

It has been remarked, not without reason, that the United States, having acquired sovereignty by session only in 1898, were at some disadvantage for the collection of evidence concerning the original acquisition and the display of sovereignty over Palmas. The Arbitrator has no possibility of taking into account this situation; he can found his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion. Moreover it does not appear that the Spanish Government refused to furnish the documents requested.

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Among the methods of indirect proof, not of the exercise of sovereignty, but of its existence in law, submitted by the United States, there is the *evidence from maps*. This subject has been very completely developed in the Memorandum of the United States and has also been fully dealt with in the Netherlands Counter-Memorandum, as well as in the United States Rejoinder. A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern. even official or semi-official maps seem wanting in accuracy. Thus, a comparison of the maps submitted to the Arbitrator shows that there is doubt as to the existence or the names of several islands which should be close to Palmas (or Miangas), and in about the same latitude. The St. Joannes Islands, Hunter's Island and the Isle of Mata are shown, all or some of them, on several maps even of quite recent date, although their existence seems very doubtful. The non-existence of the Island of Mata and the identity of the St. Joannes and Hunter's Islands with Palmas, though they appear on several maps as distinct and rather distant islands, may, on the evidence laid before the Arbitrator, be considered as fairly certain.

The "*Century Atlas*" (Exhibit No. 8 of the American Memorandum) and the map published in 1902 by the *Bureau of Insular Affairs of the United States* (Exhibit No. 11), show "Mata I.", "Palmas I." and "Haycock or Hunter I". The Spanish map (Captain Montero), reproduced by the *War Department* of the United States (Exhibit No. 9) also mentions these three islands, although "Haycock I." and "Hunter I." are here different islands. The same is to be said of the map of the Challenger Expedition of 1885. The only large scale map submitted to the Arbitrator which, as appears from inscriptions on it, is directly based on researches on the spot, is that attached to the Netherlands Memorandum (British Admiralty Chart No. 2575). Now this map shows neither an island of Mata, nor of Hunter, nor of any other name in the regions where they should be, according to the other maps, and Haycock Island is indicated at two points other than that adopted in "Exhibits Nos. 8 & 11". Whatever be the accuracy of the British Admiralty Chart for the details in question, these points show that only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas (or Miangas). The maps which, in the view of the United States, are of an official or semi-official character and are of Spanish or American origin are that of Captain Montero and that of the *Insular Department*, referred to above (Exhibits Nos. 8 & 11). The first mentioned gives for that matter no indication as to political frontiers, and the second only reproduces the lines traced by the treaty of December 10th, 1898. They have therefore no bearing on the point in question, even apart from the evident inaccuracies, at least as regards Hunter Island, which they appear to contain precisely in the region under consideration.

As regards maps of Dutch origin, there are in particular two which, in the view of the United States, possess an official character and which might exclude Palmas (or Miangas) from the Dutch possessions. The first of these, published in 1857 by M. Bogaerts, lithographer to the Royal Military Academy, and dedicated to the Governor of that institution, if it possesses the official character attributed to it by the American Memorandum and disputed by the Netherlands Counter-Memorandum, might serve to indicate that the island was not considered at the period in question as Dutch but as Spanish territory. Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights. The importance of this map can only be judged in the light of facts prior or subsequent to 1857, which the Netherlands Government alleges in order to prove the exercise of sovereignty over the Island of Palmas (or Miangas); these facts, together with the cartographical evidence relied upon in their support or submitted in connection with the question of the right location of the Island or Islands called "Meangis", will be considered at the same time as the Netherlands' arguments. While Bogaerts' map does not, as it stands, furnish proof of the recognition of Spanish sovereignty, it must further be pointed out that it is inaccurate as regards the group of islands marked "Meangis" and indicated on this map somewhat to the north of "Nanoesa", as well as in other points, for example the shape of Mindanao and the colouring of certain small islands.

The conclusions drawn in the United States Memorandum from the second map, i.e. the atlas published by the Ministry for the Colonies (1897-1904) appear to be refuted by the information contained in the Netherlands Counter-Memorandum. A copy of a detailed map from the same atlas is there shown which represents "P. Miangis (E. Palmas)" amongst Dutch possessions, not only by the coloured contours, but also because it indicates the Sarangani Islands as "Amerikaansch". The general map, on the other hand, reproduced as "Exhibit No. 10" in the American Memorandum, excludes the former island from Dutch territory, by a line of demarcation between the different colonial possessions. There seems to be no doubt that the special map must prevail over the general, even though the latter was published three months later.

As to the special map contained in the first edition of the same atlas (Atlas der Nederlandsche Bezittingen in Oost-Indië [1883-1885]), where the "Melangies" are reproduced as a group of islands north of the Nanusa and distinct from "Palmas", the same observations apply as to Bogaerts' map, which is fairly similar on this point. The "Explanations" filed by the Netherlands Government make it clear that the authors of the map did not rely on new and authentic information about the region here in question, but reproduced older maps.

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In the last place there remains to be considered *title arising out of contiguity*. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the Island of Palmas (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.

It is, however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (e.g. the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola; Lafontaine, Pasicrisie internationale, pp. 201-209) would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries.

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palmas (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.

IV.

The *Netherlands' arguments* contend that the East India Company established Dutch sovereignty over the Island of Palmas (or Miangas) as early as the 17th century, by means of conventions with the princes of Tabukan (Taboekan) and Taruna (Taroena), two native chieftains of the Island of Sangi (Groot Sangihe), the principal island of the Talautse Isles (Sangi Islands), and that sovereignty has been displayed during the past two centuries.

In the annexes to the Netherlands Memorandum the texts of conventions concluded by the Dutch East India Company (and, after 1795, by the Netherlands State), in 1677, 1697, 1720, 1758, 1828, 1885 and 1899 with the Princes, Radjas or Kings, as they are indiscriminately called, of Tabukan, Taruna and Kandahar (Kandhar)-Taruna. All these principalities are situated in the Northern part of the Island of Sangi (Groot Sangihe or Sanghir) and, at any rate since 1885, include, besides parts of that island, also certain small islands further north, the Nanusa Islands—all incontestably Dutch—and, according to the Netherlands, also the Island of Palmas (or Miangas). These successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Their eminently political nature is confirmed by the supplementary agreements of 1771, 1779 and 1782, concerning the obligations of vassals in the event of war. The dependence of the vassal State is ensured by the important powers given to the nearest representative of the colonial Government and, in the last resort, to that Government itself. The most recent of these contracts prior to the cession of the Philippines to the United States, that of 1885, contains, besides the allocation of powers for internal administration, the following provisions also, in regard to international interests: exclusion of the Prince from any direct relations with foreign Powers, and even with their nationals in important economic matters; the currency of the Dutch Indies to be legal tender; the jurisdiction over foreigners to belong to the Government of the Dutch Indies; the vassal is bound to suppress slavery, the White Slave Traffic and piracy; he is also bound to render assistance to the shipwrecked.

Even the oldest contract, dated 1677, contains clauses binding the vassal of the East India Company to refuse to admit the nationals of other States, in particular Spain, into his territories, and to tolerate no religion other than protestantism, reformed according to the doctrine of the Synod of Dordrecht. Similar provisions are to be found in the other contracts of the 17th and 18th centuries. If both Spain and the Netherlands had in reality displayed their sovereignty over Palmas (or Miangas), it would seem that, during so long a period, collisions between the two Powers must almost inevitably have occurred.

The authenticity of these contracts cannot be questioned. The fact that true copies, certified by evidently the competent officials of the Netherlands Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the production of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of texts may have any practical importance for the evidence in question.

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The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective. The sovereignty of the Netherlands over the Sangi and Talauer Islands is moreover not disputed. There is here a manifestation of territorial sovereignty normal for such a region. The questions to be solved in the present case are the following:

Was the island of Palmas (or Miangas) in 1898 *a part of territory under Netherlands' sovereignty?*

Did this sovereignty actually exist in 1898 *in regard to Palmas (or Miangas)* and are the facts proved which were alleged on this subject?

If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region.

According to the description of the frontiers of the territory of Taruna annexed to the contract of 1885, the list of dependencies of Taruna on the Talauer Islands mentions first the different islands of Nanusa, and ends by the words "ten slotte nog het eiland Melangis (Palmas)", "and lastly the island Melangis (Palmas)".

The similar description of frontiers attached to the contract of 1899 states that the Islands of Nanusa (including the Island of "Miangas") belong to the territory of Kandahar-Taruna. If these two mentions refer to the Island of Palmas (or Miangas), it must be recognized that that island, at any rate nominally, belongs to the vassal State in question; it is by no means necessary to prove the existence of a special contract with a chieftain of Palmas (or Miangas).

However much the opinions of the Parties may differ as to the existence of proof of the display of Dutch sovereignty over the Island of Palmas (or Miangas), the reports, furnished by both sides, of the visit of General Wood, in January 1906, show that at that time there were at least traces of continuous relations between the island in dispute and neighbouring Dutch possessions, and even traces of Dutch sovereignty. General Wood noted his surprise that the Dutch flag was flying on the beach and on the boat which came to meet the American ship. According to information gathered by him, the flag had been there for 15 years and perhaps even longer. Since the contract of 1885 with Taruna and that of 1899 with Kandahar-Taruna comprise Palmas (or Miangas) within the territories of a native State under the suzerainty of the Netherlands and since it has been established that in 1906 on the said island a state of things existed showing at least certain traces of display of Netherlands sovereignty, it is now necessary to examine what is the nature of the facts invoked as proving such sovereignty, and to what periods such facts relate. This examination will show whether or not the Netherlands have displayed sovereignty over the Island of Palmas (or Miangas) in an effective continuous and peaceful manner at a period at which such exercise may have excluded the acquisition of sovereignty, or a title to such acquisition, by the United States of America.

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Before beginning to consider the facts alleged by the Netherlands in support of their arguments, there are two preliminary points, in regard to which the Parties also put forward different views, which require elucidation. These relate to questions raised by the United States: firstly the power of the

East India Company to act validly under international law, on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers; secondly the identity or non-identity of the island in dispute with the island to which the allegations of the Netherlands as to display of sovereignty would seem to relate.

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The acts of the *East India Company* (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Munster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to "tous Potentats, Nations & Peuples" with whom the said Companies, in the name of the States of the Netherlands, "entre les limites de leurdits Octroys sont en Amitié et Alliance". The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.

As regards *contracts between a State* or a Company such as the Dutch East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies, by means of contracts with the native authorities, which contracts leave the existing organisation more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory. There always remains reserved the question whether the establishment of such a system is not forbidden by the pre-existing rights of other States.

The point of view here adopted by the Arbitrator is—at least in principle—in conformity with the attitude taken up by the United States in the note already quoted above, from the Secretary of State to the Spanish Minister, dated January 7th, 1900, and relating to two small islands lying just outside the line drawn by the Treaty of Paris, but claimed by the United States under the said Treaty. The note states that the two islands "have not hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdrawn as a result of the recent war."

This system of contracts between colonial Powers and native princes and chiefs is even expressly approved by Article V of the Treaty of Münster quoted above; for, among the "Potentates, Nations and Peoples", with whom the Dutch State or Companies may have concluded treaties of alliance and friendship in the East and West Indies, are necessarily the native princes and chiefs.

The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

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As to the *identity of the island* in dispute with the islands "Melangis (Palmas)" and "Miangas" in the contracts of 1885 and 1899 respectively, this must be considered as established by the large scale map which was sent to the Governor General of the Netherlands Indies by the Resident of Menado in January 1886 and which indicates in different colours the administrative districts on the Sangi and Talauer Islands in almost complete conformity with the description of the territory of Taruna given in the annex to the contract of 1885, save that the name of Nanusa, applied to the group of seven islands by the contract, is there given to a single island of this group, usually called Merampi (Mehampi). This large scale map, prepared evidently for administrative purposes, of which a reproduction has been filed with the Explanations of the Netherlands Government, shows an isolated island "Palmas of Melangis" which, though not quite correct in size and shape and though about 40′ too much to the south and 20′ too much to the east, cannot but correspond to Palmas (or Miangas), since the most reliable detailed modern maps, in particular the British Admiralty Chart, show no other island but Palmas (or Miangas) between the Talauer or Nanusa Islands and Mindanao.

This comparatively correct location of the island is supported by earlier maps. The map edited at Amsterdam by Covens and Mortier at a date not exactly known, but certainly during the 18th century, shows at about the place of Palmas (or Miangas) a single island with the inscription "'t regte P° Menangus" (the right island Menangus) as distinguished from the "engelsche Eilanden Menangus" and from the group of the Nanusa. This map proves that before that time uncertainty had existed as to the real existence of one or several islands Menangus, an uncertainty evidently due in its origin to the mention of the existence of "Islands Meangis" made by the Englishman Dampier, in his book published in 1698.

In conformity with this statement by Covens and Mortier, the map contained in the book published in 1855 by the navigator Cuarteron shows a single island "Mianguis", not in exactly the place of the island in dispute, but distinct from the "Nanuse" and lying about midway between Cape San Augustin and the "Nanuse". Cuarteron's map shows "Mianguis" distinctly as a Dutch possession—by colour expressly indicated as relating to political boundaries; it is accompanied by geographical and statistical information and due to an author who travelled extensively in these parts (1841-1849), and against whose reliability not sufficient reasons have been given. Among other points the explanation gives for "Mianguis" the comparatively exact geographical location (latitude north 5° 33′ 30″ [Special Agreement 5° 35′]); longitude east of Rome 114° 42′ 00″ = 127° 12′ 53″ east of Greenwich (Special Agreement 126° 36′) and also detailed though evidently only approximative statistical information about the composition of the population. It further appears from Cuarteron's book that "Mianguis" is something apart from the Nanusa, though Cuarteron observes that the "Nanuse" Islands are little known by the geographers under the name of "Mianguis".

A proof of the fact that the Dutch authorities were quite aware of the identity of "Miangas" with the island charted on many maps as "Palmas" is to be found in the reports of the Commanders of the Dutch Government Steamer *Raaf* (November 1896) and of H.M.S. *Edi* (June 1898). These officers mention expressly the double name and give the almost exact nautical location of the island then visited.

One observation is however to be made. The island, shown on the maps and mentioned in the contracts, bears different names: Melangis, Miangas, Miangus, Mianguis. In different documents referred to in the Netherlands Memorandum and Counter-Memorandum more than a dozen other variations of the name appear, although in the opinion of the Netherlands Government they all concern the same island. These differences, sometimes considerable at first sight, are sufficiently explained by the statements of linguistic experts, produced by the Netherlands Government. The peculiarity of the native language from which the name of the island is borrowed and the difficulty of transposing the sounds of this language into a western alphabet seem not only to make comprehensible the existence of different spellings, but to explain why precisely these variations have appeared. Differences of spelling are even recorded as such in documents as early as a letter, dated May 11th, 1701, of the Governor of the Moluccas and a report, dated September 12th, 1726. Moreover, the difference of spelling would not justify the conclusion that the more or less different names referred to different islands; for in the whole region in question no other island has been mentioned to which these names—or at least most of them—would better apply; for the Island of Tangulandang, with the place Minangan already referred to, is clearly distinguished from the island of Miangas in the documents of both the 18th and the 19th centuries relating to the dependencies of Tabukan.

No evidence has been submitted to support the supposition that the island, appearing on some old maps as "'t regte Menangus" would be identical with Ariaga (Marare), which, according to a statement of Melvill van Carnbee, mentioned in the United States Memorandum, is uninhabited.

Great stress is laid in the Rejoinder of the United States on the fact that the Nanusa Isles or some islands of this group are designated by several distinguished cartographers and navigators of the 19th century as "Islands Meangis" or by some similar name, and that amongst these cartographers and sailors some are Dutchmen, in particular Baron Melvill van Carnbee. This statement which is, no doubt, exact, cannot however prove that the island Miangas mentioned as a dependency of Tabukan or Taruna or Kandahar-Taruna is to be identified with the "Is. Meangi" and therefore with the Nanusa Isles. It is clear that the cartographers referred to apply the name of "Iles Meangis" or some similar name to a group of islands. On the other hand, the island the identity of which is disputed can be but a single, distant, isolated island. The attribution of the name Meangis to the Nanusa seems to be an error, because the official documents laid before the Arbitrator which belong about to the same period as the maps mentioning the "Is. Meangis", make a clear distinction between the principal islands composing the Nanusa and the island of Miangas or Meangas or Melangis, though the latter is considered as "onderhoorig" of the Nanusa Isles. The identification of the Nanusa with "Meangis" Islands may be explained by the desire to locate somewhere the Meangis Islands, famous since Dampier's voyage. Seeing that up to very recent times an extraordinary inexactitude about the names and the location of the islands in precisely that part of the Celebes Sea is shown to exist by almost all the maps filed by the Parties, including the two maps of Melvill van Carnbee, an erroneous attribution of the name "Miangas", even by Dutch cartographers, is easily possible.

It is not excluded that the three "English Menangis Islands" which are located on some maps to the east of the "right Menangis" and of which a detailed map with indication of the depth of the surrounding sea has been filed, did in fact exist, but have disappeared in consequence of earthquakes such as reported by Cuarteron.

Finally it may be noted that the information concerning Palmas or the other islands such as St. Juan, Mata, Hunter Island, which are to be identified with it, contains, except for the most recent period, nothing which relates to the population of the island; moreover all these names, given to the island, except Mata, may have been given by navigators who did not land or get into contact with the natives. Miangas however is a native name, which the inhabitants must have communicated to the chiefs to whom they were subject and to the navigators with whom they came in touch. The name of Miangas as designating an inhabited place (negorij) is much older than the establishment of the more centralized village in 1892.

It results from these statements that, when the contracts of 1885 and 1899 mentioned, in connection with, but distinct from the Nanusa, a single island Melangis or Miangis as belonging to Taruna or Kandahar-Taruna, only the island in dispute can have been meant, and that this island has been known under these same or similar names at least since the 18th century. No plausible suggestion has been made as to what the single island "Miangas", the existence of which cannot be doubted, might be, if it is not the island in dispute.

The special map on sheet 14 (issued in 1901) of the "Atlas van Nederlandsch Oost-Indië" (1897-1904), in showing "P. Miangis (Palmas E.)" as a Dutch possession in the place indicated in the Special Agreement, is in conformity with earlier maps and information, particularly with the Government's special map of 1886. Under these circumstances no weight can be given to the fact that on Bogaerts' map of 1857 and in the atlas of Stemfort and

Siethoff (1883-85), as well as on other maps, a group of islands called Meangis, or a similar name, appears.

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The preliminary questions being settled, the evidence laid before the Arbitrator by the Netherlands Government in support of its claim is now to be considered.

As regards the documents relating to the 17th *and* 18th *centuries*, which in the view of the Netherlands show that already at that date the Prince of Tabukan had not only claimed, but also actually displayed a certain authority over Palmas (or Miangas), the following must be noted:

The Netherlands Government gives great weight to the fact that Dutch navigators who, in search of the islands Meangis mentioned by Dampier, were sailing in the seas south of Mindanao and whose reports are at least in part preserved, not only came in sight of Palmas (or Miangas), but were able to state that the island belonged to the native State of Tabukan, which was under Dutch suzerainty as shown by the contracts of November 3rd, 1677, and September 26th, 1697.

The existence of Dutch rule would be proved by the fact that the Prince's flag—i.e. the Dutch East India Company's flag—was seen being waved by the people of the island when the Dutch ships *De Bye*, *Larycque* and *De Peer* were in sight of the island on November 21st, 1700, but were prevented from landing by the conditions of the sea. The commander of the *Larycque*, who had already sighted the island on November 12th of the same year, was instructed to make more precise investigations by landing, and he was able to do so on December 9th and 10th. Not only was the Prince's flag again hoisted by the natives, but the inhabitants informed the sailors that the name of the island was "Meangis". They gave to the commander a document—lost since that time—which, dating from 1681 and emanating from Marcus Lalero, the late king of Tabukan, whose existence and death are confirmed by the contract of 1697, stated the allegiance of the people of "Miangis" towards Tabukan. There exists however only an indirect report on this visit of December 10th, 1700, namely a letter dated May 11th, 1701, and sent by the Governor in Council of the Moluccas at Ternate to the Governor General and India Council. In this letter, based, no doubt, on information furnished by the commander of the *Larycque*, who had reached Ternate on December 29th, 1700, the Governor says that the island in question is the farthest of the Talauer islands and that its name, correctly spelt, is not "Meangis", but "Mayages".

These statements as well as the circumstance that all the reports without any mention of neighbouring islands, speak of a single island, the shape of which corresponds fairly with that of Palmas (or Miangas), would make it almost certain that the island in question is in fact Palmas (or Miangas), unless the nautical observations given in the report mentioned above (4° 49′; 4° 37′; 5° 9′) might point to the Nanusa group, to which the allegiance with Tabukan would equally apply. These observations, though no doubt subject to error, would however seem to offer relatively more guarantee of accuracy than those based on the length of time taken to cover a distance at sea, mainly relied upon in the Netherlands Memorandum for the location of the island. Since, however, no other single island in those parts of the Sea of Celebes seems to exist, and since it is most unlikely that the navigators would on none of the three visits in November and December have sighted and mentioned neighbouring islands, there is at least a great probability that the island visited by the *Larycque* on December 10th, 1700, was Palmas (or Miangas).

The mention of an island "Meamgy", in connection with, but distinct from the Nanusa, appears again in a document, dated November 1st, 1701, concerning regulations as to criminal justice (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East India Company) in the native State of Tabukan, to which the island visited December 10th, 1700, was reported to belong. The fact that the regulations for Tabukan are, by an express provision, declared applicable to the "islands of Nanusa and Meamgy thereunder included" proves that an island of the later name was known and deliberately treated as belonging to the vassal State of Tabukan.

In a report of the Governor of Ternate, dated June 11th, 1706, the island "Miangas" is mentioned as the northernmost of the dependencies of the native States of Tabukan and Taruna, in connection with "Kakarotang" (Onrata or Kakarutan on the Brit. Adm. map), one of the Nanusa, and explicitly identified with the island first seen by the *Larycque* on November 21st, 1700. Finally, another report of the Governor of Ternate, dated September 12th, 1726, mentions a decision on the question whether 80 Talauers (inhabitants of the Talauer islands) who had arrived at Taruna from the island "Meangas off (or) Mejages" were subjects of Taruna or of Tabukan. This island is expressly identified with that which was visited in 1700 by the commander of the *Larycque*.

This documentary evidence, taken together with the fact that no island called Miangas or bearing a similar name other than Palmas (or Miangas) seems to exist north of the Talautse (Sangi) and Talauer Isles, leads to the conclusion that the island Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East India Company as a part of their vassal State of Tabukan. This is the more probable for the reason that in later times, notably in an official report of 1825, the "far distant island Melangis" is mentioned again as belonging to Tabukan.

In the documents subsequent to 1825, Miangas (Melangis) appears as a dependency of Taruna, another of the vassal States in the north of Sangi (Groot Sangihe), which already in 1726 had claimed the island as its own. The date and circumstances of this transfer are not known, but it must have taken place before 1858; for a report of the Governor of Menado, dated December 31st, 1857, mentions the Nanusa and "Melangis" as parts of Taruna. This state of things has been maintained in the contracts of 1885 and 1899. From the point of view of international law, the transfer from one to another vassal State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Tabukan and Taruna goes back far beyond the date of this transfer.

Considering that the contracts of 1676 and 1697 with Tabukan established in favour of the Dutch East India Company extensive rights of suzerainty over Tabukan and an exclusive right of intercourse with that State, and considering further that at least two characteristic acts of jurisdiction expressly relating to Miangas, in 1701 and 1726, are reported, whilst no display of sovereignty by any other Power during the same period is known, it may be admitted that at least in the first quarter of the 18th century, and probably also before that time, the Dutch East India Company exercised rights of suzerainty over Palmas (or Miangas) and that therefore the island was at that time, in conformity with the international law of the period, under Netherlands sovereignty.

No evidence has been laid before the Arbitrator from which it would result that this state of things had already existed in 1648 and had thus been confirmed by the Treaty of Münster. It suffices to refer to what has already been said as to this Treaty in connection with the title claimed by Spain. On the one hand, it cannot be invoked as having transformed a state of possession into a conventional title *inter partes*, for the reason that Dutch possession of the island Palmas (or Miangas) is not proved to have existed at the critical date. On the other hand, it was stated that neither the Treaty of Münster nor the Treaty of Utrecht, if they are at all applicable to the case, could at present be invoked for invalidating the acquisition of sovereignty over Palmas (or Miangas) obtained by the Dutch at a date subsequent to 1648. It follows rather from what has been said about the rights of Netherlands suzerainty over Tabukan, in the early 18th century, and as to relations between Tabukan and Palmas (or Miangas), that the Treaty of Utrecht recognized these rights of suzerainty as comprising the radja of Tabukan amongst the "potentates, nations, and peoples with whom the Lords States or members of the East and West India Companies are in friendship and alliance".

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The admission of the existence of territorial sovereignty early in the 18th century and the display of such sovereignty in *the* 19th *century* and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumptions of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals.

There is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government, as far as concerns not the vassal State of Tabukan in general, but Palmas (or Miangas) in particular. There is however no reason to suppose, when the Resident van Delden, in a report of 1825, mentioned the island "Melangis" as belonging to Tabukan, that these relations has not existed between 1726 and 1825.

Van Delden's report, as well as later documents relating to the 19th century, shows that Miangas was always considered by the Dutch authorities as belonging to the Sangi and Talauer Isles and as being in a particular connection with the Nanusa. An extensive report of the Resident of Menado, dated August 12th, 1857, gives detailed statements about the administrative organisation, including the names of the villages (negorijen) and districts or presidencies (djoegoeschappen) and the number and title and names of the native officials. The island "Melangis" goes with the Nanusa, but is distinct from the island "Nanoesa" (usually called Mehampi, after the chief village) and Karaton; it is administered by one "radja", who at that time was named Sasoeh. This report leaves no room for doubt as to the legal situation of Melangis at that period, and is in conformity with the territorial description given for Palmas (or Miangas) in the contracts of 1885 and 1899 already mentioned, and also with a table, dated September 15th, 1889, showing the whole system of administrative districts in the

Talauer Islands which are dependencies of the native principalities of the Sangi Isles.

It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose. In a report on a visit paid to the island in November 1895 by the Resident of Menado, it is stated that, according to the natives, no ship had ever before that time visited the island, and that no European had ever been there; the Resident himself was of opinion that he was the first colonial official who went to Palmas (or Miangas); also the commander of H.M.S. *Edi*, who patrolled the Celebes Sea in 1898, mentions that "in man's memory a steamer had never been at Miangas". The documents relating to the time before 1895 are indeed scanty, but they are not entirely lacking. A series of statements made by certain natives, chiefs and others, mostly of good age, whose memories went back far beyond 1906—at least to 1870— have been laid by the Netherlands Government before the Tribunal, two of them also in the native language used by the witnesses. It would seem to result from these depositions that the people of Miangas used to send yearly presents (pahawoea) to the radja of Taruna as token of their submission; even details about the distribution of the tribute to be collected are given. On the other hand the radja of Taruna was under the obligation to give assistance to the island in case of distress. A deposition made by a Dutch civil officer gives the list of 8 headmen who had been instituted either by the radja of Tabukan (probably Taruna) or by the Resident of Menado at Miangas until 1917.

Whatever may be the value of such depositions made all since 1924, they are at least in part supported by documentary evidence. Thus the list of headmen is confirmed as concerns the nomination of Timpala by a decree signed on September 15th, 1889, by the Resident of Menado. The most important fact is however the existence of documentary evidence as to the taxation of the people of Miangas by the Dutch authorities. Whilst in earlier times the tribute was paid in mats, rice and other objects, it was, in conformity with the contract with Taruna of 1885, replaced by a capitation tax, to be paid in money (one florin for each native man above 18 years). A table has been produced by the Netherlands Government which contains for all the dependencies of the Sangi States situated in the Talauer Islands the number of taxpayers and the amount to be paid. There "Menagasa" ranks as a part of the "Djoegoeschap" (Presidency) of the Nanusa under the dependencies of Taruna, with 88 "Hassilplichtigen" (taxpayers), paying each Fl. 1.—.

It further results from a report of the Controleur of Taruna dated November 17th, 1896, that the people of "Melangis" paid their tax by selling products on the larger islands and thus getting the money with which the new tax was to be paid. The effective payment of the tax is likewise confirmed by the commander of H.M.S. *Edi* in a report dated June 18th, 1898.

The report of the Controleur of Taruna referred to mentions the fact that on November 4th, 1896, a coat of arms was handed to the "Kapitein-laoet" (administrative head) of "Melangis", just as two days before, the same act had taken place at Karaton (Karatong), an island of the Nanusa. The report mentions that in both cases the native authorities were informed as to the meaning of this act. The distribution of coats of arms and flags as signs of sovereignty is regulated by instructions sanctioned by the Crown in 1843. The coats of arms placed at Miangas in 1896 were found in good state by H.M.S. *Edi* in 1898. The existence of a "vlaggestok" on the island is proved by sketches made in 1895 and 1898 by officers of the Dutch ships *Raaf* and *Edi.*

The orders given, May 13th, 1898, to H.M.S. *Edi* which was to be stationed in the seas of North-East Celebes and Ternate leave no doubt that the task of the said vessel was to patrol these coasts and the Sangi and Talauer Islands, and, "if necessary, to make respected the rules for the maintenance of strict neutrality". The log-book of the ship proves that H.M.S. *Edi* twice visited Palmas (or Miangas) during the war, in June and in September 1898.

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As regards *the* 20th *century*, it is to be observed that events subsequent to 1906 must in any case be ruled out, in accordance both with the general principles of arbitral procedure between States and with the understanding arrived at between the Parties in the note of the Department of State, dated January 25th, 1915, and the note of the Netherlands Minister at Washington, dated May 29th, 1915. The events falling between the Treaty of Paris, December 10th, 1898, and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding. It is to be noted in the first place that there is no essential difference between the relations between the Dutch authorities and the island of Palmas (or Miangas) before and after the Treaty of Paris. There cannot therefore be any question of ruling out the events of the period 1899-1906 as possibly being influenced by the existence of the said Treaty. The contract with Kandahar-Taruna of 1899 runs on the same lines as the preceding contract of 1885 with Taruna, and was in preparation already before 1898. The system of taxation, as shown by the table of the years 1904 and 1905, is the same as that instituted in 1895. The headman Timpala, instituted in 1889, was replaced by a new man only in 1917.

The assistance given in the island after the typhoon of October 1904, though in itself not necessarily a display of State functions, was considered as such—as is shown by the report of the Resident of Menado, dated December 31st, 1904—that the island "Miangis", which was particularly damaged, could only get the indispensable help through Government assistance ("van Gouvernementswege"). Reference may also be made to a relation which seems to have existed already in former times between the tribute paid by the islanders to the Sangi radjas and the assistance to be given to them in time of distress by the larger islands with their greater resources.

V.

The conclusions to be derived from the above examination of the arguments of the Parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States base their claim on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time.

The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of State authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal State as a part of his territory.

c. Acts characteristic of State authority exercised either by the vassal State or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.

Now the evidence relating to the period after the middle of the 19th century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place.

Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of State authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority (so-called prescription), some of which have been discussed in the United States Counter-Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the State authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of State authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain in 1648, the rights of Spain to be derived from the Treaty of Münster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good.

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The same conclusion would be reached, if, for argument's sake, it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not—as it is submitted by the United States—suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, Parties to the dispute. For since, according to the terms of its Preamble, the Agreement of January 23rd, 1925, has for object to "terminate" the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a "non liquet", but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the Parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.

For the reasons given above, no presumption in favour of Spanish sovereignty can be based in international law on the titles invoked by the United States as successors of Spain. Therefore, there would not be sufficient grounds for deciding the case in favour of the United States, even if it were admitted, in accordance with their submission, that the evidence produced by the Netherlands in support of their claim either does not relate to the Island in dispute or does not suffice to establish a continuous display of State authority over the island. For, in any case, the exercise of some acts of State authority and the existence of external signs of sovereignty, e.g. flags and coat of arms, has been proved by the Netherlands, even if the Arbitrator were to retain only such evidence as can, in view of the trustworthy and sufficiently accurate nautical observations given to support it, concern solely the island of Palmas (or Miangas), namely that relating to the visits of the steamer *Raaf* in 1895, of H.M.S. *Edi* in 1898 and of General Wood in 1906.

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any State, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, i.e. until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21st, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each Party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the Arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which—as has been stated above—may be regarded as sufficiently proving the existence of Netherlands sovereignty.

For these reasons the Arbitrator, in conformity with Article I of the Special Agreement of January 23rd, 1925, decides that: The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April 1928.

MAX HUBER, *Arbitrator.*

MICHIELS VAN VERDUYNEN, *Secretary General.*

Forrest-022

CHARTER OF THE UNITED NATIONS

AND

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

SAN FRANCISCO · 1945

CHARTER OF THE UNITED NATIONS

WE THE PEOPLES OF THE UNITED NATIONS
DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS
TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III

ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

THE GENERAL ASSEMBLY

Composition

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a

Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

THE SECURITY COUNCIL

Composition

Article 23

1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the

United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

Article 27

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Procedure

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The 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.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X

THE ECONOMIC AND SOCIAL COUNCIL

Composition

Article 61

1. The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

Functions and Powers

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

Article 67

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI

DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII

INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII

THE TRUSTEESHIP COUNCIL

Composition

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

a. those Members administering trust territories;

b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

Functions and Powers

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a. consider reports submitted by the administering authority;

b. accept petitions and examine them in consultation with the administering authority;

c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting

Article 89

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

Procedure

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV

THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

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.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV

THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI

MISCELLANEOUS PROVISIONS

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of

this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII

TRANSITIONAL SECURITY ARRANGEMENTS

Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII

AMENDMENTS

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX

RATIFICATION AND SIGNATURE

Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 1

THE INTERNATIONAL COURT OF JUSTICE established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I

ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list

in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to

discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to peri-

odic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among

those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their traveling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II

COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid

down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. 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 concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. 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.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III

PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the

case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV

ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V

AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

FOR CHINA:
POUR LA CHINE:
中國:
За Китай:
POR LA CHINA:

顧維鈞
王寵惠
魏道明
吳貽芳
李璜
張君勱
董必武
胡霖

For the Union of Soviet Socialist Republics:
Pour l'Union des Républiques Soviétiques Socialistes:
蘇維埃社會主義共和國聯邦:
За Союз Советских Социалистических Республик:
Por la Unión de Repúblicas Socialistas Soviéticas:

А. Лавренцев
Ю. Новиков
С. Царапкин
С. Голунский
С. Крылов
Родионов

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:
POUR LE ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD:
大不列顛及北愛爾蘭聯合王國:
За Соединенное Королевство Великобритании и Северной Ирландии:
POR EL REINO UNIDO DE LA GRAN BRETAÑA E IRLANDA DEL NORTE:

Halifax.
Cranborne.

FOR THE UNITED STATES OF AMERICA:
POUR LES ETATS-UNIS D'AMÉRIQUE:
美利堅合衆國:
За Соединенные Штаты Америки:
POR LOS ESTADOS UNIDOS DE AMÉRICA:

E R Stettinius Jr
Tom Connally
A H Vandenberg.
Sol Bloom
Charles A. Eaton
Harold E Stassen
Virginia C. Gildersleeve.

FOR FRANCE:
POUR LA FRANCE:
法蘭西:
За Францию:
POR FRANCIA:

J. Paul-Boncour

FOR ARGENTINA:
POUR L'ARGENTINE:
阿根廷:
За Аргентину:
POR LA ARGENTINA:

FOR AUSTRALIA:
POUR L'AUSTRALIE:
澳大利亞:
За Австралию:
POR AUSTRALIA:

F. M. Forde
H V Evatt.

FOR THE KINGDOM OF BELGIUM:
POUR LE ROYAUME DE BELGIQUE:
比利時王國:
За Королевство Бельгии:
POR EL REINO DE BÉLGICA:

A E De Schryver

FOR BOLIVIA:
POUR LA BOLIVIE:
玻利維亞:
За Боливию:
POR BOLIVIA:

V Andrade
C Salamanca

For Brazil:
Pour le Brésil:
巴西:
За Бразилию:
Por el Brasil:

P. Leão Velloso

C de Freitas Valle

Gen. Estevão Leitão de Carvalho

A. Camillo de Oliveira.

Dr Bertha Lutz

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOVIÉTIQUE SOCIALISTE DE BÉLORUSSIE:
白俄羅斯蘇維埃社會主義共和國:
За Белорусскую Советскую Социалистическую Республику:
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA BIELORRUSA:

К Киселев
А Жебрак
В. Перцев
Байдаков
Ф. Шмыгов

FOR CANADA:
POUR LE CANADA:
加拿大:
За Канаду:
POR EL CANADÁ:

W L Mackenzie King.
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For Chile:
Pour le Chili:
智利:
За Чили:
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Contreras Labarca

F. Nieto del Río

E. Alcalde C.

Germán Vergara

Julio Escudero.-

For Colombia:
Pour la Colombie:
哥倫比亞:
За Колумбию:
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Alberto Lleras

Alfonso González Fernández

Eduardo Zuleta Angel

Silvio Villegas

Jesús M. Yepes.

For Costa Rica:
Pour Costa-Rica:
哥斯大黎加:
За Костарику:
Por Costa Rica:

Julio Acosta

Rafael Oreamuno

For Cuba:
Pour Cuba:
古巴:
За Кубу:
Por Cuba:

Gmo Belt

Ernesto Dihigo

For Czechoslovakia:
Pour la Tchécoslovaquie:
捷克斯拉夫:
За Чехословакию:
Por Checoeslovaquia:

Jan Masaryk

For Denmark:
Pour le Danemark:
丹麥:
За Данию:
Por Dinamarca:

Henrik Kauffmann

Hartvig Frisch

E. Husfeldt

For the Dominican Republic:
Pour la République Dominicaine:
多明尼加共和國：
За Доминиканскую Республику:
Por la República Dominicana:

Minerva Bernardino

For Ecuador:
Pour l'Equateur:
厄瓜多：
За Эквадор:
Por el Ecuador:

P2020

Galo

C. Tobar Zaldumbide

For Egypt:
Pour l'Egypte:
埃及：
За Египет:
Por Egipto:

A. Badaw

For El Salvador:
Pour le Salvador:
薩爾瓦多:
За Сальвадор:
Por El Salvador:

Héctor David Castro
Carlos Leiva, M.D.

For Ethiopia:
Pour l'Ethiopie:
阿比西尼亞:
За Эфиопию:
Por Etiopía:

Ambaye
Ephrem T. Medhen

For Greece:
Pour la Grèce:
希臘:
За Грецию:
Por Grecia:

J. A. Vofianopoulos

For Guatemala:
Pour le Guatemala:
瓜地馬拉:
За Гватемалу:
Por Guatemala:

Guillermo Toriello
M. Noriega M.

For Haiti:
Pour Haïti:
海地:
За Гаити:
Por Haití:

Gerard Lescot

For Honduras:
Pour le Honduras:
洪都拉斯:
За Гондурас:
Por Honduras:

Julián R. Cáceres
Marcos Carías Reyes

For India:
Pour l'Inde:
印度:
За Индию:
Por la India:

A. Ramaswami Mudaliar.
V. T. Krishnama Chari

For Iran:
Pour l'Iran:
伊朗:
За Иран:
Por Irán:

Mostafa Adl

FOR IRAQ:
POUR L'IRAK:
伊拉克:
За Ирак:
POR IRAK:

Mohd. Fadhel Jamali

FOR LEBANON:
POUR LE LIBAN:
黎巴嫩:
За Ливан:
POR EL LÍBANO:

W. Naim

A. Yafi

Charles Malik

For Liberia:
Pour le Libéria:
利比里亞:
За Либерию:
Por Liberia:

C. L. Simpson
Gabriel L. Dennis
J. Lemuel Gibson
Richard Henries
M. M. Grant

For the Grand Duchy of Luxembourg:
Pour le Grand Duché de Luxembourg:
盧森堡大公國:
За Великое Герцогство Люксембург:
Por el Gran Ducado de Luxemburgo:

Hugues Le Gallais

For Mexico:
Pour le Mexique:
墨西哥:
За Мексику:
Por México:

E. Padilla
F. Castillo Nájera
Manuel Tello.

For the Kingdom of the Netherlands:
Pour le Royaume des Pays-Bas:
荷蘭王國:
За Королевство Нидерландов:
Por el Reino de Holanda:

For New Zealand:
Pour la Nouvelle-Zélande:
紐西蘭:
За Новую Зеландию:
Por Nueva Zelandia:

Peter Fraser.
C. A. Berendsen

For Nicaragua:
Pour le Nicaragua:
尼加拉瓜:
За Никарагуа:
Por Nicaragua:

Mariano Argüello

Luis Manuel Debayle

For the Kingdom of Norway:
Pour le Royaume de Norvège:
挪威王國:
За Королевство Норвегии:
Por el Reino de Noruega:

Wilhelm Munthe Morgenstierne

For Panama:
Pour le Panama:
巴拿馬:
За Панаму:
Por Panamá:

Roberto Jiménez

For Paraguay:
Pour le Paraguay:
巴拉圭:
За Парагвай:
Por el Paraguay:

Cesar R. Velázquez

J. B. Ayala

For Peru:
Pour le Pérou:
秘魯:
За Перу:
Por el Perú:

Manuel C. Gallagher

V. A. Belaunde

Luis Fernán Cisneros

For the Philippine Commonwealth:
Pour le Commonwealth des Philippines:
菲律賓共和國:
За Филиппины:
Por la Mancomunidad de Filipinas:

Carlos P. Romulo

Francisco A. Delgado.

For Poland:
Pour la Pologne:
波蘭:
За Польшу:
Por Polonia:

For Saudi Arabia:
Pour l'Arabie Saoudite:
蘇地亞拉伯:
За Сауди Аравию:
Por Arabia Saudita:

For Syria:
Pour la Syrie:
叙利亞:
За Сирию:
Por Siria:

F. Al-Khouri

Antaki

N. Koudsi

For Turkey:
Pour la Turquie:
土耳其:
За Турцию:
Por Turquía:

Hasan Saka

Hüseyin Ragıp Baydur

For the Ukrainian Soviet Socialist Republic:
Pour la République Soviétique Socialiste d'Ukraine:
烏克蘭蘇維埃社會主義共和國:
За Украинскую Советскую Социалистическую Республику:
Por la República Socialista Soviética Ucraniana:

Дм. Мануїльський
Іван Сенін
Олександр Паладін

Микола Петровський

For the Union of South Africa:
Pour l'Union Sud-Africaine:
南非聯邦:
За Южноафриканский Союз:
Por la Unión Sudafricana:

J. C. Smuts F.M.

For Uruguay:
Pour l'Uruguay:
烏拉圭:
За Уругвай:
Por el Uruguay:

José Serrato

Jacobo Varela

Héctor Luisi

C. Giambruno

Juan F. Guichón

For Venezuela:
Pour le Venezuela:
委內瑞拉:
За Венесуэлу:
Por Venezuela:

C. Parra Pérez

Gustavo Herrera

A. Machado Hernández

R. Ernesto López

For Yugoslavia:
Pour la Yougoslavie:
南斯拉夫:
За Югославию:
Por Yugoslavia:

Stanoje Simić

I Certify That the foregoing is a true copy of the Charter of the United Nations, with the Statute of the International Court of Justice annexed thereto, signed in San Francisco, California, on June 26, 1945, in the Chinese, French, Russian, English, and Spanish languages, the signed original of which is deposited in the archives of the Government of the United States of America.

In Testimony Whereof, I, Edward R. Stettinius, Jr., Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by an Assistant Chief, Division of Central Services of the said Department, at the city of Washington, in the District of Columbia, this twenty-~~seventh~~ sixth day of June 1945.

E. R. Stettinius Jr
Secretary of State

By
Assistant Chief, Division of Central Services

WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Port of Helsinki vs. Paragon International Projects Ltd.

Case No. D2001-0002

1. The Parties

Complainant is Port of Helsinki, Olympiaranta 3, FIN-00099 Helsinki, Finland.

Complainant's authorised representative in this case is Heinonen & Co,

Attorneys-at-Law, Ltd, P.O Box 671, FIN-00101 Helsinki, Finland, with visiting address Fredrikinkatu 61 A, FIN-00100 Helsinki.

Respondent is Paragon International Projects Ltd. In the Complaint, Respondent's address is indicated as: Trafford House, Trafford Street, Chester, Cheshire CH1 3HP United Kingdom. In the Response, Respondent has indicated its contact details as "1 Hunters Walk, Canal Street, Chester, CH1 4EB".

2. Domain Name and Registrar

The domain name at issue is "portofhelsinki.com". The Registrar is Network Solutions, Inc, Herndon, Virginia, United States.

3. Procedural History

The WIPO Arbitration and Registration Center (the Center) received Complainant's complaint in electronic form on January 2, 2001, and in hard-copy form on January 5, 2001. The Center verified that the Complaint satisfied the formal requirements of the ICANN Uniform Domain Name Dispute Resolution Policy (the Policy), the Rules for Uniform Domain Name Dispute Resolution Policy (the Rules) and the WIPO Supplemental Rules. The Center then issued, on January 22, 2001, a Notification of Complaint and Commencement of Administrative Proceeding which was communicated to Respondent, to Complainant's representative and to ICANN as well as to the Registrar.

Having sent a Verification Request to Network Solutions, Inc. the Center received, on January 16, 2001, a Verification Response. In that Response was indicated that:

(a) Network Solutions was in receipt of the Complaint sent to it by Complainant;

(b) Network Solutions is the Registrar of the domain name at issue;

(c) Network Solutions confirmed that the current Registrant of the domain name registration is Paragon International Projects Ltd (PORTOFHELSINKI-DOM) Trafford House, Trafford Street, Chester, Cheshire CH1 3HP, United Kingdom;

(d) the domain name at issue is "PORTOFHELSINKI.COM;

(e) Administrative Contact is Carr, Steve (SC9079) Paragoni@GLOBALNET.CO.UKC, Paragon International Projects Ltd, Trafford House, Trafford Street, Chester, Cheshire CH1 3HP, United Kingdom;

(f) Technical Contact is Hostmaster (HOS194-ORG) hostmaster@NET-WORK.NET, Net-Work, Suite W" 16, Chester Enterprise Centre, Chester, Cheshire CH2 3NE, United Kingdom;

(g) Billing Contact is Dean, David (DD208) d@Vid.NET, Net-Work Internet Ltd, Technology House Rhewl, RUTHIN, LLO15 1TN, United Kingdom;

(h) Network Solutions 5.0 Service Agreement is in effect, and;

(i) the domain name registration is in "Active" status.

On January 26, 2001, the Center received a Response from Respondent; the Center acknowledged receipt of this the same day.

Having invited Mr. Henry Olsson so serve as a Sole Panelist in this case and having received, on February 5, 2001, Mr. Olsson's Statement of Acceptance and Declaration of Impartiality, the Center issued, on February 5, 2001, a Notification of Appointment of Administrative Panel and Projected Decision Date, in which Mr. Olsson was formally appointed as Sole Panelist. The Projected Decision Date was February 19, 2001.

The Sole Panelist finds that the Administrative Panel was properly constituted and appointed in accordance with the Rules and the WIPO Supplemental Rules.

4. Factual Background

The name "Port of Helsinki" refers to the Port of Helsinki, which is the port authority of the City of Helsinki, Finland. The Port Authority is a legal person of public law incorporated under the laws of Finland. Its regulations entitle the Port Authority to represent itself in a court or similar proceeding.

5. Parties´ Contentions

A. Complainant

Complainant contends that the domain name at issue is identical or confusingly similar to a trademark or a service mark in which Complainant has rights, that Respondent has no rights or legitimate interests in respect of the domain name and that the domain name was registered and is being used in bad faith.

In the Complaint, Complainant agrees, in accordance with Paragraph 3(b)(xiii) of the Rules, to submit, only with respect to any challenge that may be made by Respondent to a decision by the Administrative Panel to transfer or cancel the domain name that is the subject of the Complaint, to the jurisdiction of the courts where the principal office of the concerned registrar is located.

Identity or confusing similarity

In respect of the first one of these allegations Complainant states essentially the following:

The Port of Helsinki has used the trademark "Port of Helsinki" for decades in connection with its various port services and the trademark has been used both in Finland and internationally.

The trademark in question has not been registered but enjoys nevertheless protection under the Finnish Trademark Act. Article 2, first Paragraph, of that Act prescribes: "A sole right to a trademark may be acquired even without registration after the mark has become established."

The name "Port of Helsinki" is the only possible name for the port. It is, according to Complainant, common practice around the world that ports are called "port of the *name of the location*." Complainant has submitted a printout from a website to support this statement. In the view of Complainant, port business is international and it is thus naturally the domain name "portofhelsinki.com" that people will look at when they want to obtain information about the Port of Helsinki.

In the view of Complainant a unique geographical name should – just like trademarks- enjoy protection against others registering the name in bad faith; such a geographical name functions in the same way as a trademark by distinguishing one person's goods and services from those of another person. Thus the rights in a geographical name should be considered to belong to the owner of the geographical area in question.

Complainant also stresses that the Port of Helsinki is the owner of the Finnish domain name "portofhelsinki.fi." The Telecommunications Administration Centre (TAC) is the authority that issues domain names under the country code top level domain ".fi". As Finnish domain names are issued only to parties that are entitled to the name, the TAC has been convinced that the name "Port of Helsinki" is an established trademark.

Complainant adds that the "Port of Helsinki" is internationally known as the name of the port in Helsinki. All letterheads, brochures, visiting cards, advertisements and forms – of which Complainant has submitted samples – all include the trademark "Port of Helsinki".

On the basis of these allegations Complainant submits that the domain name "portofhelsinki.com" is identical with Complainant's trademark "Port of Helsinki".

Rights or legitimate interests

Complainant contends that it has not entitled or licensed Respondent to use the trademark "Port of Helsinki" and Respondent does not have any business at Helsinki and especially not at the port of that city and no connection to it. The name "Port of Helsinki" is not a general common word that anyone would have the right to use but refers only to the port of that city and does not have any other meaning. To the knowledge of Complainant, Respondent does not own a trademark or a service mark "Port of Helsinki" and at least in Finland Respondent would not have been able to obtain such a mark without the consent of Complainant.

In view of this, Respondent should not be considered to have any rights or legitimate interest in the name of the geographical area to which it has no connection.

Registration and use in bad faith

Complainant contends that Respondent knows that "Port of Helsinki" is a sign that refers to the port services in Helsinki, Finland. As shown in an Annex to the Complaint, Respondent has registered more than 50 domain names beginning with "portof…." The pattern shows that Respondent has intentionally registered all available port names around the world as its domain names. Respondent has registered the domain name at issue in order to prevent the City of Helsinki from registering the mark Port of Helsinki in a corresponding domain name and Respondent has a pattern of having done so in respect of several ports all around the world. Respondent must have known that the names of different ports belong to themselves and therefore the registration of the domain name at issue has been made in bad faith.

Respondent is selling advertisement space to companies in the website "portofhelsinki.com". Thus the domain name has been registered with the intention to obtain commercial gain from another person's trademark.

According to Complainant, using the domain name at issue creates a likelihood of confusion with Complainant's mark and the website tries to create the impression that the "portofhelsinki.com" website would be the official website of the Port of Helsinki.

In addition, according to Complainant, the website creates a likelihood of confusion as to the source of the services advertised at Respondent's website in that one is made to believe that the advertisers have something to do with the port and that the services are available at the port. According to Complainant the website contains a lot of false or misleading information which can cause damage both to the Port of Helsinki and to third parties. Because the Port of Helsinki is a public authority and as such is trusted for giving accurate information, there is a risk that visitors will believe in the misleading information, which may lead to damages. Complainant submits, as examples, some information from the different pages of the website which in its view includes only a minor part of the different services provided at the Port of Helsinki (only those companies that have paid Respondent for advertising space) and some of the services advertised at the website have nothing to do with the Port of Helsinki. In this respect Complainant has submitted some extracts from the website on, among several other matters, banking, car rental and security services available at the Port.

Remedy requested

In accordance with Paragraph 4b(i) of the Policy and for the reasons indicated Complainant requests that the Administrative Panel issue a decision that the contested domain name be transferred to Complainant.

B. Respondent

General

Respondent contends that the domain name portofhelsinki.com is part of the www.portof.com network containing presently about 23 sites on-line with more than 200 additional ones following in the next eight months as part of Respondent's global plan to launch a comprehensive search engine for the shipping industry world-wide. Consequently, Respondent has a legitimate interest in respect of the domain name at issue. It has been registered and is being used in connection with the global promotion of bona fide shipping related services within Helsinki Port. Until 1998, Helsinki Port promoted itself as "Helsingin Satama" under which name it was known in both the national and international maritime market.

In addition, according to Respondent, the web site which address is www.portofhelsinki.com, is presented as an independent venture totally different from any "official" site the ports may have as shown in the disclaimer included in the website linked to the domain name at issue. Complainant contends that this is the strength of the www.portof.com network as it is recognised and actively promoted as an independent venture that promotes local shipping related companies within a specific global network.

Observations on specific points.

Respondent refers to Complainant's statement that "The name 'Port of Helsinki' belongs to the Port of Helsinki, etc" and Complainant's assumption that a unique geographical name should be regarded as belonging to the owner of the geographical area in question. Respondent does not believe this to be the case as evidenced by a number of examples referring to the names of cities registered as domain names and which are owned by organisations rather than by the respective cities. Respondent refers in this context also to the example of helsinki.com which is owned by another party than the City of Helsinki. Respondent has submitted a number of annexes to support its contentions in this respect. Respondent is firmly of the view that

non-distinct geographical terms cannot be trademarked.

Respondent remarks that "Port of Helsinki" is rather a phrase or sign that refers to the port services in a port and not to the administrative body that handles a specific port.

In the view of Respondent "Port of Helsinki" is not the only possible name for the port until fairly recently Helsinki Port's website was promoted as www.hel.fi/port, and it was only fairly recently that Helsinki Port changed their promotional material to promote the new website address www.portofhelsinki.fi.

Respondent furthermore contends that the statement that all ports around the world are called "Port of *the name of the port"* is not accurate and examples show that domain names containing names of cities are not always owned by the respective cities. From, for example, Annex 6 to Helsinki Port's Complaint can be seen that ports may have varying website addresses (www.revolta.com"/-andrey/port.hmtl). In fact, according to Respondent, it is apparent that only a small number of ports have www.portof.com as their website address. Instead they have, as mentioned, varying website addresses which again, according to Respondent highlights the strength and the legitimacy of the www.portof.com network by promoting a uniform domain name for bona fide and legitimate shipping services around the world.

Respondent furthermore contends that Complainant's statement that Respondent has no rights or legitimate interests in respect of the domain name is not correct, as portofhelsinki.com is part of Respondent's global www.portof.com network. The domain name has not been registered in bad faith and has not been registered to prevent the City of Helsinki from registering portofhelsinki.xxx, as there are other variables available. Helsinki Port already owns portofhelsinki.net which is, however, an inoperative link.

Finally, Respondent contends that the specific points raised about the services and more specifically the accuracy of the services within Helsinki Port refer more to the intention of the individual private company's to join the project rather than of the accuracy of the information. According so Respondent, the information is to the best of its knowledge accurate. However, certain information referred to by Complainant has been removed from the website.

6. Discussion and Findings

Rule 15 of the Rules prescribes that the Panel shall decide a Complaint on the basis of the statements made and documents submitted and in accordance with the Policy, these rules and any rules and principles of law that it deems applicable.

Applied to this case, Paragraph 4(a) of the Policy directs that Complainant must prove each of the following:

(a) that the domain name registered by Respondent is identical or confusingly similar to a trademark or a service mark in which Complainant has rights;

(b) that Respondent has no rights or legitimate interests in the domain name, and;

(c) that the domain name has been registered and is being used in bad faith.

a) Identity or confusing similarity

First the Panel notes that the present Dispute Resolution Policy applies only to conflicts between on the one hand a trademark or a service mark (Complainant's) and on the other hand a domain name (Respondent's). The Policy consequently does not presently apply to, for instance, conflicts between domain names and geographical indications or signs or symbols that are not supported by trademarks/service marks. The Panel cannot agree with the contention that a unique geographical name should be considered as belonging to the legal authority of the geographical area in question under the Policy. Protection for geographical names can be provided through other means, such as the special protection for geographical indications and not *per se* under trademark law.

The domain name at issue is "portofhelsinki.com."

Complainant has invoked that it has rights in the symbol "Port of Helsinki" under Article 2, first paragraph, of the Finnish Trademark Act, which establishes trademark rights on the basis of establishment of the mark on the market. According to Article 2, third Paragraph, "a trade symbol shall be regarded as established if it has become generally known in the appropriate business or consumer circles in Finland as a symbol specific to its proprietor's goods."

From the evidence available in the case appears that the notion "Port of Helsinki" is being used together with its Finnish corresponding denomination "Helsingin Satama" and its Swedish one "Helsingfors Hamn." In view of this and of the fact that no market research or similar evidence has been submitted by Complainant to prove establishment on the market in the sense of the trademark law, the Panel cannot make a finding that trademark rights exist in the denomination "Port of Helsinki.

b) Rights or Legitimate Interests

From the evidence available it appears that Respondent is using this domain name – together with several similar domain names – to provide information about the services available in different ports around the world. In the view of this Panel such a use does not imply that Respondent would have no rights or legitimate interests in respect of the domain name in the sense of Paragraph 4.2(ii) of the Policy.

(c) Registration and Use in Bad Faith

Evidence submitted in the case does not suggest that bad faith would be present in any of the senses referred to in Paragraph b(i)-(iv) of the Policy. In addition, the Panel attaches some importance to the fact that Respondent has put on the website "portofhelsinki.com" a disclaimer indicating that: "This Site Refers to the geographical location of the Port of Helsinki and the Companies located within the port area. It is not the official port authority Site. It is part of the Global port community search Engine portof.com"

Obviously, the registration of the domain name at issue would have an impact on the ability of the Port of Helsinki to register the same domain name for its services. In view of the circumstances just described and of the use that Respondent is making of its registration of the domain name, the Panel does not consider that the domain name has been registered and is being used in bad faith as mentioned in Paragraph 4a(iii) of the Policy.

d) Conclusions

On the basis of the foregoing the Panel concludes that it has not been established;

(a) that "Port of Helsinki" enjoys trademark protection,

(b) that Respondent has no rights or legitimate interests in the domain name at issue in the sense of Paragraph 4a(ii) of the Policy, or

(c) that the domain name has been registered and is being used in bad faith.

Complainant's request for transfer of the domain name at issue shall consequently be denied.

7. Decision

Complainant's request for transfer of the domain name "portofhelsinki.com" is denied.

Henry Olsson
Sole Panelist

Dated: February 12, 2001

Forrest-024

WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

City of Hamina v. Paragon International Projects Ltd.

Case No. D2001-0001

1. The Parties

The Complainant is City of Hamina, a legal person under public law, incorporated under the laws of Finland, Raatihuoneenkatu 1, FIN-49400 Hamina, Finland.

The Respondent is Paragon International Projects Ltd., Trafford House, Trafford Street, Chester, Cheshire CH1 3HP, United Kingdom.

2. The Domain Name

The domain name at issue is "portofhamina.com", registered with Network Solutions, Inc., 505 Huntmar Park Drive, Herndon, VA 20170, United States.

3. Procedural History

A complaint was submitted electronically to the World Intellectual Property Organization Arbitration and Mediation Center (the "WIPO Center") on January 2, 2001, and was there received in hardcopy form on January 5, 2001. Payment of the administration fee was made by bank transfer on January 2, 2001, and duly received. The Center correctly verified that the complaint satisfies the formal requirements of the ICANN Uniform Domain Name Dispute Resolution Policy (the "Uniform Policy"), the Rules for Uniform Domain Name Dispute Resolution Policy and the WIPO Center Supplemental Rules for Uniform Domain Name Dispute Resolution Policy. The WIPO Center acknowledged receipt of the Complaint on January 9, 2001. Request for Registrar Verification was issued on January 11, 2001, and the Response by the Network Solutions, Inc. was received on January 16, 2001. After appropriate Formal Compliance Review and an ensuing e-mail communication from the WIPO Center on January 22, 2001, to the Complainant, with a copy to the Respondent, the Complainant submitted on January 29, 2001 to the Center, by e-mail (hard copy received on January 31, 2001), an amendment to the Complaint, evidenced to have been transmitted to the Respondent on the same day. The Complaint was properly notified to the Respondent on January 31, 2001, and its response was received by e-mail on February 16, 2001. After an intermediate e-mail communication to the WIPO Center from the Complainant on February 23, receipt of the Response was acknowledged by the Respondent on February 26, 2001.

The Complainant chose to have the dispute decided by a single member Administrative Panel. The Respondent has not elected that a three member panel decide the case. Founded on a Statement of Acceptance and Declaration of Impartiality and Independence dated February 27, 2001, the Administrative Panel was properly constituted on February 28, 2001, the formal date of commencement of this administrative proceeding. There have been no further submissions. The date scheduled for the issuance of the Panel's decision is March 13, 2001.

4. Factual background

The port of Hamina is run by the port authority of the City of Hamina, Finland. The authority works under the name of Port of Hamina as an administrative entity of the City, Complainant in this case and presenting itself as the owner of any port authority's rights related to the complaint. There is also a body corporate, registered under the name of Port of Hamina Ltd./Haminan Satama Oy, for the City of Hamina.

The Respondent has not brought any material to bear evidence of its statements. However, in its response, reference was made the WIPO Case No. D2001-0002, Port of Helsinki vs. Paragon International Projects Ltd., dated February 12, 2001.

5. Parties' Contentions (summary)

A. Complainant

The complaint is based on the assertion that the name Port of Hamina is a trademark widely used over considerable time nationally and internationally in connection with port services by the City of Hamina/Port of Hamina, the City being the owner of an unregistered trademark right to the name of Port of Hamina, based upon Section 2 of the Finnish Trademarks Act, according to which an exclusive right to a trademark may be acquired even without registration "after the mark has become established" (quotation from Annex 5 to the complaint). It is common practice that ports are called "Port of *the name of the location*". The name Port of Hamina is the only possible name for the port of the City of Hamina. Whoever wishes to obtain information related to the Port of Hamina will, consequently, as a matter of cause, look up the domain name "portofhamina.com". Any rights to a unique geographical name should be regarded to belong to the owner of the geographical area in question. The top domain name "portofhamina.fi" has been assigned to the port authority of the City of Hamina, which mirrors the conviction of the issuing authority in Finland, its Telecommunications Administration Centre, that the name Port of Hamina is an established trademark of the City of Hamina. Also, the trademark is widely used for letterheads, brochures, advertisements etc., referring to a port with a yearly turnover of FIM 60 million, visited by approximately 1,200 ships a year with over 55,000 containers passing through. The domain name and the trademark are identical.

The Respondent has not acquired any rights or legitimate interests to the domain name. No right of use to the trademark has been licensed to it and claimant has no business at Hamina or its port. Nor has it any trademark or service mark Port of Hamina and it would not have been able to obtain any right to such a mark without the consent of the City of Hamina. The name Port of Hamina exclusively refers to that port and the Respondent will not have rights or any legitimate interest related to the name of a geographical area to which it is not connected.

The domain name has been registered and is used in bad faith, the Respondent knowing that Port of Hamina is a sign that refers to the port services in Hamina, Finland. The Respondent has internationally as a pattern registered every available name all around the world as its domain names and in the case at hand it has done so knowingly in order to prevent the City of Hamina from registering its mark in a corresponding domain name. Without authorization, the Respondent uses the logo of the Port of Hamina on its website which shows knowledge of the trademark character of Port of Hamina, there presented in figurative form. An intention to obtain financial gain by use of the trademark is evidenced by the fact that the Respondent sells advertising space to companies in the website "portofhamina.com". The use of the domain name creates a likelihood of confusion with the trademark. The site creates the impression that it would be the official website of the Port of Hamina or related to it in co-operation and it also makes believe that advertisers on the website have something to do with the port and that the services advertised are available at the port. This is to be seen together with false and misleading information provided on the website which can cause damage to the Port of Hamina as a trusted party and to third parties. Examples of false information have been adduced as evidence in annexes to the complaint.

B. Respondent

The Respondent argues that its domain name is part of a network "www.portof.com", recognized and actively promoted as an independent venture that promotes local shipping related companies within a specific global network of presently 23 sites

online with another 200 web sites to be introduced online "within the next 8 months as part of a plan to launch a comprehensive search engine for the shipping industry world wide". Thus, "www.portofhamina.com" is used to provide information about services available within a system covering different ports under the concept of "www.portof[name of port].com". As a consequence, the Respondent has acquired a legitimate interest in respect of the domain name at issue, its registration and use being connected with the "global promotion of bona fide shipping related services within Hamina Port." Also, the domain name is presented together with a disclaimer on the home page, saying: "This site refers to the geographical location of the Port of Hamina and the Companies located within the port area. It is not the official port authority site. It is part of the Global port community search engine portof.com." This shows that the domain name is an independent venture different from any "official" site of Hamina port. The Respondent holds that "a unique geographical name can not be considered as automatically belonging to the authority of the geographical area in question".

6. Discussion and findings

On the basis of the Parties' submissions and evidence introduced by the Complainant and in particular with regard to the content of the relevant provisions of the Uniform Policy, (paragraph 4. a to c), the Administrative Panel, noting that the Policy only applies to conflicts between trademarks/service marks and domain names, concludes as follows:

The Respondent has referred to the case No. D2001-0002, Port of Helsinki vs. Paragon International Projects Ltd., *ie,* itself, mentioning that "Nearly all of the legal and technical points raised are specifically covered in the previous case…" mentioned. This Administrative Panel is familiar with the decision in that case. It will, however, not take notice, from that case, for its information or decision, of which "legal and technical points", of the "nearly all", that the Respondent may have intended to draw attention to. Consequently, the Administrative Panel considers the response of the Respondent to concern only what is expressly mentioned in its response of February 16, 2001, in the part following "In general, paragon's response is as follows:" The content of that part of the Respondent's response has been summarized here above under 5(B).

A. Is the domain name "portofhamina.com" identical or confusingly similar to a trademark or service mark in which the Complainant has rights?

The Administrative Panel notes that the name Port of Hamina, as used by the Complainant, indicates the geographical origin of services rendered in that port. It has not been made clear to which extent, if any, the name is used by the Complainant in relation to goods. However, the name should not be seen as just the name of a place, like *e. g.* Newport. It also, in itself, connotes such services as are possibly rendered to ships, boats etc., and, in cities of some significance, implicitly under such rules as may have been established by a port authority of some kind, at least by offering a harbor. Thus, the name Port of Hamina may, in itself, be a trademark for services and protected as such, irrespective of trademark registration, if fulfilling the conditions required under Finnish law for the protection of non registered trademarks (service marks). The test applied to distinguish protected trademarks of this kind from those non protectible bears reference to whether the mark, by its use, has acquired distinctiveness so as to distinguish the goods and services of one undertaking from those of other undertakings. Under Section 2 third paragraph of the Finnish Trademarks Act the notion "established" is defined to mean that the mark has become generally known in the appropriate business or consumer circles in Finland as a symbol specific to its proprietor's goods or services.

Finland is a member of the European Union and consequently, to put it simply, it is bound by European law. The European Court of Justice, in its decision May 4, 1999, in the joint cases C-108/97 and C-109/97 (usually referred to as the Chiemsee-decision), interpreted articles 3.1c and 3.3 first sentence of the Directive 89/104/EEC. Article 3 of the Directive, entitled "Grounds for refusal or invalidity", provides that certain signs and trademarks shall not be registered or if registered shall be liable to be declared invalid. Among these, we find trademarks which "consist exclusively of signs or indications which may serve, in trade, to designate the … geographical origin… of the goods or service". The Administrative Panel finds that Port of Hamina is such a trademark designating geographical origin. Of interest in this context is now the Court's interpretation of article 3.3 first sentence together with the content of article 6.1(b); the latter, however, not subject to interpretation by the Court. Be it, that article 3.3 refers to non refusal of registrations and declarations of invalidation of registered signs, which cannot constitute a trademark, and of trademarks; the criterion for registration is, notwithstanding the presence of any ground for refusal related to trademarks in article 3.1, under the main rule in article 3.3 first sentence, whether the mark has "acquired a distinctive character" before the date of application for registration and following the use which has been made of it. If so, registration may take place and no invalidation shall occur.

The Court: "The first sentence of Article 3(3) of the First Directive 89/104/EEC is to be interpreted as meaning that:

- a trademark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;

- it precludes differentiation as regards distinctiveness by reference to the perceived importance of keeping the geographical name available for use by other undertakings;

-in determining whether a trademark has acquired distinctive character following the use which has been made of it, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating form a particular undertaking and thus to distinguish that product from goods of other undertakings;

- if the competent authority finds that the significant portion of the relevant class of persons identify goods as originating from a particular undertaking because of the trademark, it must hold the requirement for registering the mark to be satisfied;

- where the competent authority has particular difficulty in assessing the distinctive character of a mark in respect of which registration is applied for, Community law does not preclude it from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgement."

The Administrative Panel takes definite exception to the Complainant's view that rights to a unique geographical name should, evidently as a matter of principle, "be regarded to belong to the owner of the geographical area in question". However, applying by analogy relevant parts of the European Court's interpretation to evidence introduced by the Complainant, the Administrative Panel concludes that the Port of Hamina has acquired distinctiveness and become established in the meaning of the Trademarks Act as a trademark/service mark relating to services originating from the City of Hamina/Port of Hamina. Consequently, Port of Hamina is a trademark/service mark to which the Complainant has rights. The Administrative Panel also finds that the domain name "portofhamina.com" is confusingly similar to that mark.

However, referring to the principle expressed in article 6.1(b) of the Directive about "Limitation of the effects of a trademark", according to which "The trademark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, … indications concerning the … geographical origin … of goods or rendering of services or other characteristics of goods or services; … provided he uses them in accordance with honest practices in industrial and commercial matters" and paragraph 4(a)(ii) of the Uniform Policy, the Administrative Panel now moves to consider the issue.

B. Whether the Respondent has no rights or legitimate interests in the domain name.

The Respondent has registered and uses the domain name "portofhamina.com" within a business concept of presenting under domain names of the type "portof[name of port].com" information intended for users of the respective ports or services rendered there or in connection with the ports by port authorities, servicing companies etc. The Administrative Panel considers that by materializing this business concept which, as such, has not been proven to be in disaccord with honest practices in industrial and commercial matters, the Respondent has acquired a legitimate interest in the domain name "portofhamina.com".

C. Has the domain name been registered and/or is it used in bad faith?

The Administrative Panel disregards the Complainant's contentions about false or misleading information provided on the website of the Respondent. There is no evidence that such information has been introduced under the domain name with an evil intent or else outside the course of, perhaps not infallible, ordinary business services such as mentioned here above under B. There is no evidence of an intent to create confusion as mentioned in paragraph 4.b (iv) of the Uniform Policy, nor of any other element of bad faith. Any confusion that may appear as a result of the semi-identity between trademark and domain name must be accepted under the law, because of the character of the mark and the character of the opposite legitimate interest in the use of the domain name. The risk of confusion may have been foreseen by the Respondent, introducing on its website "http://www.portofhamina.com/"the disclaimer: "This Site refers to the geographical location of the Port of Hamina and the Companies located within the port area. It is not the official port authority Site. It is part of the Global port community search Engine portof.com." Foresight about a possibility of confusion can not under the circumstances be held against the Respondent. The disclaimer rather attests to the finding of the Administrative Panel that no bad faith is involved.

D. Summarizing its findings under A-C., the Administrative Panel finds 1) that although there is a confusing similarity between the trademark Port of Hamina to which the City of Hamina/Port of Hamina has rights and the domain name "portofhamina.com", 2) the Respondent has a legitimate interest in respect of the domain name and 3) that the domain name has not been registered and is not being used in bad faith.

7. Decision

The Administrative Panel denies the remedy (transfer to the Complainant of the domain name "portofhamina.com") requested by the Complainant pursuant to paragraph 4(i) of the Uniform Policy.

Gunnar Karnell
Panelist

Dated: March 12, 2001

Forrest-025

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Domain Name Allocation and Government Super-Prioritization: Lessons Learned From the UDRP Keep ICANN Out of the Business of Deciding What Is or Is Not a Country

Heather Ann Forrest[*]

ABSTRACT

Governments' growing awareness of the Domain Name System (DNS), the Internet Corporation for Assigned Names and Numbers (ICANN), and its stewardship of DNS policy development fuel recent attempts to steer Internet domain name allocation toward policies that prioritize government interests ahead of all other rights and interests, including trademark rights. As the DNS expands, the top level in its hierarchical structure (the level of domains such as ".com" and ".uk") assumes the characteristics and attributes, and therefore also the conflicts and challenges, of its second level (the level of public-registered names). This Article argues that these developments necessitate a new, holistic approach to developing name allocation policy in which established Uniform Domain-Name Dispute-Resolution Policy (UDRP) norms are brought to bear in evaluating government claims to name priority beyond the limited scope of the UDRP.

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Governments' requests for exemptions from trademark protections to super-prioritize their interests in geographic names bear striking resemblance to the claims made and rejected by UDRP panels in challenges to geographic second-level domain registrations by non-government parties. A unified framework of allocating geographic names in the DNS renders such decisions relevant and indeed integral to current and future policy development.

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I. INTRODUCTION

At the heart of the allocation of names in the Internet Domain Name System (DNS) lies the early, fundamental decision to allocate names on a first-come, first-serve basis.[1] In adopting this approach, the DNS's architects ensured an immediate and uncomplicated registration process that contributed much to the Internet's rapid expansion and widespread utilization. As the steward of DNS policy development, the Internet Corporation for Assigned Names and Numbers (ICANN) has largely maintained the status quo, as evidenced by its agreements with the operators of top-level domains

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[1] *See* MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 36 (2002).

and the businesses that sell domain names to the public.[2] Accordingly, ICANN has, as a general principle, deliberately avoided assuming responsibility for validating or weighing claims to rights or interests in names. Where prioritization has occurred for other than technical and operational reasons, its legitimacy has been firmly grounded in international law as interpreted by a qualified external body.

Consistent with this approach, ICANN has made it abundantly clear in relation to the use of country code top-level domains (TLDs), the spaces at the highest level in the DNS hierarchy with the familiar ".com," ".net," and ".org" suffixes but designated by a two-letter code that corresponds to an existing international standard of English-language country names,[3] that it "is not in the business of deciding what is and what is not a country. Instead, [it] employ[s] a neutral standard maintained by the ISO 3166 Maintenance Agency."[4] Yet, this Article argues, ICANN steps into "the business of deciding what is and what is not a country" when it accedes to demands from ICANN's Governmental Advisory Committee that geographic names be reserved for governments, or used only with government consent, and that government registrations of such names be prioritized over all others.[5] This is, for ICANN, a new and potentially litigious sphere of responsibility in which its decisions lack the support of a qualified external authority. International law, which ICANN's Board of

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[2] ICANN's relationships with these entities are contractual in nature. In relation to registry operators, *see, e.g.*, *.asia Registry Agreement*, ICANN art. III, § 3.1(b) (Jun. 22, 2010), https://www.icann.org/resources/unthemed-pages/asia-agreement-2006-12-06-en [https://perma.cc/3FYF-UJUY]. In relation to registrars, *see Registrar Accreditation Agreement 2013*, ICANN 17 cl. 3.8 (Jun. 27, 2013), https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en [http://perma.cc/3RU6-PG45].

[3] *See* JON POSTEL, RFC 1591: DOMAIN NAME SYSTEM STRUCTURE AND DELEGATION 1 (Mar. 1994), https://www.ietf.org/rfc/rfc1591.txt [http://perma.cc/7BSJ-V2VS]. For a fuller definition of "ccTLD," *see Glossary*, ICANN, https://www.icann.org/resources/pages/glossary-2014-02-03-en#c [http://perma.cc/UQ5H-ZXK6].

[4] *User Documentation on Delegating and Re-Delegating a Country-Code Top-Level Domain*, ICANN (Sept. 9, 2013), https://www.icann.org/en/system/files/files/drd-ui-09sep13-en.pdf [http://perma.cc/MZ8B-HSJQ].

[5] *See, e.g.*, GAC SUB-WORKING GROUP FOR PROTECTION OF GEOGRAPHIC NAMES IN NEXT ROUNDS OF NEW GTLDS, *The Protection of Geographic Names in the New gTLDs Process*, ICANN (Aug. 29, 2014), https://gacweb.icann.org/display/gacweb/Community+Input+-+The+protection+of+Geographic+Names+in+the+New+gTLDs+process?preview=/35455403/35622234/Geo%20names%20in%20new%20gTLDs%20Updated%20%20V3%20%2029%20august%202014%5B4%5D.pdf [http://perma.cc/2FBH-KVB2]; *see* GOVERNMENTAL ADVISORY COMMITTEE, *Singapore Communiqué*, ICANN (Feb. 11, 2015), https://www.icann.org/en/system/files/correspondence/gac-to-board-11feb15-en.pdf [http://perma.cc/8UHJ-R2GV].

Directors undertook to comply with in expanding the DNS,[6] offers no support for the prioritization that governments seek.[7]

The World Intellectual Property Organization (WIPO), the qualified external body upon which ICANN can and should rely in developing DNS policy affecting trademark rights, acknowledged this void of authority soon after ICANN's formation, reporting: "While the misuse of geographical attributions may offend many feelings, only certain types of such misuse are sanctioned by the law."[8] This assessment is plainly reflected in the elements of the widely adopted Uniform Domain-Name Dispute-Resolution Policy (UDRP), the WIPO-developed administrative procedure for resolving disputes involving trademarks registered as domain names by parties other than a trademark owner.[9] A significant body of policy has developed out of disputes resolved under this procedure, which now applies to all generic TLDs in the DNS.[10] It may be argued that these decisions lack precedential significance or are too limited by their context to be relevant to ICANN policy-making more broadly. The objective of this Article is to preempt such arguments, particularly in the context of governments' demands for special treatment of geographic, cultural, and other names of national significance throughout the DNS,[11] and to reveal the applicability and necessity of applying the rationales of existing UDRP decisions to geographic domain name allocation policy.

Part II of this Article discusses the hierarchical structure of the DNS and reflects upon how this has influenced policy development on the use of names. This discussion reveals that policy development at the top level—the level of domains such as ".com" and ".org"—has occurred independently of and without meaningful reference to policy

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[6] *Resolution 2008-06-26 GNSO Recommendations on New gTLDs*, ICANN (Jun. 26, 2008), https://features.icann.org/2008-06-26-gnso-recommendations-new-gtlds [http://perma.cc/8K7F-TEVD].

[7] *See generally* HEATHER ANN FORREST, PROTECTION OF GEOGRAPHIC NAMES IN INTERNATIONAL LAW AND DOMAIN NAME SYSTEM POLICY (P. Bernt Hugenholtz ed., 2012) (evaluating ICANN's new gTLD policy on geographic names and concluding that no basis exists in international law for government claims to ownership of or priority rights in geographic names).

[8] WIPO, THE RECOGNITION OF RIGHTS AND THE USE OF NAMES IN THE INTERNET DOMAIN NAME SYSTEM: REPORT OF THE SECOND WIPO INTERNET DOMAIN NAME PROCESS 205 (2011), http://www.wipo.int/amc/en/processes/process2/report/html/report.html [http://perma.cc/A35H-SHRA] [hereinafter *WIPO II*].

[9] *See Uniform Domain-Name Dispute-Resolution Policy*, ICANN, https://www.icann.org/resources/pages/help/dndr/udrp-en [http://perma.cc/QD2Y-5NTW].

[10] *See id.*

[11] *See* GOVERNMENTAL ADVISORY COMMITTEE, *Community Input - The Protection of Geographic Names in the New gTLDs Process*, ICANN (Aug. 29, 2014), https://gacweb.icann.org/display/gacweb/Community+Input+-+The+protection+of+Geographic+Names+in+the+New+gTLDs+process [http://perma.cc/9P8L-U5W9].

applicable to the second level—the level of public-registered names. The rationales and mechanisms for prioritization at the top and second levels of the DNS are identified as a basis from which to make the case for unifying these two currently separate streams of policy development going forward. This line of reasoning additionally serves to illustrate the relevance of the UDRP, a policy applicable to second-level domain names, to current and future geographic domain name allocation policy at all levels of the DNS. In Part III, governments' assertions of priority rights in geographic domain names are then assessed against UDRP-derived norms, revealing the full extent of the void into which ICANN steps as it accedes to the advice of the Governmental Advisory Committee.

II. PRIORITIZATION IN THE DNS

Prioritization in domain name allocation is fundamentally driven by the DNS's functional requirement of uniqueness. Uniqueness is imposed at each level of the DNS such that there can only be one single custodian of a given name: only one ".com," only one ".book," only one "book" domain name registered in the ".com" registry (e.g., "book.com"), only one "paris" in ".book" (e.g., "paris.book"), and so on. The end result is absolute uniqueness, such that each domain name corresponds to one—and only one—location of stored information from an ever-expanding number of locations. Without this requirement, the DNS cannot function.

Because there can be only one single custodian of a given name, conflicting claims are inevitable. At the top level—the level of generic top-level domains (gTLDs), such as ".com," ".org," and ".net," and country code top-level domains (ccTLDs), such as ".uk," ".ca," and ".jp"—naming disputes have arisen significantly less frequently than at the second level (i.e., the "book" in "book.com") for several reasons inherent in the DNS's hierarchical design. First, the top level has expanded substantially more slowly than lower levels as a result of the DNS architects' vision of a deeply hierarchical system.[12] Between the implementation of the DNS in the early 1980s and 2011, fewer than three hundred generic country code and internationalized country code domains were created at the top level,[13] while in the same period the second level came to comprise more than 225 million

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[12] *See* J. POSTEL & J. REYNOLDS, RFC 920: DOMAIN REQUIREMENTS 6–7 (Oct. 1984), https://tools.ietf.org/rfc/rfc920.txt [http://perma.cc/5KAC-WPTZ] ("There are very few top level domains, each of these may have many second level domains . . . ."); POSTEL, *supra* note 3, at 1 (declaring it "extremely unlikely that any other TLDs will be created" beyond the initial eight gTLDs and country code TLDs).

[13] *See generally* FORREST, *supra* note 7, at 44–58.

domain name registrations.[14] Second, naming disputes rarely arise in top-level domains because prioritization is, by design, irrelevant to ccTLDs and was not a pressing problem for gTLDs until recently. Prioritization is irrelevant to ccTLDs because they are strictly derived from the International Standardization Organization's ISO3166-1 standard of "English country names and code elements,"[15] which, given its nature as an international standard of unique naming elements, contains no duplicate entries. Until recently, prioritization was also not appreciably implicated in the creation of gTLDs. The DNS launched with eight gTLDs: ".arpa," ".gov," ".mil," ".edu," ".com," ".net," ".org," and ".int."[16] An initial attempt at expansion commencing in 2000 produced seven additional gTLDs, joined by a further eight in the period of 2005 to 2011.[17] Only twenty-three gTLDs existed by the end of 2011.[18] Few applications received by ICANN in those early expansion efforts implicated names with a semantic value beyond an obviously non-proprietary, generic meaning.[19]

As a consequence of the varied growth paces and design intentions of the DNS's top and second levels, domain name allocation policy addressing this uniqueness has bifurcated, with divergent policy mechanisms applying to each. A review of these mechanisms and the rationales by which they are underpinned in light of the rapidly changing structure of the DNS engenders two key observations: first, the circumstances justifying bifurcated policy development and applicability have radically changed; and second, those changes support merging these two separate streams to form a single, coherent policy framework applicable at all levels of the DNS. Such a unified policy framework rejects a universal role of super-prioritizing government interest in geographic domain names. As this Article will show, this framework would also refocus current and future geographic domain name allocation policy on issues and concerns already addressed by UDRP decisions.

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[14] *See* VERISIGN, 9 DOMAIN NAME INDUSTRY BRIEF (1st ed. Mar. 2012), https://www.verisigninc.com/assets/domain-name-brief-march2012.pdf [http://perma.cc/V7NC-4YBK].

[15] *Country Codes - ISO 3166*, ISO, http://www.iso.org/iso/country_codes.htm [http://perma.cc/TLY2-Q3F2].

[16] POSTEL, *supra* note 3; POSTEL & REYNOLDS, *supra* note 12.

[17] *See* INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, NEW GTLD PROGRAM – NEW GTLD PROGRAM IN BRIEF (2009). *See generally* FORREST, *supra* note 7, at 47–54.

[18] *See supra* note 17 and text accompanying. The gLTDs ".post" and ".xxx" were very slow to enter the root due to rather complex negotiations. *See Root Zone Database*, INTERNET ASSIGNED NUMBERS AUTHORITY, http://www.iana.org/domains/root/db [http://perma.cc/WD5W-2H34].

[19] *See infra* note 20.

A. Prioritization Mechanisms at the Top Level

A total of twenty-one conflicts arose in the applications for new gTLDs received by ICANN in 2000 and 2004, including ".kids," ".sex," ".inc," and ".site."[20] Six of the fifteen new gTLDs ultimately added to the DNS from these processes had also been applied for by other applicants,[21] but all were generic, non-proprietary terms such that ICANN was not forced to prioritize on any basis other than the strength of the application against stated evaluation criteria. At this point, it was not necessary for ICANN to validate or balance between several competing interests in names at the top level of the DNS.

Conflicts were inevitable, however, when ICANN launched a new expansion round in 2012. This round placed no restrictions on the type or number of successful applications. Certain conflicts were precisely anticipated and dealt with preventatively to avoid technical instability; ICANN's name and names of other bodies responsible for DNS addressing were "reserved,"[22] consistent with technical advice and the recommendations of the Generic Names Supporting Organization (GNSO), the body within ICANN responsible for policy making regarding gTLDs.[23] Similarly, two-letter names, such as ".go" and ".bp," were deemed ineligible due to their potential confusion with ccTLDs.[24] More controversially, the gTLD Applicant Guidebook,[25] the document setting out the policy framework contractually imposed by ICANN on all new gTLD applicants participating in the 2012 expansion round, deemed some names ineligible other than for technical or operational reasons. The reservation of names relating to the International Olympic Committee (IOC) and the International Red

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[20] *See Status Report on the sTLD Evaluation Process*, ICANN (Dec. 3, 2005), https://archive.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf [http://perma.cc/2H3L-HZTP]; *TLD Applications Lodged,* ICANN (Oct. 10, 2000), http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm [http://perma.cc/32Z2-A3ZU].

[21] These six applications were: ".xxx," ".biz," ".info," ".tel," ".pro," and ".travel." *See supra* note 20.

[22] INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, NEW GTLD APPLICANT GUIDEBOOK § 2.2.1.2.1 (rev. ed. 2012), http://newgtlds.icann.org/en/applicants/agb/ [http://perma.cc/CG8Y-A3JA] [hereinafter ICANN, APPLICANT GUIDEBOOK].

[23] See INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, RESERVED NAMES WORKING GROUP FINAL REPORT annex 1 (Sept. 4, 2009) (ICANN/IANA Sub Group Report), http://gnso.icann.org/en/issues/new-gtlds/final-report-rn-wg-23may07.htm [http://perma.cc/YC7U-DHAV] [hereinafter ICANN, RESERVED NAMES].

[24] APPLICANT GUIDEBOOK, *supra* note 22, at § 2.2.1.3.2 ("Two character ASCII strings are not permitted, to avoid conflicting with current and future country codes based on the ISO 3166-1 standard."); *see* ICANN, RESERVED NAMES, *supra* note 23 at annex 2 (Single & Two Character Reserved Names Sub Group Report (Including Symbols)).

[25] ICANN, APPLICANT GUIDEBOOK, *supra* note 22.

Cross and Red Crescent Movement (IRC)[26] drew support from the widespread practice in domestic legislation of restricting these names from trademark registrability.[27] Country and territory names were, at the urging of ICANN's Governmental Advisory Committee (GAC)[28] but against the recommendations of the GNSO,[29] also deemed ineligible.[30] This restriction cut a broad path, rendering ineligible applications for domain names with three-letter country codes on the ISO 3166-1 standard, short- and long-form names, translations in any language, separable components, permutations, and transpositions of country names.[31] Various sub-national geographic names and supra-national region names were not excluded outright but were eligible only with proof of support or non-objection from relevant governments.[32] Applications for any of these restricted names were rejected by ICANN in a preliminary "Initial Evaluation" phase.[33]

Initial Evaluation additionally entailed a review of applications to identify conflicts. From the 1,930 applications received,[34] ICANN formed 233 "contention sets" of applications competing for "identical or similar"[35] strings. As in the earlier, smaller-scale expansion rounds launched in 2000 and 2004, most of the names placed in contention sets were generic, rather than proprietary, in nature. Consistent with its previous avoidance of responsibility for validating or weighing conflicting interests, ICANN mandated that any conflicts not resolved by the affected applicants themselves would go to auction.[36] As a result, even right-holders with applications in contention sets—for example, applications for ".guardian" by Guardian News and Media

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[26] *See id.* at § 2.2.1.2.3.

[27] *See Unredacted Version of Board Workshop Paper on IOC/Red Cross Protections*, ICANN (Aug. 28, 2012), https://www.icann.org/en/system/files/bm/briefing-materials-unredacted-20jun11-en.pdf [http://perma.cc/YXD6-ZBNC].

[28] *See* ICANN GOVERNMENTAL ADVISORY COMMITTEE, *GAC Principles Regarding New gTLDs* § 2.2 (2007), https://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf [http://perma.cc/D7HZ-VPAT] ("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.").

[29] *See* ICANN, RESERVED NAMES, *supra* note 23 at 19 tbl. 22.

[30] ICANN, APPLICANT GUIDEBOOK, *supra* note 22, at § 2.2.1.4.1.

[31] *Id.*

[32] *Id.* at § 2.2.1.4.2.

[33] *Id.* at § 2.2.

[34] *See New Generic Top-Level Domains – Program Statistics*, ICANN, http://newgtlds.icann.org/en/program-status/statistics [http://perma.cc/7MAY-7NT3].

[35] ICANN, APPLICANT GUIDEBOOK, *supra* note 22, at § 1.1.2.10 (defining "similar" as "strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone").

[36] *Id.* at § 4.2.2.

Limited[37] and The Guardian Life Insurance Company of America[38] —were not prioritized on any basis other than pocket depth.

ICANN has previously avoided prioritization of rights and interests at the top level of the DNS except as required by technical and operational security and stability. New expansion initiatives unimpeded by quotas, like those of the 2012 expansion round, however, have generated protectionist policy. In this new status quo heralded by new gTLD policy as recorded in the gTLD Applicant Guidebook, only geographic names stand out for the lack of technical, operational, or legal basis for their protection through the prioritization of government interests against all other parties, including trademark holders.

B. Prioritization Mechanisms at the Second Level

The conflicts created by recent efforts to expand the top level of the DNS, resolved in some instances on non-technical grounds, have long been an issue at the second level, where the term "cybersquatting" had emerged even prior to ICANN's formation, in the earliest days of the commercialized DNS.[39] In the first-come, first-served domain name registration process, where there were no pre-registration eligibility checks, early registrants seized trademark names without restraint, leaving trademark holders with the expense, in time and money, of trademark infringement litigation. Since then, various mechanisms, including the UDRP, have evolved to combat this practice.

One of the first initiatives of the newly formed ICANN was the adoption of the WIPO-proposed administrative dispute-resolution mechanism, the UDRP. To make the UDRP binding upon all gTLD domain name registrants, ICANN contractually requires all registrars, the companies that sell domain names to the public, to include the applicability of the UDRP in their registration

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[37] *Application Details for Application ID: 1-1728-88967*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/430 [http://perma.cc/K7TA-Y35X].

[38] *Application Details for Application ID: 1-1298-37058*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1038 [http://perma.cc/3EFB-JZBL].

[39] *Avery Dennison Corp. v. Sumpton*, 999 F. Supp. 1337, 1338 (C.D. Cal. 1998) *rev'd*, 189 F.3d 868 (9th Cir. 1999) ("Like all 'cybersquatters,' defendants merely 'squat' on their registered domain names until someone else comes along who wishes to use them. Like all 'cybersquatters,' defendants usurp all of the accepted meanings of their domain names, so as to prevent others from using the same domain names in any of their accepted meanings. And like all 'cybersquatters,' defendants seek to make a financial return by exacting a price before consenting to allow others to use the domain names on which they have chosen to 'squat.'").

agreements.[40] ICANN additionally contractually requires all gTLD operators to sell domain names only through registrars that meet this requirement.[41] Numerous ccTLDs have also adopted the UDRP,[42] although ICANN does not require that they do so. Given this broad applicability of the UDRP and a high volume of disputes resulting from steady registration volumes in the TLDs in which this dispute resolution mechanism applies, UDRP decisions form a significant body of policy in their own right. The Uniform Rapid Suspension System (URS), a rapid response version of the UDRP targeted at "those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place,"[43] is mandated in all new gTLDs. Late 2014 data revealing fifteen times more UDRP and URS disputes being filed against new gTLD domain names than other TLDs[44] suggest that over time, the URS may also develop into a significant resource for shaping future name allocation policy.

Another mechanism of relatively longstanding use at the second level of the DNS is the sunrise period. This period helps prioritize certain registrants by providing a registration period prior to the availability of domain names to the general public. To date, it has overwhelmingly been used to prioritize trademark holders. In 2012, the gTLD Applicant Guidebook introduced a mandatory sunrise requirement upon all new gTLDs resulting from the 2012 application round to provide a priority registration period of no less than thirty days[45] for "all word marks" meeting the following criteria:

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[40] *See Registrar Accreditation Agreement 2013*, ICANN 17 cl. 3.8 (Jun. 27, 2013), https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en [http://perma.cc/X5YH-J7AF].

[41] This requirement is imposed through an obligation in the Registry Agreement into which gTLD registry operators enter with ICANN to comply with and implement ICANN Consensus Policies (of which the UDRP is one). *See, e.g.*, *.asia Registry Agreement*, ICANN art. III, § 3.1(b) (Jun. 22, 2010), https://www.icann.org/resources/unthemed-pages/asia-agreement-2006-12-06-en [http://perma.cc/3FYF-UJUY].

[42] *See, e.g.*, *Domain Name Registration Agreement*, U. OF CYPRUS COUNTRY CODE TLD REGISTRAR FOR .CY, http://www.nic.cy/rulesreg.htm [http://perma.cc/6CJS-RLGJ]; *Domain Registration Agreement*, AMERICAN SAMOA DOMAIN REGISTRY, http://www.nic.as/policy.cfm [http://perma.cc/5VYJ-WCHV]; *FJ – Uniform Domain Name Dispute Resolution Policy*, FJ DOMAIN REGISTRY, http://www.register.bs/terms.html [http://perma.cc/2KKP-8V7V].

[43] IMPLEMENTATION RECOMMENDATION TEAM, *Final Report on Trademark Protection in New gTLDs*, ICANN 25 (May 29, 2009), https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf [http://perma.cc/5XDP-C7PV].

[44] *See* Michael Berkens, *Guess I Was Wrong There Is a Lot of Cybersquatting Going on in the New gTLD's: 15X as Much?*, THE DOMAINS (Dec. 15, 2014), http://www.thedomains.com/2014/12/15/guess-i-was-wrong-there-is-a-lot-of-cybersquatting-going-on-in-the-new-gtlds-15x-as-much/ [http://perma.cc/6BFW-9Z7S].

[45] *See* ICANN, APPLICANT GUIDEBOOK, *supra* note 22, at Trademark Clearinghouse § 6.2.1.

> (i) nationally or regionally registered and for which proof of use—which can be a declaration and a single specimen of current use—was submitted to, and validated by, the Trademark Clearinghouse; or
>
> (ii) that have been court-validated; or
>
> (iii) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before June 26, 2008.[46]

Notable here is ICANN's reliance upon external parties—the specially created Trademark Clearinghouse, courts, and domestic and international law—to validate marks' eligibility.

It would be inappropriate to characterize the Trademark Claims period as a prioritization mechanism because it does not strictly establish priority. However, for completeness it should be noted as the second major rights-protection mechanism introduced by the gTLD Applicant Guidebook resulting from the 2012 application round. During the first sixty days in which domain names are available for registration by the general public in new gTLDs, the registry operator is required to provide a notification service to put domain name registrants on notice of existing trademark rights in an applied-for name.[47] During new gTLD policy development, much discussion revolved around the mitigation of chilling effects of such a notice through precise wording to avoid the message being interpreted as an assertion of priority.[48]

The gTLD Applicant Guidebook thus imposed a minimum standard of protection, affording priority in second-level domain name registration only to trademark holders and only during the sunrise period, without prohibiting operators from extending the mandated trademark protection mechanisms or implementing additional mechanisms. One such approach involves prioritizing the registrants of names in existing TLDs as proposed by the operator of ".xxx" in relation to the launch of the new gTLDs ".sex" and ".adult."[49] This "grandfathering" plan was abandoned in late 2014 after unsuccessful negotiations with ICANN and replaced by a post-sunrise and pre-general availability alternative "Domain Matching Program."[50]

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[46] *See id.* at Trademark Clearinghouse § 7.2.

[47] *See id.* at Trademark Clearinghouse § 6.1.1.

[48] *See* ICANN, NEW GTLD TRADEMARK CLEARINGHOUSE SUNRISE AND TRADEMARK CLAIMS PROCESSES: SUMMARY OF INPUT FROM THE IMPLEMENTATION ASSISTANCE GROUP 25 (2012), https://newgtlds.icann.org/en/about/trademark-clearinghouse/summary-iag-input-26sep12-en.pdf [http://perma.cc/8H2P-LPEV].

[49] *See* Michael Berkens, *ICM Owner of .XXX Applies for .Sex, .Porn & .Adult to Give .XXX Owners Grandfather Rights*, THE DOMAINS (Apr. 12, 2012), http://www.thedomains.com/2012/04/12/icm-owner-of-xxx-applies-for-sex-porn-adult-to-give-xxx-owner-grandfather-rights/ [http://perma.cc/GCA9-JF69].

[50] *See Get Priority Entry into .PORN and .ADULT*, ICM REGISTRY,(Apr. 14, 2015), http://www.icmregistry.com/media/press/?article=58 [http://perma.cc/V7E9-TYC6].

Another approach, reserved names, has long been a feature of second-level domain name allocation policy.[51] This is evident from the Final Report of the GNSO's Reserved Names Working Group, which was formed to evaluate reservations as part of the new gTLD policy development process.[52] As noted in the context of top-level domains above, many status quo reservations address technical and operational stability. A separate stream of work during new gTLD policy development explored reserving well-known trademarks on a Globally Protected Marks List (or, as it is most commonly referred to, GPML).[53] This mechanism was ultimately not mandated by the gTLD Applicant Guidebook, but the concept has been voluntarily implemented by, for example, large portfolio applicant Donuts,[54] whose new domains include ".tennis," ".apartments," ".school," and ".casino."[55]

Prioritization on bases other than trademark rights has been adopted by various ccTLDs and gTLDs, although, to be clear, this was not mandated by ICANN. For example, when the European Union's ".eu" launched, "[h]olders of prior rights recognised or established by national and/or [c]ommunity law," defined to include trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works, were accorded registration priority.[56] When the new gTLD ".jobs" launched in 2005, holders of trade names were eligible to apply during a sunrise-like priority period.[57] Where additional mechanisms are voluntarily adopted by gTLDs, they must comply with, and not circumvent, the trademark rights protection mechanisms contractually mandated by ICANN.

C. The Case for Unified Geographic Name Allocation Policy

The New gTLD Program, which by March 30, 2015 had added nearly 550 gTLDs to the DNS from 1,930 applications received, has

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[51] *See generally* ICANN, RESERVED NAMES, *supra* note 23.

[52] *See generally id.*

[53] *See* IMPLEMENTATION RECOMMENDATION TEAM, *supra* note 43, at 16.

[54] *See Domains Protected Marks List*, DONUTS, http://www.donuts.domains/services/dpml [http://perma.cc/97WY-D7D8].

[55] *Available Domain Names*, DONUTS, http://www.donuts.domains/services/domain-names [http://perma.cc/8AAT-WEZ8].

[56] Commission Regulation 874/2004 of Apr. 28, 2004, Laying Down Public Policy Rules Concerning the Implementation and Functions of the .eu Top Level Domain and the Principles Governing Registration, 2004 O.J. (L 162) 40, 44 (EC).

[57] *See* Steve Quinn, *Follow-up File: The Internet.jobs Domain Registrars*, DALL. MORNING NEWS, (June 25, 2005), http://www.goto.jobs/news/2005-6-23-dallas.asp [http://perma.cc/NY37-NH4A].

fundamentally altered the DNS landscape. The potential for conflict at the top level is now no less a concern than at lower levels, and the rationales underpinning prioritization policy at the second level now apply with equal logic at the top level. Where the impact of the uniqueness requirement may previously have been mitigated at the second level by the potential availability of the name in other non-semantic gTLDs (e.g., "book.com," "book.net," and "book.org"), the addition to the DNS of new gTLDs with obvious semantic or proprietary value may eliminate any such benefits. Domain name registrations in new gTLDs are not fungible in the way that domain name registrations in the pre-2011 DNS were: a "marriott.hotel" domain name is not substituted by the registration of the name "marriott" in some other gTLD ("marriott.restaurant," for example). There is likewise no substitute for a ".marriott" gTLD. In today's DNS, uniqueness is relevant at *all* levels of the system.

The conditions at the top and second levels of the DNS are no longer sufficiently different to justify separate bodies of policy, rendering the continued bifurcation of geographic domain name allocation policy by level both inefficient and impractical. Going forward, prioritization policy should take a whole-of-system view. The success of such an approach requires clearly defining the right or interest being prioritized; a harmonized definition can then be applied across all levels of the DNS. Transparency, accountability, and consistency demand that definitions be sufficiently clear to enable domain name applicants—at every level—to reliably assess whether a name is subject to a protection mechanism. Policy establishing eligibility for participation in a mandated sunrise process in the launch of a new gTLD, for example, generated few questions and gave ICANN no responsibility in validating claims. Eligibility was expressly limited to "Sunrise-Eligible Rights Holders," defined as holders of "marks . . . verified by the Trademark Clearinghouse."[58] Clearly, what constitutes a trademark, for example, does not change between the top and lower levels of the DNS, nor does the evidence of the existence of a trademark change between the top and lower levels of the DNS. On the other hand, application of the definition of "geographic name" in the gTLD Applicant Guidebook has proved particularly difficult because the interests captured by the defined term cannot readily be identified or verified. Rights or interests such as these that are incapable of clear definition or verification are, quite

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[58] ICANN, TRADEMARK CLEARINGHOUSE: RIGHTS PROTECTION MECHANISM REQUIREMENTS § 2 (Sept. 30, 2013), http://newgtlds.icann.org/en/about/trademark-clearinghouse/rpm-requirements-30sep13-en.pdf [http://perma.cc/NAM4-47NW] [hereinafter ICANN, RPM REQUIREMENTS].

simply, patently out of place in a system with transparency, accountability, and consistency as its core values.

Governments' interests in geographic, cultural, and related names are not clearly or consistently documented, making their prioritization difficult not only to justify, but also to implement. The fragmented definition of "geographic name" in ICANN's gTLD Applicant Guidebook, which cobbles together various external resources, is clear evidence of the difficulty in prioritizing an interest not elsewhere clearly defined.[59] ICANN relies on existing external lists seemingly to excuse itself from the responsibility of validation. This is particularly evident in the politically-fraught context of geographic names, where adoption of the International Standardization Organization's ISO3166-1 standard of "English country names and code elements"; the ISO3166-2 standard of "Country subdivision codes"; and the United Nations' "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" has historically removed ICANN from "the business of deciding what is and what is not a country."[60] Yet in fact, ICANN has assumed that responsibility simply in deciding to prioritize *someone's* rights in *something*, irrespective of who that one or what that thing is. In other words, by reserving country and territory names and by imposing a consent requirement on other geographic names, ICANN inherently validates governments' claims to geographic names. Because there is no external qualified body or express international law upon which it can rely, the only way ICANN can avoid the responsibility of validation in this situation is to avoid making policy that prioritizes as yet unverifiable, indefinable government interests.

Consistent implementation is the crucial second step in achieving effective uniform prioritization policy. In addition to complete ignorance of the convoluted definition of "geographic name" just noted, ICANN went on to characterize sixty-six of the 1,930 new gTLD applications it received as "geographic."[61] This characterization

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[59] *See* ICANN, APPLICANT GUIDEBOOK, *supra* note 22, at §§ 2.2.1.4–2.2.1.4.4.

[60] INT'L ORG. FOR STANDARDIZATION, ENGLISH COUNTRY NAMES AND CODE ELEMENTS 1, http://www.choralfestivalnetwork.org/admin/filez/26_Country%20codes.pdf [http://perma.cc/ZC6A-JS6L]; U.N. Stat. Div., Composition of Macro Geographical (Continental) Regions, Geographical Sub-regions, and Selected Economic and Other Groupings (Oct. 31, 2013), http://unstats.un.org/unsd/methods/m49/m49regin.htm [http://perma.cc/6D4N-K74K]; U.N. Ctr. for Trade Facilitation and E-Business, UN/LOCODE Country Subdivisions ISO 3166-2, http://www.unece.org/cefact/locode/subdivisions.html [http://perma.cc/ST66-WV5T]; *User Documentation on Delegating and Re-Delegating a Country-Code Top-Level Domain*, *supra* note 4.

[61] *Program Statistics*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS (Sept. 18, 2015), http://newgtlds.icann.org/en/program-status/statistics [http://perma.cc/7MAY-7NT3].

inexplicably includes such domains as ".bar,"[62] ".nrw,"[63] ".ist,"[64] and ".zulu"[65]—none of which are a capital city name of a country or a territory listed in the ISO3166-1 standard, a city name to be used for purposes associated with the city name, an exact match of sub-national place names on the ISO3166-2 standard, a UNESCO region, or included on the UN "[c]omposition of macro geographical (continental) regions . . ." list. Interests neither clearly defined nor legally justified usurp ICANN's new gTLD policy of legally recognized and demonstrable trademark rights. In some cases, this occurred by preventing applications outright,[66] and in other cases by rejecting applications not expressly or impliedly ineligible.[67] Would-be applicants in future expansion rounds have undoubtedly been discouraged by ICANN's inconsistency in this space.[68] Leaving to one side the question of whether one agrees with the substance of

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[62] *See Application Details for Application ID: 1-1870-98363*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/246 [http://perma.cc/29AM-NQWU] (last visited Mar. 30, 2015) (PDF of public portion of application available calling ".bar" a geographic TLD).

[63] *See Application Details for Application ID: 1-994-3470*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1010 [http://perma.cc/Y7Z4-HHKH] (PDF of public portion of application available calling ".nrw" a geographic TLD).

[64] *Application Details for Application ID: 1-896-64208*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1786 [http://perma.cc/HN32-Z52Q] (PDF of public portion of application available calling ".ist" a geographic TLD).

[65] *Application Details for Application ID: 1-994-74713*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1618 [http://perma.cc/N3LW-G4DC] (answering "no" to the self-designation as a geographic name). *But see* ICANN, NEW GENERIC TOP-LEVEL DOMAINS: NEW GTLD CURRENT APPLICATION STATUS, https://gtldresult.icann.org/application-result/applicationstatus/viewstatus [https://perma.cc/JD6J-8CHB] (identifying ".zulu" as "geographic" in the search by application type).

[66] For example, American turkey farmers, cooks, and enthusiasts were denied by ICANN APPLICANT GUIDEBOOK at § 2.2.1.4.2 from applying for ".turkey."

[67] Well-known brands Amazon and Patagonia, for example, have both had their trademark rights displaced for lacking government support when neither falls within the agreed gTLD Applicant Guidebook definition of "geographic name." *See* M.E., *New Internet Addresses: .patience*, THE ECONOMIST, (July 25, 2013, 12:30 PM), http://www.economist.com/blogs/schumpeter/2013/07/new-internet-addresses-0 [http://perma.cc/Y2KA-F58D]; Eric Pfanner, *Amazon Rejected as Domain Name After South American Objections*, N.Y. TIMES, (July 18, 2013, 5:21 PM), http://bits.blogs.nytimes.com/2013/07/18/amazon-rejected-as-domain-name-after-south-american-objections/?_r=0 [http://perma.cc/UH3F-7WL4].

[68] *See* ICANN GENERIC NAMES SUPPORTING ORG. BUS. CONSTITUENCY, BC COMMENT ON GAC PROPOSAL FOR PROTECTION OF GEOGRAPHIC NAMES IN NEW GTLDS 1 (2014), https://gacweb.icann.org/download/attachments/35455403/BC%20Comment%20on%20GAC%20Proposal%20for%20Geographic%20Names.pdf?version=1&modificationDate=1415614595000&api=v2 [http://perma.cc/C3VA-NFWX] (arguing that the requirement that applicants for geographic names seek government consent "sets an unclear burden for business users applying for new gTLDs").

ICANN's definition of "geographic name," or indeed even the legality of prioritization in geographic names, it is unquestionably the case that once a consensus-driven definition is formulated, ICANN must unerringly apply that definition and only that definition.

Further, implementation by ICANN staff must align with and enable the intentions of a policy's drafters. In law, this notion takes shape as an expectation or obligation upon judicial bodies to interpret and apply legislation in a manner consistent with the purpose that legislation is intended by its drafters to fulfill.[69] An expectation of purposive implementation of ICANN's domain name policy would promote critical evaluation rather than acquiescent acceptance of ad hoc special requests to deviate from consensus-driven policy requirements. Such an expectation would certainly have changed the course of ICANN's new gTLD policy implementation, which expressly invited such requests from governments seeking super-prioritization above trademark rights holders.

Clearly sensitive to concerns expressed by the GAC in relation to certain new gTLD applications considered by governments to be geographic in nature but not falling within the gTLD Applicant Guidebook definition of protected "geographic name,"[70] ICANN staff developed the Rights Protection Mechanism (RPM) Requirements document,[71] which set out technical and operational requirements for implementing the mandated sunrise and Trademark Claims notice periods and expressly invited deviations from these agreed mechanisms.[72] Appropriately detailed launch plans set out in a new gTLD application were presumed approved "unless ICANN reasonably determines that such requested registration program could contribute to consumer confusion or the infringement of intellectual property rights."[73] Thus, before ICANN had even begun to constructively apply

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[69] *See, e.g.*, DENNIS C. PEARCE & ROBERT S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 37–39 (8th ed. 2014).

[70] *See, e.g.*, *GAC Advice Response Form for Applicants for string .amazon*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, http://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf [http://perma.cc/8ZCU-RYH6]; *GAC Advice Response Form for Applicants for string .patagonia*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1084-78254-en.pdf [http://perma.cc/BUH7-H23D]; *GAC Advice Response Form for Applicants for string .spa*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, http://newgtlds.icann.org/sites/default/files/applicants/08may14/gac-advice-response-1-1309-81322-en.pdf [http://perma.cc/L66P-ENYV].

[71] ICANN, RPM REQUIREMENTS, *supra* note 58.

[72] *Id.* at § 4.5.2.

[73] *Id.*

its hard-earned, bottom-up, consensus-driven policy, it undermined that outcome by prescribing the pathway to exemption.

In the case of geographic new gTLDs, the RPM requirements went beyond anticipating some applicants' plans to request exemption from the mandated, consensus-driven rights protection mechanisms and positively invited such requests:

> If registry operators that indicated in their applications for their TLDs that their TLD would be a geographic name ("Geo TLDs") and representatives of the Intellectual Property Constituency recommend to ICANN the creation of a registration program that sets forth a defined list of labels or categories of labels that Geo TLDs MAY Allocate [sic] or register to third parties prior to or during the Sunrise Period, and ICANN accepts and implements such recommendation ("Approved Geo Launch Program"), registration programs submitted by the Geo TLDs pursuant to Section 4.5.2 for the Approved Geo Launch Program will carry a presumption of being approved, unless ICANN reasonably determines that such requested program could contribute to consumer confusion or the infringement of intellectual property rights.[74]

The RPM requirements thus opened the door to governments' exerting control over domain name registration by any or all of the following mechanisms:

> (1) Allocating a limited number of names outside of the sunrise process to promote the TLD;
>
> (2) Restricting, reserving, or pre-allocating names specifically related to governmental functions, departments, interests, or initiatives;
>
> (3) Grandfathering based on registrations in existing TLDs;
>
> (4) Expanding sunrise eligibility to include registrants other than trademark holders; and
>
> (5) Offering priority rights to champion stakeholders who promote the new TLD and are actively involved in its launch and development.

To fully appreciate the impact of the exceptions sought for geographic domains, one must acknowledge the critical decision to be made by all new gTLD applicants, including those applying for geographic names: sell domain names to the public (e.g., "juliescafe.paris") or operate an internal TLD making names available only to the TLD applicant and its constituent parts or divisions (e.g., "police.miami"). Where names are sold to the public, ICANN's base Registry Agreement and related documentation present only narrow opportunities for the registry operator to itself reserve or register names.[75] This is a policy that dates to ICANN's formation, put in place to prevent the registry operator from "gaming the system" by

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[74] ICANN, RPM REQUIREMENTS, *supra* note 58, at § 4.5.3.

[75] ICANN, BASE REGISTRY AGREEMENT § 2.8 (2015) [hereinafter ICANN, BASE REGISTRY], http://newgtlds.icann.org/en/applicants/agb/agreement-approved-20nov13-en.pdf [http://perma.cc/CG8Y-A3JA]; ICANN, APPLICANT GUIDEBOOK, *supra* note 22, at Specification 5 § 3.2, Specification 9 § 1(b).

registering choice names itself or manipulating the registration process to maximize profit.[76] Geographic new top-level domain applicants (and the governments that back them) that seek to "have their cake and eat it too" argue that such restrictions open the door to public registration of names commonly associated with the geographic location, thus producing confusion and abuse. This risk is said to be exacerbated by the community-developed, mandated thirty-day sunrise which prioritizes only trademark holders.

So it came to be that both the rules and the exceptions in new gTLD name allocation prioritized government interests in geographic names at both the top and second levels of the DNS. This super-prioritization relies upon an imprecise definition of interests that cannot be proven by reference to an existing law or standard and are not protected under international law, to the diminishment of rights that can be proven and are protected under international law. It relies upon inconsistent application of an imprecise definition and the willingness of domain name applicants to bear the risk of entirely unpredictable outcomes. This is simply not sustainable in a system that derives its legitimacy from transparency, accountability, and consistency.

Taking a whole-of-system view, as the current DNS now necessitates, consistency and transparency demand that domain name allocation policy at one level of the DNS not be ignored when developing policy at other levels. Such an approach means that existing policy at the second level should be brought to bear on analysis at the top level. It seems to have been forgotten that geographic domain names were some of the first to be challenged under the now more than a decade old UDRP, and that good reasons were clearly provided for not including geographic names as such within its scope. Landmark UDRP decisions in challenges to the domain names "newzealand.com"[77] and "andalucia.com"[78] have normative value in the recognition of non-governmental interests in geographic names' use in the DNS, while decisions in challenges to the domain names "brisbane.com,"[79] "rouen.net," and "rouen.com"[80] have

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[76] *See Vertical Integration: History of Vertical Separation,* ICANN, http://icannwiki.com/index.php/Vertical_Integration [http://perma.cc/V7YU-JKQ7].

[77] HM the Queen *ex rel* New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html [http://perma.cc/QEN9-WCA5].

[78] Junta de Andalucia Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A. v. Andalucía.Com Ltd., WIPO Case No. D2006-0749 (Oct. 13, 2006), http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0749.html [http://perma.cc/SY8G-6NCE].

[79] Brisbane City Council v. Joyce Russ Advert. Pty. Ltd., WIPO Case No. D2001-0069 (May 14, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0069.html

established that government use of a geographic name is not equivalent to trademark rights. Geographic domain name disputes arise with less frequency at the second level of the DNS today, despite the fact that UDRP decisions have no strict precedential value.[81] This is certainly evidence of the normative value of these early decisions, which were "overwhelmingly unsuccessful,"[82] with complainant governments succeeding "in only a few exceptional cases."[83] In the aggregate, these decisions unequivocally reject the absolute priority of government interests over trademark rights. As the ICANN community lays the foundation for the next generation of domain name allocation policy in a new environment where conflicts arise at every level of the DNS, the substantial and growing body of UDRP decisions should, at a minimum, be reflected upon or, more appropriately, relied upon as a starting point.

III. LESSONS LEARNED FROM THE UDRP ON PRIORITIZING GOVERNMENT INTERESTS IN GEOGRAPHIC NAMES

A. Elements of the UDRP

The Registry Agreement into which each new gTLD registry operator enters with ICANN requires the sale of domain names only through ICANN-accredited registrars,[84] which in turn are bound by ICANN's Registrar Accreditation Agreement to implement the UDRP through the domain name registration agreement into which registrants enter.[85] Under the UDRP, a domain name registration is deemed abusive on proof of each of the following three elements:

> (i) the registrant's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

[http://perma.cc/N5WY-BSKJ]; *see also* Brisbane City Council v. Warren Bolton Consulting Pty. Ltd., WIPO Case No. 2001-0047 (May 7, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0047.html [http://perma.cc/RW84-6YE8].

[80] Chambre de Commerce et d'Industrie de Rouen v. Stenzel, WIPO Case No. D2001-0348 (Jun. 18, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0348.html [http://perma.cc/2N2H-GD3S].

[81] *See Uniform Domain Name Dispute Resolution Policy*, ICANN § 4(k), http://www.icann.org/en/help/dndr/udrp/policy [http://perma.cc/3V5L-LLPT] [hereinafter *UDRP*]; *see also* Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc., No. 00 C 1738, 2000 WL 562470 (N.D. Ill. May 3, 2000).

[82] JOHN R. OLSEN ET AL., DOMAIN NAMES: GLOBAL PRACTICE AND PROCEDURE 65 (2007).

[83] TORSTEN BETTINGER, DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 1015 (2005).

[84] ICANN, BASE REGISTRY, *supra* note 75.

[85] *2013 Registrar Accreditation Agreement*, ICANN, https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en [http://perma.cc/X5YH-J7AF].

> (ii) the registrant has no rights or legitimate interests in respect of the domain name; and
>
> (iii) the registrant's domain name has been registered and is being used in bad faith.[86]

The two-step analysis undertaken to determine the first element underscores the limited scope of applicability to trademarks only:

> (1) Is there a trademark upon which the UDRP claim can be raised?
>
> (2) If yes, is the domain name identical or confusingly similar?

This initial hurdle presents significant difficulties for government complainants challenging geographic names, which in ordinary circumstances connote a geographic location, rather than a particular trader and its goods, and therefore lack distinctiveness.[87] Critically, the first element of the UDRP makes clear that without a trademark, the UDRP is not available to a would-be complainant. It is worth specifically noting, however, that the first element does not require that a mark be registered; specific examples are provided below of common law and statutory rights having formed the basis of successful challenges.

The second element of the UDRP, an assessment of a registrant's "legitimate interests" in a domain name, also presents difficulty because geographic names' ordinarily geographic connotation makes them a desirable and logical descriptive choice for a multitude of domain name registrants, commercial or otherwise. Where the complainant government is able to make a prima facie case based upon a lack of rights or legitimate interests, the burden of proof shifts to the domain name registrant to affirmatively demonstrate rights or legitimate interests.[88] Rights and legitimate interests can be demonstrated by use or preparations to use the name at issue "in connection with a bona fide offering of goods or services"; being "commonly known by the domain name" even in the absence of trademark rights; and making "legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue."[89]

The third element, bad faith, has traditionally been less an obstacle to governments seeking to challenge geographic domain

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[86] *UDRP*, *supra* note 81.

[87] *See* FORREST, *supra* note 7, at 149–51.

[88] WIPO, WIPO OVERVIEW OF WIPO PANEL VIEWS ON SELECTED UDRP QUESTIONS § 2.1 (2nd ed. 2011), http://www.wipo.int/amc/en/domains/search/overview2.0/#21 [http://perma.cc/C9NG-ELK7].

[89] *UDRP*, *supra* note 81.

names once the burden of proving the first and second elements is met.[90] An attempt to ransom a name to its "rightful owner"[91] is perhaps the clearest indication of bad faith, but as the DNS has matured and awareness of the UDRP has increased, the number of blatant cybersquatting cases has declined. Other bad faith activities include disrupting the business of a competitor or diverting business by creating a likelihood of confusion.[92] Disclaimers may, but are not guaranteed to, avoid a finding of bad faith.[93]

While not binding on national courts[94] or on other UDRP panelists, prior decisions evidence the rationale behind prioritization on the basis of demonstrable, verifiable legal rights and elucidate the norms present in weighing government interests in geographic names against those verifiable legal rights. These norms provide a baseline for evaluating government requests for prioritization in the DNS more broadly. From this baseline, successful government challenges to third party use depend upon a narrow and relatively uncommon constellation of facts, while unsuccessful challenges to third party use fall into two (at times overlapping) categories. Both of those categories serve to emphasize the recognition of trademark rights in the DNS and the non-recognition of government interests in names: (1) complainant government lacks trademark rights, and (2) domain name registrant demonstrates a legitimate right or interest in the name. These categories are analyzed in detail in the remaining sections of this Article.

B. Where Government Succeeds

1. No Use by Domain Name Registrant

One clear path to success in UDRP challenges is laid by the respondent being unable to demonstrate use of the domain name registration. This series of decisions illustrates that UDRP challenges brought by state actors against third-party geographic domain name

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[90] *See, e.g.*, SAM Marques de l'Etat de Monaco v. Swartz, WIPO Case No. D2013-0099 (Mar. 15, 2013), http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0099 [http://perma.cc/SXK5-GLW7]; Australian Stock Exch. Ltd. v. Cmty. Internet (Australia) Pty. Ltd., WIPO Case No. D2000-1384 (Nov. 30, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1384.html [http://perma.cc/8J5W-PE4C].

[91] *UDRP*, *supra* note 81, at § 4(b)(1).

[92] *Id.* at § 4(b)(2)–(4).

[93] City of Hamina v. Paragon Int'l Projects Ltd., WIPO Case No. D2001-0001 (Mar. 12, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0001.html [http://perma.cc/P6LZ-MDV3].

[94] *See UDRP*, *supra* note 81, at § 4(k); *see also* Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc., No. 00 C 1738, 2000 WL 562470 (N.D. Ill. May 3, 2000).

registrants may succeed where there is no evidence of the respondent's use of the name, provided that the claimant demonstrates trademark rights. Facts in such disputes range from obvious cybersquatting to unrealized intentions to use the domain name registration.

For example, the Sydney Market Corporation, of Sydney, Australia, successfully challenged the registration of the domain name "sydneymarkets.com" by a registrant who claimed to have registered the name for use in connection with an IT consultancy business known as "Shell Information Systems."[95] The Sydney Market Corporation was not itself a government entity but had taken on the operation of the Sydney Markets from a statutorily created state-owned enterprise, the Sydney Market Authority.[96] The state government-owned site from which the markets operated was named "Sydney Markets," a name it acquired in 1996, prior to which it had been known as the suburb of "Flemington."[97] The panelist noted in his decision that "the Sydney Markets occupy the entire suburb 'Sydney Markets,'" but nevertheless considered the case as involving more a local landmark name than a strictly geographical name.[98] The website accessed through the respondent's domain name was headed "Sydney I.T. Markets," but no other evidence of use was presented.[99] Although there was "no evidence that the Respondent registered the contested domain name primarily for the purpose of disrupting the business of a competitor, or even that the Complainant was a competitor of the Respondent," bad faith was found on the basis that the respondent, a Sydney resident, could be assumed to have awareness of the local markets and had registered the domain name to "attract, for commercial gain, Internet users to the Respondent's website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website."[100] The first UDRP element was satisfied not by a registered mark, but by common law rights in the name "Sydney Markets," and the absence of a link between the respondent's IT consultancy and the name "Sydney Markets" supported a finding of no right or legitimate interest.[101]

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[95] Sydney Mkts. Ltd. v. Rakis, WIPO Case No. D2001-093 (Oct. 8, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0932.html [http://perma.cc/44SE-WB4D].

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

An equivalent outcome resulted in an earlier Australian dispute involving the domain name "australianstockexchange.com."[102] At the time of the UDRP complaint, the domain name resolved to a "parked" web page which presented the following message: "This domain was registered through . . . registrars.com. We are Moving in Shortly. . . . [P]lease come back soon."[103] The respondent ran an "Internet Newspaper" but failed to present evidence of use of the domain name at issue in connection with that business or any other activity.[104] The UDRP panelist inferred from this lack of evidence that the respondent had registered the domain name defensively, "as a way of 'protecting' it 'from being registered by hostile persons.'"[105] The first complainant, Australian Stock Exchange Limited, was a statutorily created corporation "formed to operate the first national exchange, which was named the 'Australian Stock Exchange,'" the amalgamation of the six independent stock exchanges that had been operated by the various states of Australia.[106] The corporation notably did not possess a registered trademark at the time of the dispute.[107] However, it was found to have satisfied the first UDRP element through the establishment of common law rights.[108] Finding no right or legitimate interest, it was determined that:

> [the] domain name bears no relationship to any legitimate business or other activity of the Respondent, because that domain name is not one that the Respondent, in the context of provision of goods, services or information via a web site, would use unless seeking to create a false impression of an association with the Complainants, and because that domain name is not one that the Respondent could legitimately use under Australian law.[109]

This final point is notable: that statutorily created complainants may find that their legislative origin speaks to both the first and second UDRP elements, potentially demonstrating the requisite trademark right or preventing third parties from acquiring legitimate rights or interests. Another example of this is provided by the disputed domain name "sydneyoperahouse.net."[110] The

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[102] Australian Stock Exch. Ltd., v. Cmty. Internet (Australia) Pty Ltd., WIPO Case No. D2000-1384 (Nov. 30, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1384.html [http://perma.cc/6ZVR-RAKG].

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See id.*

[108] *See id.*

[109] *Id.*

[110] Sydney Opera House Trust v. Trilynx Pty. Ltd., WIPO Case No. D2000-1224 (Oct. 31, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1224.html [http://perma.cc/SQH2-W4UG].

respondent's IT business specialized in building "web networks," one of which organized various sites including "www.AustNews.com," "www.AustArt.com," "www.AustStocks.com," "www.AustMusic.com," and "www.SydneyHomes.com" under the domain name "Harbourbridge.com." The respondent submitted that it registered the name "sydneyoperahouse.net" and others to "protect" them and create free web networks to be used by the public "for the common good."[111] As in the case of the domain name "australianstockexchange.com," no use by the respondent was demonstrated and the domain name resolved to a holding page.[112] The complainant, Sydney Opera House Trust, was a statutory corporation established under an act of state legislation, the Sydney Opera House Trust Act. The panelist focused on the Trust's legislative mandate, which both confirmed the complainant's trademark rights and prevented the respondent and others from acquiring legitimate rights or interests:

> By conferring upon the complainant the right to acquire and register trademarks in connection with its objects and to exercise its rights thereunder, the NSW Parliament, on behalf of the people of New South Wales, Australia, designated the complainant as the appropriate entity to manage and administer the famous building and protect its reputation. Accordingly, sincere though the respondent may be in seeking to be a responsible owner of the disputed domain name and to prevent others from significantly damaging the cultural heritage of all peoples of the world, as expressed in the Sydney Opera House, the law of New South Wales (where both the complainant and the respondent are located) prevents the respondent from establishing a legitimate right or interest in a domain name which incorporates the complainant's trademark.[113]

This series of decisions illustrates that UDRP challenges by state actors to third-party geographic domain name registrations may succeed where there is no evidence of the respondent's use of the name, provided that the claimant demonstrates trademark rights. Such cases are not guaranteed to succeed. Consider, for example, a 2001 decision rejecting a challenge to the registrations of "rouen.com" and "rouen.net."[114] In that case, the claimant's failure to establish trademark rights made it unnecessary for the panel to reach a determination on the second and third elements of the UDRP. However, one of the three panelists attributed some significance to the respondent's stated intentions to use the domain names at issue.[115]

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[111] *Id.*

[112] *See id.*

[113] *Id.*

[114] Chambre de Commerce et d'Industrie de Rouen v. Stenzel, WIPO Case No. D2001-0348 (Jun. 18, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0348.html [http://perma.cc/NA3R-TPCP] (finding that the response was silent as to the respondent's business but expressed an intention to use the domain name registrations in connection with a website providing travel information).

[115] *See id.*

Another significant norm emanating from this series of decisions is the recognition of name rights of statutorily created claimants, who may rely upon such statutory origin to prove possession of requisite trademark rights and to disprove third party rights or legitimate interests. Where legislation deals with the name of the created entity, this speaks against third-party rights or legitimate interests, but the mere fact of statutory origin does not displace the need to specifically satisfy each of the three UDRP elements.

2. No Nexus Between Registrant and Domain Name

A related stream of UDRP challenges succeed where there is use of a geographic domain name by its registrant, but this use has little or no actual connection to the domain name registrant. From these decisions the principle can be extrapolated that mere use of a domain name by its registrant is not sufficient; rather, the use must be in connection with genuine ongoing activity not aimed at confusing the public. A prime example is Wembley National Stadium Limited's challenge to the registration of "wembleystadium.net" by a registrant named "Bob Thomson [aka Wembleystadium.net]."[116] The panelist had no difficulty in finding the first element satisfied by the complainant's registered and unregistered trademarks, there being "every likelihood that at least members of the British Public [sic] will expect a domain name comprising the words wembleystadium to have some connection with the famous Stadium of that name and the organisation which runs that Stadium, the Complainant."[117] The domain name registrant's claim to the name at issue was unconventional: "one week after the Notification of Complaint and Commencement of the Administrative Proceeding was issued to the Respondent by the Center, the Respondent changed his name by deed poll from Robert Thomson to wembleystadium.net." This evidence gave little difficulty in the panel's finding the second and third elements of the stadium's UDRP claim satisfied.

While geographic names' inherently descriptive character legitimizes third-party use, the strength of this registrant-favorable evidence on the second UDRP element is limited by the need for an actual connection between the respondent, its products or services, and the location. For example, a website associated with the domain

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[116] Wembley Nat'l Stadium Ltd. v. Thomson, WIPO Case No. D2000-1233 (Nov. 16, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1233.html [http://perma.cc/TN4R-CYUT].

[117] *Id.*

name "montecarlovodka.com" advertised the pending availability of a vodka named "Monte Carlo Vodka."[118] The US-based registrant demonstrated no link to the principality of Monte Carlo or any link between the vodka, which was produced in both France and Monte Carlo.[119] The respondent's pending US trademark application was noted by the panel but considered unlikely to succeed due to its false use of a geographical indication in connection with spirits and use of a logo similar to the coat of arms of the Principality of Monaco, both prohibited under US trademark law.[120] Although the respondent had made use of the domain name, it was considered unlikely that the market knew of the respondent and its products by that name. Thus, the use was found to be insufficient to support a finding of legitimate rights or interest in the name.[121]

This stream of decisions illustrates that use of the domain name by its registrant will not per se defeat government challenges to geographic domain name registrations by third parties. These decisions also highlight the need for a genuine factual connection between registrant and domain name. It must be carefully noted, however, that just as trademark law recognizes acquired distinctiveness,[122] UDRP panels will probe for consumer awareness where the connection is not patently evident. That said, the factual underpinnings of cases falling in this basket are relatively uncommon because they tend not to involve local citizens who identify their business or other activity with the name of its location.

3. Domain Name Registrant Defaults

Finally, government challenges to geographic domain name registrations are successful where the respondent fails to participate in the UDRP process. In a dispute involving the domain name "sydneyairports.com,"[123] for example, the complainant operator of Kingsford Smith Airport—which the panel noted was "known

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[118] SAM Marques de l'Etat de Monaco v. Swartz, WIPO Case No. D2013-0099 (Mar. 15, 2013), http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0099 [http://perma.cc/2PSA-PL9Z].

[119] *See id.*

[120] *See id.* (citing 15 U.S.C. §§ 1052 (2)(a)–(b)).

[121] *See id.*

[122] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 15(1), Apr. 15, 1994, 1869 U.N.T.S. 299 ("Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.").

[123] Sydney Airport Corp. v. John Crilly, WIPO Case No. D2005-0989 (Nov. 22, 2005), http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0989.html [http://perma.cc/4UYP-5DSF].

nationally and internationally as Sydney Airport and has been so since 1998 when the airport was privatised"[124]—satisfied the first UDRP element with its stylized Australian registered trademark "comprising the words 'Sydney Airport.'"[125] The panel drew inferences from the respondent's default in finding no rights or legitimate interests.[126] Due to the similarity between the complainant's trademark and "sydneyairport" domain names registered in the ".com," ".info," ".net," ".org," and ".com.au" domains, the panel also found bad faith, characterizing the registration as "a clear attempt by the Respondent to divert users to Internet sites other than the Complainant's."[127]

Each of the three streams of successful challenge circumstances highlighted above is narrowly limited by the facts. Notably, the key to the complainant government's success is an omission or failing on the part of the domain name registrant more than a positive act on the part of the government (although as the discussion immediately following highlights, this assumes that government has taken the affirmative steps needed to secure trademark rights). Accordingly, successful challenges tend not to implicate local citizens and businesses that self-identify according to geography or who acquire a reputation through use of the name.

C. Where Government Fails

1. No Government Trademark

A significant obstacle to success in challenging geographic domain names in UDRP proceedings is the UDRP's limited scope, reflected in its elements, under which only trademarks are actionable.[128] From this stream of UDRP challenges emerges the guiding principle that claims to sovereignty, governments' expressions of dissatisfaction, or public interest-type concerns are not valid bases upon which to construct geographic domain name challenges.

The benchmark for actionability, set according to the harmonized minimum standards of Article 15(1) of the TRIPS

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[124] *Id.*

[125] *Id.*

[126] *See id.*

[127] *Id.*

[128] *See Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules")*, ICANN (July 31, 2015), https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en [http://perma.cc/R97K-44DL] (requiring at Cl. 3(b)(viii) that the UDRP complaint "[s]pecify the trademark(s) or service mark(s) on which the complaint is based and, for each mark, describe the goods or services, if any, with which the mark is used").

Convention, is relatively high. These standards allow World Trade Organization members to recognize marks that are not simply inherently distinctive, but have acquired distinctiveness through use.[129] Inherent distinctiveness essentially demands that a sign bring to mind one and only one message;[130] this is extremely unlikely for geographic names because in addition to any other connotations a commercial enterprise might attempt to create in the mind of the consuming public, they identify a particular geographic location. Trademark distinctiveness can only be achieved through commercial use to replace the inherent connotation of geography with a trader and its particular goods or services.

Challenges to geographic names have consequently—and unsurprisingly—failed on the first UDRP element. From these decisions emerge norms that strike the balance of public and private rights and interests in geographic domain names. The oft-cited dispute between the government of New Zealand and a US-based company called Virtual Countries over the domain name "newzealand.com"[131] is a logical starting point in this analysis, as it elucidates the limits of asserting sovereign rights and makes clear that these are not equivalent to the trademark rights upon which a UDRP claim must be based.

Virtual Countries registered a number of countries' names as domain names and used them in connection with websites providing information about the named country. In the case of "newzealand.com," Virtual Countries had taken the additional step of registering "newzealand.com" as a US trademark. At the time of the dispute, the complainant government of New Zealand had five trademark applications pending in New Zealand for the mark "NEW ZEALAND;" the applications were not considered by the panel because none had been issued. New Zealand's claim was therefore based on common law unregistered trademark rights, but no evidence of secondary meaning was presented, prompting the panel to note that "to support the claim to trade/service mark rights the Complainant relies solely and exclusively upon the geographical significance of the name."[132] The first UDRP element was found not satisfied, so the claim failed. Common law rights were similarly rejected in a

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[129] *See supra* note 122 and accompanying text.

[130] *See* Charles Martin, *The Meaning of Distinctiveness in Trademark Law*, 45 U. ILL. L. REV. 535, 536 (1951).

[131] HM the Queen *ex rel* New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html [http://perma.cc/GMA2-96LL].

[132] *Id.*

challenge to the domain name "cityofdearborn.com" by the city of Dearborn in Michigan.[133]

Equivalent determinations have been made in relation to marks from civil law countries. Challenges to the domain names "olkiluoto.com" and "olkiluoto.net,"[134] as well as "portofhelsinki.com,"[135] for example, relied unsuccessfully on Article 2 of the Finnish Trademark Law. Article 2 establishes trademark rights on the basis of establishment of the mark on the market. According to the third paragraph of Article 2, "a trade symbol shall be regarded as established if it has become generally known in the appropriate business or consumer circles in Finland as a symbol specific to its proprietor's goods."[136]

In the "portofhelsinki.com" dispute, the complainant authority of the Finnish capital city of Helsinki had made extensive and long-time use of the name "Port of Helsinki," but had not registered the term as a trademark. Thus, it relied on the establishment of the mark under Article 2. The panelist rejected this argument for lack of supporting evidence. Similarly, in the challenge to an environmental group's registrations of the name "Olkiluoto," the name of the island on which the complainant's nuclear power facility is situated, the complainant failed to demonstrate that the "general Finnish public through the considerable press coverage has come to identify Olkiluoto." Olkiluoto was not part of the complainant's trade name, which was used by other businesses on the island along with the complainant's power services.[137]

The "portofhelsinki.com" decision was referenced by a subsequent UDRP panel in a challenge by the German city of Heidelberg to the domain name "heidelberg.net."[138] In that dispute, the city asserted protection of the name "Heidelberg" under German

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[133] City of Dearborn v. Mekled, Nat'l Arb. F. Case no. 99602 (Nov. 12, 2001), http://www.udrpsearch.com/naf/99602 [http://perma.cc/XNT2-Y6M6].

[134] Teollisuuden Voima OY v. Vastamäki, WIPO Case No. D2001-0321 (May 4, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0321.html [http://perma.cc/Z6GP-WJTD].

[135] Port of Helsinki v. Paragon Int'l Projects Ltd., WIPO Case No. D2001-0002 (Feb. 12, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0002.html [http://perma.cc/DQQ7-3V2P]. *Cf.* City of Hamina v. Paragon Int'l Projects Ltd., WIPO Case No. D2001-0001 (Mar. 12, 2014), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0001.html [http://perma.cc/WF9F-AG6M] (valid trademark established, relying on the *Chiemsee* decision of the European Court of Justice interpreting Article 3(3) of the First Directive 89/104/EEC, but second and third UDRP elements not established).

[136] *Port of Helsinki*, WIPO Case No. D2001-0002 at § 6.

[137] *Teollisuuden Voima*, WIPO Case No. D2001-0321 at § 5A.

[138] Stadt Heidelberg v. Media Factory, WIPO Case No. D2001-1500 (Mar. 6, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1500.html [http://perma.cc/5ZA8-WT57].

legislation but failed to specify the precise statutory origin in German law of this protection.

The Brisbane City Council's challenge to the domain name registration "brisbane.com" in 2001 was similarly hampered by private action.[139] This dispute also highlights the limits of asserting a government trademark portfolio of marks that include, but are not identical to, the challenged registration. The respondent advertising agency had registered the name "brisbane.com" and the names of other Australian state capital cities as part of a business plan "to develop a network of visual information booths or kiosks to be located in areas including major shopping centres."[140] The complainant city council sought to satisfy the first UDRP element by asserting statutory rights under the City of Brisbane Act 1924 to exercise powers under the name "Brisbane City Council" and trademark rights in the following registrations:

> E-BRISBANE logo;
>
> WATER SAVE IT! – BRISBANE CITY logo (the panel highlighted that the registration disclaimed right to the exclusive words "Brisbane City"); and
>
> BRISBANE CITY WORKS logo.[141]

Just prior to lodging its UDRP claim, the City Council filed an application for the trademark "BRISBANE CITY" in a number of classes.[142] The application, which could only be characterized as optimistic in light of the disclaimer on the City Council's existing "WATER SAVE IT!—BRISBANE CITY" trademark noted above, was pending when the UDRP panel was convened.[143] The panel considered this and the respondent's demonstration of extensive third-party registration of business names, corporate names, and trademarks in Australia incorporating or comprising the name "Brisbane" or "Brisbane City" to be "an indication that the Complainant does not have trademark rights to 'Brisbane City' or 'Brisbane.'"[144]

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[139] Brisbane City Council v. Joyce Russ Advert. Pty Ltd., WIPO Case No. D2001-0069 (May 14, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0069.html [http://perma.cc/N5WY-BSKJ]; *see also* Brisbane City Council v. Warren Bolton Consulting Pty Ltd., WIPO Case No. 2001-0047 (May 7, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0047.html [http://perma.cc/MYG4-JZGB].

[140] *Joyce Russ Advert.*, WIPO Case No. D2001-0069 at § 4B.

[141] *Id.* at § 4A.

[142] *See id.* at § 6.

[143] *See id.*

[144] *Id.*

In another challenge to a domain name registered by Virtual Countries, "puertorico.com,"[145] the complainant, a public corporation of the Commonwealth of Puerto Rico, owned multiple registered trademarks consisting of slogans comprising the name "Puerto Rico" and other words (for example, "Puerto Rico ¡Lo hace mejor!").[146] The challenge was defeated because no registration was comprised solely of the name "Puerto Rico." The Madrid City Council's registrations for marks comprising the name "Madrid" along with other words (for example, "PROMOTION MADRID" and "MADRID CIUDAD 2000") were likewise found to be insufficient to challenge the domain name registration "madrid.com."[147] While trademark rights were established in a challenge to the domain name registration "andalucia.com," the panel in that dispute notably characterized the finding as a "close call."[148]

The domain name registrations "rouen.com" and "rouen.net" were also unsuccessfully challenged by the Chamber of Commerce of the city of Rouen, France, despite the fact that the city's name was mentioned twice in a registered trademark, "C.C.I. ROUEN E.S.C. ROUEN L'ESPRIT DE CONQUETE."[149] The three members of the UDRP panel agreed that the first element had not been satisfied, offering differing reasons that converged on a lack of identity or confusing similarity.[150] It was acknowledged that the "attractive element" of the complainant's French trademark registration, the geographic name "Rouen," was identical to the domain name registration at issue.[151] The panel nevertheless found it impossible for "Rouen" to "be stripped of the abbreviations and the tag or epithet Spirit of Conquest, such that in essence the distinctive element is ROUEN."[152]

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[145] Puerto Rico Tourism Co. v. Virtual Countries, Inc., WIPO Case No. D2002-1129 (Apr. 14, 2003), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-1129.html [http://perma.cc/SEQ7-LCEQ].

[146] This slogan is translated in English as: "Puerto Rico does it better!" *Id.*

[147] Empresa Mun. Promoción Madrid S.A. v. Easylink Servs. Corp., WIPO Case No. D2002-1110 (Feb. 26, 2003), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-1110.html [http://perma.cc/YN59-62QT].

[148] Junta de Andalucia Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A. v. Andalucía.com Ltd., WIPO Case No. D2006-0749 (Oct. 13, 2006), http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0749.html [http://perma.cc/MQ7Z-RETM].

[149] Chambre de Commerce et d'Industrie de Rouen v. Marcel Stenzel, WIPO Case No. D2001-0348 (Jun. 18, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0348.html [http://perma.cc/2N2H-GD3S].

[150] *See id.*

[151] *Id.*

[152] *Id.*

Finally, rarely has local trademark law played a more prominent role in a UDRP dispute than in the 2000 challenge to the domain name registration "barcelona.com."[153] The local government based its UDRP claim on various trademark registrations consisting of "one main element, namely the expression 'BARCELONA' and another element of different importance, namely 'Excelentísimo Ayuntamiento de Barcelona.'" The sole panelist (who had also served on the three-member panel in the "andalucia.com" dispute) found the first UDRP element to be established on the basis that the "distinctive character" of the local government's mark was the name "Barcelona." The domain name had initially been registered in 1996 by a resident of Barcelona, who in 2000 transferred the name to a New York company wholly owned by the original registrant and her husband. The respondent's claim to rights or legitimate interests of the domain name was based on priority under the first-come, first-served system. The panelist rejected the claim to legitimate interests and also found bad faith. The respondent subsequently brought an action against the Barcelona local government in US courts under the Anticybersquatting Consumer Protection Act (ACPA).[154] The district court supported the outcome of the UDRP.[155] The Fourth Circuit Court of Appeals subsequently reversed the decision,[156] finding that the lower court had inappropriately applied Spanish law and that the Lanham Act (which incorporates the ACPA) should have been applied.

Applying the ACPA, the court came to:

> the ineluctable conclusion . . . that Bcom, Inc.'s registration and use of the name "Barcelona" is not unlawful. Under the Lanham Act, and apparently even under Spanish law, the City Council could not obtain a trademark interest in a purely descriptive geographical designation that refers only to the City of Barcelona. Under United States trademark law, a geographic designation can obtain trademark protection if that designation acquires secondary meaning. On the record in this case, however, there was no evidence that the public—in the United States or elsewhere—associates "Barcelona" with anything other than the City itself. Indeed, the Chief Director of the City Council submitted an affidavit stating that "[t]he City does not own and is not using any trademarks in the United States, to identify any goods or services." Therefore, under United States trademark law, "Barcelona" should have been treated as a purely descriptive geographical term entitled to no trademark protection. It follows then that there was nothing unlawful about Nogueras' registration of <barcelona.com>,

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[153] Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com Inc., WIPO Case No. D2000-0505 (Aug. 4, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html [http://perma.cc/6HAJ-5LN9].

[154] 15 U.S.C. § 1125(d).

[155] Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 189 F. Supp. 2d 367 (E.D. Va. 2002).

[156] Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003).

nor is there anything unlawful under United States trademark law about Bcom, Inc.'s continued use of that domain name.[157]

What emerges from this stream of UDRP challenges is that government prioritization is rejected when interests are based purely on sovereignty, government dissatisfaction, or public interest-type concerns—the very bases upon which governments seek priority over trademark holders and others at both the top and second levels through new gTLD policy. Sovereignty claims are not equivalent to, and do individually provide a basis for, challenging a private party's use of the name in the DNS. This rejection of government prioritization is, of course, explained by the strict limitation of the UDRP to actionable trademark rights, but here it must be highlighted that sovereignty offers no legal (and, specifically, no trademark-equivalent) claim to a particular name.[158] Arguably, this point is inherently acknowledged by WIPO in its having limited the scope of applicability of the UDRP (as is evident from the first UDRP element cited above) to trademarks. In summary, these UDRP decisions explain the limitations of the status quo of prioritization in domain name allocation to recognized legal rights—trademark rights—as an exception to first-come, first-served domain name allocation.

2. Use of the Name by the Registrant

Satisfaction of the first UDRP element, that the complainant has rights in a confusingly similar mark, does not automatically precede satisfaction of the second element, that a registrant lacks legitimate rights in the domain name.[159] Each element must be proven, but the two are conceptually linked.[160] The obvious consequence of the requirement of trademark distinctiveness is that the descriptive nature of geographic terms weakens governments' position in establishing trademark rights. The logical corollary to this should be that the descriptive nature of geographic terms serves to weaken governments' argument that third parties lack rights or legitimate interests in geographic names. Arguments to this effect

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[157] *Id.* at 628–29 (internal citations omitted).

[158] *See* FORREST, *supra* note 7, at 170–88.

[159] *See, e.g.*, HM the Queen *ex rel* New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html [http://perma.cc/YE6A-XU5Q] (noting that "even if the Complainant does have trademark or service mark rights in respect of the Domain Name, the Panel would have required a lot more evidence than the Complainant has put before the Panel to persuade it that the Respondent has no rights or legitimate interests in respect of the Domain Name").

[160] *UDRP*, *supra* note 81, at § 4(a) ("In the administrative proceeding, the complainant must prove that each of these three elements are present.").

have not been universally accepted by UDRP panels, as evidenced by the "barcelona.com" UDRP decision,[161] in which the respondent's claims to rights or legitimate interests based on first registration of a descriptive term were rejected by the panel but notably formed, ultimately, the basis for the subsequent litigation in the United States.[162]

The element of legitimacy divided the three-member panel in a challenge brought by the authority of Manchester Airport to the domain name registration "manchesterairport.com."[163] Two of the three panelists found the second UDRP element unmet. The two panelists based their finding on the respondent's claims that they have registered the domain name to offer website services to a group of businesses established at the airport. The presiding panelist questioned whether the choice of name had been motivated solely by descriptive reference and not with the intention to trade as, or suggest affiliation with, the airport.

By contrast, the three-member panel that administered the challenge by the local commerce and tourism department of Andalucia, Spain, to "andalucia.com"[164] agreed in finding legitimacy in the respondent's nexus to the domain name. The respondent had registered the domain name in 1996 and incontrovertibly used it to operate a website providing information about Andalucia for tourists and expatriates.[165] The panel found:

> [W]here, as here, a respondent is using a geographic indication to describe his product/business or to profit from the geographic sense of the word without intending to take advantage of complainant's rights in that word, then the respondent has a legitimate interest in respect of the domain name.[166]

This is a logical point to highlight that proof of the second element of the UDRP does not hinge on a subjective evaluation of the quality of a website. In other words, there are no "minimum

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[161] Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com Inc., WIPO Case No. D2000-0505 (Aug. 4, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html [http://perma.cc/L7ZN-PSUW].

[162] *See supra* notes 155 and 156.

[163] Manchester Airport PLC v. Club Club Ltd., WIPO Case No. D2000-0638 (Aug. 22, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0638.html [http://perma.cc/H3T6-2TQQ].

[164] Junta de Andalucia Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A. v. Andalucía.com Ltd., WIPO Case No. D2006-0749 (Oct. 13, 2006), http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0749.html [http://perma.cc/75PR-WQCB].

[165] *See id.*

[166] *Id.*

standards for development"[167] of a site operated under a particular domain name. Although the panel found it unnecessary to reach a decision on rights or legitimate interests in the government of New Zealand's challenge of the "newzealand.com" domain name registration,[168] its comments on this point are instructive. The threshold of legitimate use is not so high as the well-maintained and clearly functional website operated under the "andalucia.com" domain name registration; even a website that is "sketchy and badly in need of being updated"[169] may suffice.

While the "anyone can use it" argument tends to defeat the first UDRP element, the existence of a trademark, it is too simplistic to say that the same argument also defeats the second element, the absence of rights or legitimate interests. A more precise articulation of the norm derived from this series of disputes is the fact that anyone can use a geographic name means that private party (i.e., non-government) use of a geographic domain name is not inherently illegitimate. This norm is a cornerstone of domain name allocation at the second level of the DNS. Geographic domain name registrations by private party registrants are not inherently illegitimate, and domain name allocation policy should not be developed at any level that treats them as such. Each dispute turns on its own facts, and allocation policy must facilitate the evaluation of those facts.

IV. CONCLUSIONS

UDRP-derived norms provide meaningful insight into the process and substance of evaluating governments' assertion of priority rights at all levels of the DNS, not simply the second level where the UDRP is applicable. This is not based on an underlying principle of binding precedent—quite clearly, UDRP decisions are not binding on courts, other UDRP panels, or any other decision maker—but rather on the value of relying upon established norms within a system whose core values are transparency, accountability, and consistency.[170]

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[167] Empresa Mun. Promoción Madrid S.A. v. Easylink Servs. Corp., WIPO Case No. D2002-1110 (Feb. 26, 2003), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-1110.html [http://perma.cc/WD8L-25EY], *quoting* Penguin Books Ltd. v. Katz Family and Anthony Katz, WIPO Case No D2000-0204 (May 20, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0204.html [http://perma.cc/AP6S-4VVT].

[168] HM the Queen *ex rel* New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html [http://perma.cc/8HKM-FJXQ].

[169] *Id.*

[170] *See UDRP*, *supra* note 81, § 4(k); *see also* Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc., No. 00 C 1738, 2000 WL 562470 (N.D. Ill. May 3, 2000).

Governments' requests to ICANN—to exempt governments' applications for geographic domain names from sunrise requirements, to impose consent requirements on private party uses of geographic names, and to preemptively reserve geographic names for government use—bear striking resemblance to the claims made in a series of "overwhelmingly unsuccessful"[171] UDRP challenges more than a decade ago. The UDRP and decisions under it offer no support for per se prioritization of government interests in domain name allocation. Panels have repeatedly and consistently found that governments do not have what the government of Puerto Rico in its challenge against Virtual Countries, and indeed more recently and broadly by the GAC in new gTLD policy-making, argued were "better rights or more legitimate interests"[172] than non-government parties.

The existing body of UDRP decisions assessing government interests in geographic domain names serves a normative function that contributes to the consistency, accountability, and transparency of ICANN DNS policy making. Procedurally, government claims are treated no differently than private parties' claims. As in all disputes there must be, as a first step, a valid trademark. The existence of a trademark is not of itself dispositive; claimants must additionally prove that the respondent has no legitimate rights or interests, as well as bad faith. The domain name registrant must, therefore, succeed in the context of such ordinary and legitimate business enterprises such as online tourism products and services and where descriptive use is related to geographically identified goods and services.[173]

As the DNS expands, its top level (the level of gTLDs, such as ".com," ".org," and more recently, ".cars" and ".lawyer"), at which expansion has until very recently occurred at a very measured and carefully controlled rate, assumes the characteristics and attributes—and therefore also the conflicts and challenges—of the rapid, conflict-ridden expansion at the second level, where the general public registers domain names. One impact of this convergence of circumstances and challenges in top-level and second-level DNS expansion is that established UDRP norms are now relevant and instructive in evaluating government claims to priority beyond the UDRP context. Governments' requests for exemptions from

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[171] OLSEN, *supra* note 82.

[172] Puerto Rico Tourism Co. v. Virtual Countries, Inc., WIPO Case No. D2002-1129 (Apr. 14, 2003), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-1129.html [http://perma.cc/W7Q2-D6MQ].

[173] *See, e.g.*, Junta de Andalucia Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A. v. Andalucía.com Ltd., WIPO Case No. D2006-0749 (Oct. 13, 2006), http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0749.html [http://perma.cc/SY8G-6NCE].

trademark protections to super-prioritize their interests in geographic names bear striking resemblance to the claims made by government complainants in UDRP challenges. URDP panels have expressly rejected the claim that geographic domain names belong to government in challenges to both:

> "portofhelsinki.com": "The Panel cannot agree with the contention that a unique geographical name should be considered as belonging to the legal authority of the geographical area in question under the Policy";[174] and
>
> "portofhamina.com": "The Administrative Panel takes definite exception to the Complainant's view that rights to a unique geographical name should, evidently as a matter of principle, 'be regarded to belong to the owner of the geographical area in question.'"[175]

Further, the claim that private parties have no rights or legitimate interests in geographic domain names because only governments have rights or legitimate interests in geographic domain names has been expressly rejected by UDRP panels, including the panel that administered the challenge to "newzealand.com": "[T]he Panel would have required a lot more evidence than the Complainant has put before the Panel to persuade it that the Respondent has no rights or legitimate interests in respect of the Domain Name."[176]

Where governments possess trademark rights, these rights under the UDRP do not—and should not in any context of DNS policy be permitted to—automatically trump non-government parties' rights. UDRP claims brought by governments possessing trademarks have failed despite the claimant government's ownership of registered or unregistered marks; all elements of the UDRP must be established. Where geographic terms are permitted to be registered as trademarks, their registration and use by many is indicative of the non-exclusivity of government's interests. Where geographic terms are disclaimed in a trademark registration, the result is the same.

Finally, it is clear that each UDRP decision turns on its facts, with the outcome depending heavily not only upon the claimant's rights to the name in dispute, but also on the respondent's use and intentions. The varied factual constellations identified above reveal the impracticality and unworkability in developing a uniform name-allocation framework applicable across all levels of the DNS, of

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[174] Port of Helsinki v. Paragon Int'l Projects Ltd., WIPO Case No. D2001-0002 (Feb. 12, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0002.html [http://perma.cc/J8AC-5PYB].

[175] City of Hamina v. Paragon Int'l Projects Ltd., WIPO Case No. D2001-0001 (Mar. 12, 2014), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0001.html [http://perma.cc/522S-ZJZ7].

[176] HM the Queen *ex rel* New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html [http://perma.cc/QEN9-WCA5].

a universal rule of government super-prioritization in geographic domain name allocation. While it can be said that "merely because the contested domain name has a geographic connotation does not mean that the Complainant should fail,"[177] neither, as more than a decade of UDRP precedent shows, does this mean that the complainant government should succeed. This conclusion is notably consistent with not only the findings of WIPO on the availability of legal protection for government interests in geographic domain names, but also with the limited scope of application of the UDRP.[178] Applying the principles elucidated from UDRP decisions on geographic domain names and the rationale of the UDRP, with its dependence upon clearly demonstrable legal rights as a basis for a valid complaint, would provide ICANN with a rational, legally justified method of assessing government claims to geographic names in the DNS as a whole.

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[177] Sydney Mkts. Ltd. v. Nick Rakis trading as Shell Info. Sys., WIPO Case No. D2001-093 (Oct. 8, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0932.html [http://perma.cc/XE4L-AVPR].

[178] WIPO II, *supra* note 8, at 205.

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OCEANS :: PACIFIC OCEAN

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VIEW **18 PHOTOS OF PACIFIC OCEAN**

Introduction PACIFIC OCEAN

Background:

The Pacific Ocean is the largest of the world's five oceans (followed by the Atlantic Ocean, Indian Ocean, Southern Ocean, and Arctic Ocean). Strategically important access waterways include the La Perouse, Tsugaru, Tsushima, Taiwan, Singapore, and Torres Straits. The decision by the International Hydrographic Organization in the spring of 2000 to delimit a fifth ocean, the Southern Ocean, removed the portion of the Pacific Ocean south of 60 degrees south.

Geography PACIFIC OCEAN

Location:

body of water between the Southern Ocean, Asia, Australia, and the Western Hemisphere

Geographic coordinates:

0 00 N, 160 00 W

Map references:

Political Map of the World

Area:

total: 155.557 million sq km

note: includes Bali Sea, Bering Sea, Bering Strait, Coral Sea, East China Sea, Gulf of Alaska, Gulf of Tonkin, Philippine Sea, Sea of Japan, Sea of Okhotsk, South China Sea, Tasman Sea, and other tributary water bodies

Area - comparative:

about 15 times the size of the US; covers about 28% of the global surface; almost equal to the total land area of the world

Coastline:

135,663 km

Climate:

planetary air pressure systems and resultant wind patterns exhibit remarkable uniformity in the south and east; trade winds and westerly winds are well-developed patterns, modified by seasonal fluctuations; tropical cyclones (hurricanes) may form south of Mexico from June to October and affect Mexico and Central America; continental influences cause climatic uniformity to be much less pronounced in the eastern and western regions at the same latitude in the North Pacific Ocean; the western Pacific is monsoonal - a rainy season occurs during the summer months, when moisture-laden winds blow from the ocean over the land, and a dry season during the winter months, when dry winds blow from the Asian landmass back to the ocean; tropical cyclones (typhoons) may strike southeast and east Asia from May to December

Terrain:

surface currents in the northern Pacific are dominated by a clockwise, warm-water gyre (broad circular system of currents) and in the southern Pacific by a counterclockwise, cool-water gyre; in the northern Pacific, sea ice forms in the Bering Sea and Sea of Okhotsk in winter; in the southern Pacific, sea ice from Antarctica reaches its northernmost extent in October; the ocean floor in the eastern Pacific is dominated by the East Pacific Rise, while the western Pacific is dissected by deep trenches, including the Mariana Trench, which is the world's deepest

Elevation:

mean elevation:

elevation extremes:

lowest point: Challenger Deep in the Mariana Trench -10,924 m

highest point: sea level 0 m

Natural resources:

oil and gas fields, polymetallic nodules, sand and gravel aggregates, placer deposits, fish

Natural hazards:

surrounded by a zone of violent volcanic and earthquake activity sometimes referred to as the "Pacific Ring of Fire"; subject to tropical cyclones (typhoons) in southeast and east Asia from May to December (most frequent from July to October); tropical cyclones (hurricanes) may form south of Mexico and strike Central America and Mexico from June to October (most common in August and September); cyclical El Nino/La Nina phenomenon occurs in the equatorial Pacific, influencing weather in the Western Hemisphere and the western Pacific; ships subject to superstructure icing in extreme north from October to May; persistent fog in the northern Pacific can be a maritime hazard from June to December

Environment - current issues:

endangered marine species include the dugong, sea lion, sea otter, seals, turtles, and whales; oil pollution in Philippine Sea and South China Sea

Geography - note:

the major chokepoints are the Bering Strait, Panama Canal, Luzon Strait, and the Singapore Strait; the Equator divides the Pacific Ocean into the North Pacific Ocean and the South Pacific Ocean; dotted with low coral islands and rugged volcanic islands in the southwestern Pacific Ocean

Government PACIFIC OCEAN

Country name:

etymology: named by Portuguese explorer Ferdinand MAGELLAN during the Spanish circumnavigation of the world in 1521; encountering favorable winds upon reaching the ocean, he called it "Mar Pacifico," which means "peaceful sea" in both Portuguese and Spanish

Economy PACIFIC OCEAN

Economy - overview:

The Pacific Ocean is a major contributor to the world economy and particularly to those nations its waters directly touch. It provides low-cost sea transportation between East and West, extensive fishing grounds, offshore oil and gas fields, minerals, and sand and gravel for the construction industry. In 1996, over 60% of the world's fish catch came from the Pacific Ocean. Exploitation of offshore oil and gas reserves is playing an ever-increasing role in the energy supplies of the US, Australia, NZ, China, and Peru. The high cost of recovering offshore oil and gas, combined with the wide swings in world prices for oil since 1985, has led to fluctuations in new drillings.

Transportation PACIFIC OCEAN

Ports and terminals:

major seaport(s): Bangkok (Thailand), Hong Kong (China), Kao-hsiung (Taiwan), Los Angeles (US), Manila (Philippines), Pusan (South Korea), San Francisco (US), Seattle (US), Shanghai (China), Singapore, Sydney (Australia), Vladivostok (Russia), Wellington (NZ), Yokohama (Japan)

Transportation - note:

the Inside Passage offers protected waters from southeast Alaska to Puget Sound (Washington state); the International Maritime Bureau reports the territorial waters of littoral states and offshore waters in the South China Sea as high risk for piracy and armed robbery against ships accounting for 55% of all attacks in 2014; numerous commercial vessels have been attacked and hijacked both at anchor and while underway; hijacked vessels are often disguised and cargoes stolen; crew and passengers are often held for ransom, murdered, or cast adrift

Transnational Issues PACIFIC OCEAN

Disputes - international:

some maritime disputes (see littoral states)

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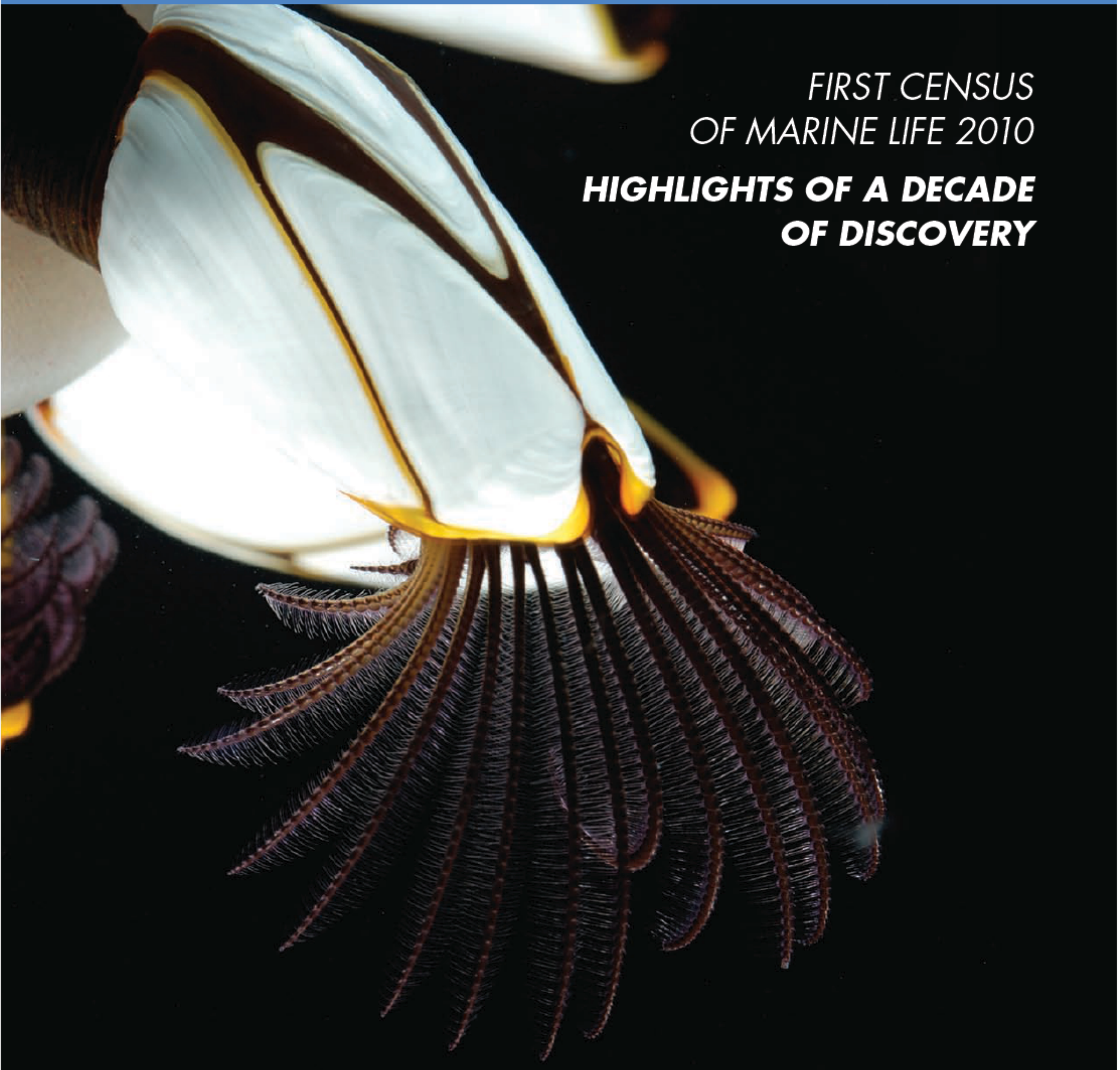

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HIGHLIGHTS OF A DECADE OF DISCOVERY

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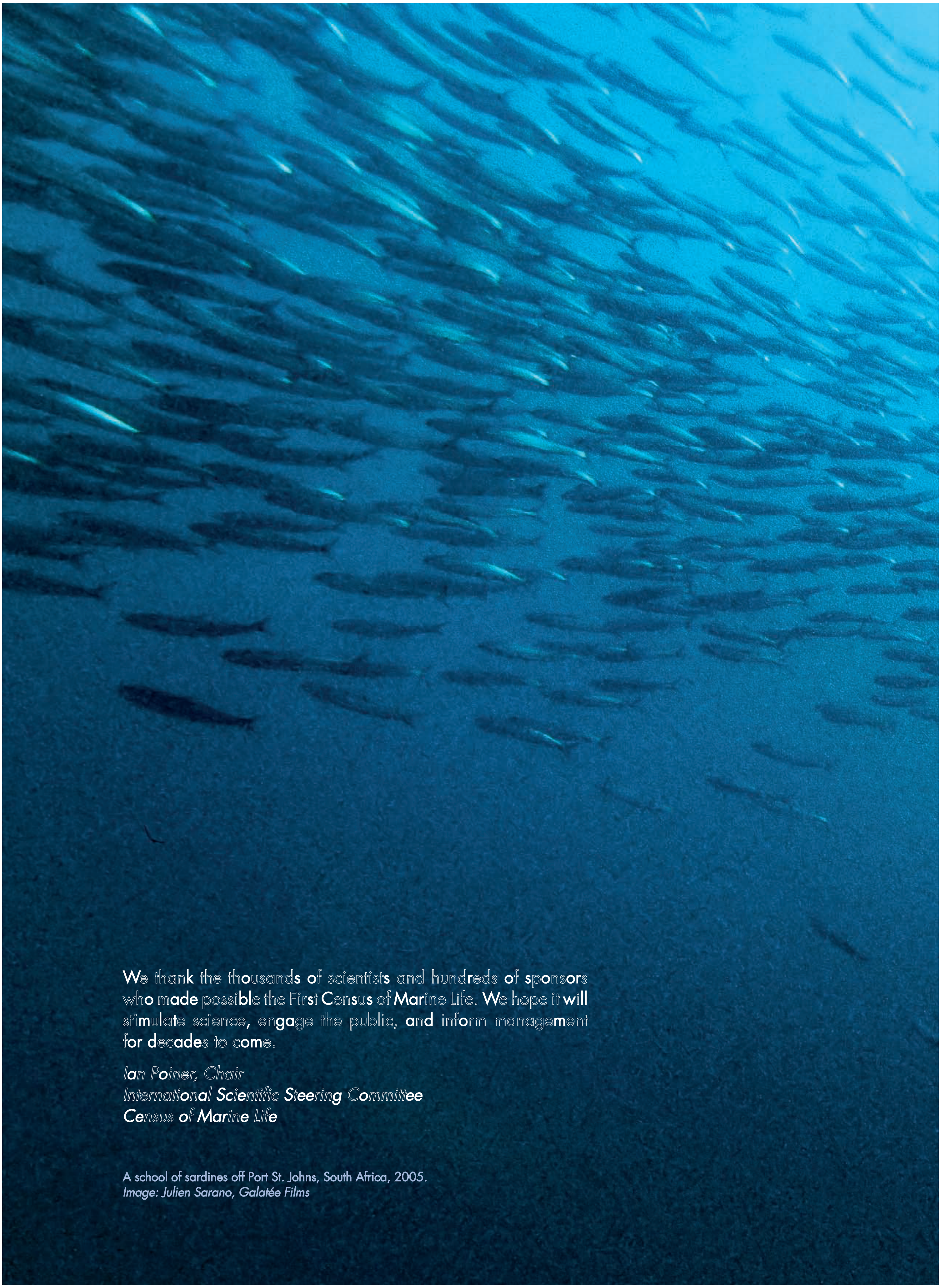

We thank the thousands of scientists and hundreds of sponsors who made possible the First Census of Marine Life. We hope it will stimulate science, engage the public, and inform management for decades to come.

Ian Poiner, Chair
International Scientific Steering Committee
Census of Marine Life

A school of sardines off Port St. Johns, South Africa, 2005.
Image: Julien Sarano, Galatée Films

FIRST CENSUS
OF MARINE LIFE 2010

HIGHLIGHTS OF A DECADE OF DISCOVERY

CONTENTS

Readers may approach this volume, like marine life, at different levels. A sequence of images and blue captions tell the story, as does the black text, and the combination.

Editors: Jesse H. Ausubel,
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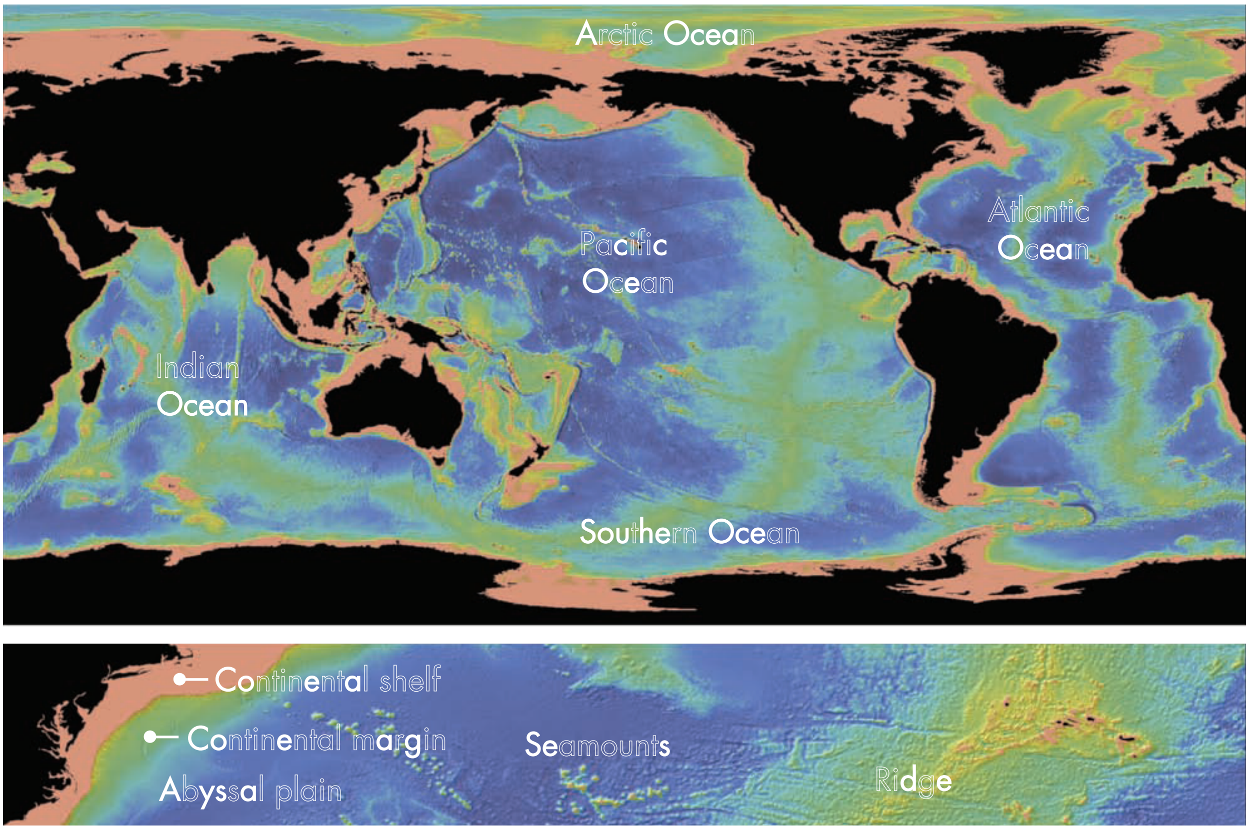
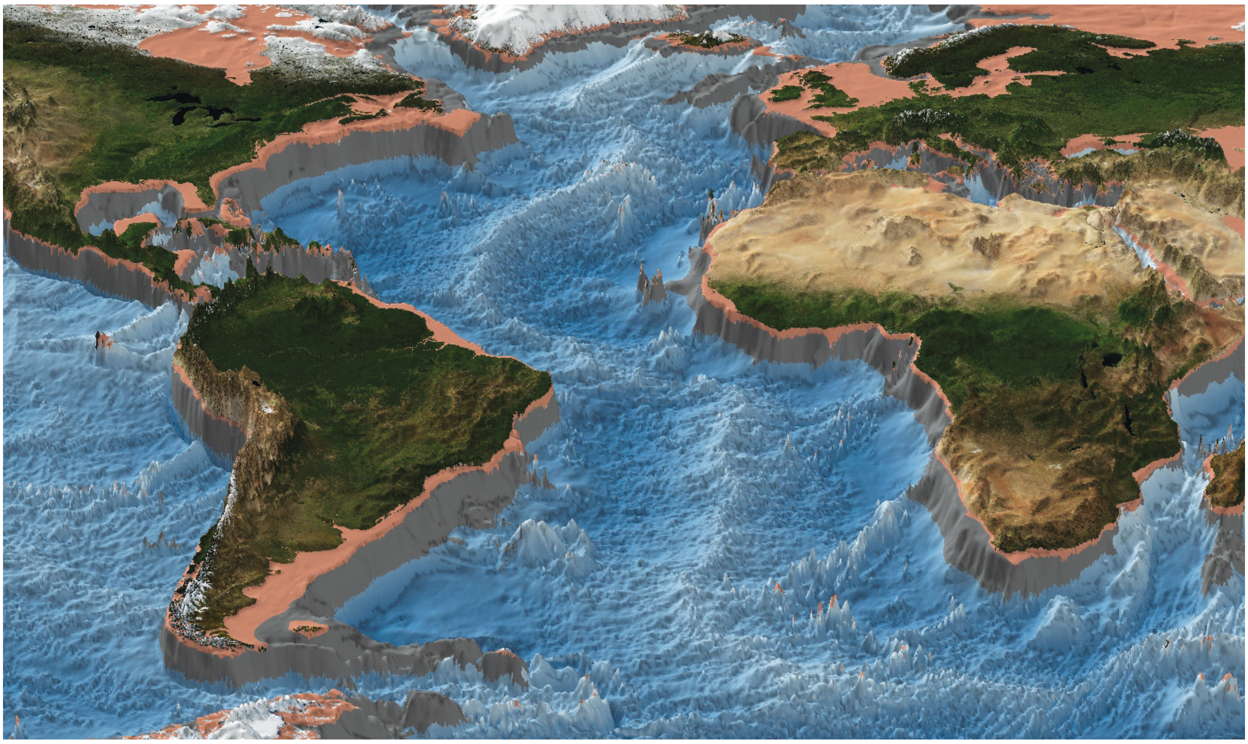


1. The oceans encompass almost 10 times as much deep sea (averaging 4,000 meters) as shallow shelf (up to 200 meters). Shelves may be as narrow as 5 kilometers (e.g., off California or Chile) or as wide as hundreds of kilometers (e.g., off China or Argentina). Until recently, most human activities, and their impacts, have concentrated on the shallow shelves highlighted in pink around land here. The largest oceans are the Pacific and the Southern, which whirls like a carousel around Antarctica. Earth's Southern Hemisphere is 80 percent water, mostly very deep. Undersea mountain ranges or ridges divide ocean basins, and about 100,000 seamounts higher than 1,000 meters rise from the seafloor.
Image: Census of Marine Life Mapping and Visualization Team



2. Between the shallow pink shelves that extend to a depth of about 200 meters around continents and the blue abyssal plains beneath the deep sea that average about 4,000 meters deep, the gray continental margins slope downward. Their gradient, exaggerated in this rendering, brings great and little-explored biodiversity. The margins also offer access to vast resources of petroleum and natural gas. In the view here, the world's longest mountain range, the Mid-Atlantic Ridge, traverses the ocean from north to south.
Image: Census of Marine Life Mapping and Visualization Team

SUMMARY

In the late 1990s, leading marine scientists shared their concerns that humanity's understanding of what lives in the oceans lagged far behind our desire and need to know. Some emphasized the question, "What kinds of life inhabit the oceans?" They pointed to opportunities to discover new kinds of life and to catalog and estimate the total diversity of life in the vast global ocean. Others asked, "What lives where?" They highlighted establishing addresses of marine life and drawing reliable maps of neighborhoods and travels. Still others asked, "How much of each lives?" and pointed to the human appetite for seafood. Everyone worried about changes in marine life and the need to improve management with sound knowledge.

In the year 2000, the scientists founding the Census of Marine Life converged on a strategy, a worldwide Census to assess and explain the diversity, distribution, and abundance of marine life. The founders organized the Census around three grand questions: What did live in the oceans? What does live in the oceans? What will live in the oceans? They designed a program to explore the limits to knowledge of marine life. They agreed to report in the year 2010.

Delving in archives, setting out on more than 540 expeditions in all ocean realms, and partnering with other organizations and programs, the 2,700 scientists from more than 80 nations who have become the Census community have assembled, augmented, and organized what is known about life in the oceans. They have drawn baselines for measuring changes of marine life after natural changes and human actions. Equally important, the Census has systematically delineated for the first time the unknown ocean.

Many books, papers, Web sites, videos, films, maps, and databases now form and report the Census. The pages here highlight its findings, describe its legacies, and tell how it worked.

Diversity

The Census encountered an unanticipated riot of species, which are the currency of diversity. It upped the estimate of known marine species from about 230,000 to nearly 250,000. Among the millions of specimens collected in both familiar and seldom-explored waters, the Census found more than 6,000 potentially new species and completed formal descriptions of more than 1,200 of them. It found that rare species are common.

With its collective digital archive grown to almost 30 million observations, the Census compiled the first regional and global comparisons of marine species diversity. It helped to create the first comprehensive list of the known marine species, already passing 190,000 in September 2010, and also helped to compose Web pages for more than 80,000 of them in the Encyclopedia of Life.

Applying genetic analysis on an unprecedented scale to a dataset of 35,000 species from widely differing major groupings of marine life, the Census graphed the proximity and distance of relations among distinct species, painting a new picture of the genetic structure of marine diversity. With the genetic analysis often called barcoding, the Census sometimes shrank seeming diversity by revealing that organisms had been mistakenly called separate, but generally its analyses expanded the number of species—and especially the number of kinds of different microbes, including bacteria and archaea.

After all its work, the Census still could not reliably estimate the total number of species, the kinds of life, known and unknown, in the ocean. It could logically extrapolate to at least a million kinds of marine life that earn the rank of species and to tens or even hundreds of millions of kinds of microbes.

Distribution

The Census found living creatures everywhere it looked, even where heat would melt lead, seawater froze to ice, and light and oxygen were lacking. It expanded known habitats and ranges in which life is known to exist. It found that in marine habitats, extreme is normal.

With sound, satellites, and electronics, sometimes carried by marine life itself, the Census tracking of thousands of animals mapped migratory routes of scores of species and charted their meeting places and blue highways across the interconnected ocean. The tracking measured animals' surroundings as they swam and dove and revealed where they succeed and where they die. The Census found temperature zones favored by animals and saw the immigration into new conditions such as melting ice.

Now anyone can see the distribution of a species by entering its name at iobis.org, a Web site that accesses the names and "addresses" of species compiled in the Census's global marine life database.

With the names and addresses of species compiled in the database, the Census found and mapped the places of high and low diversity of marine life, globally. Coastal species showed maximum diversity in the tropical Western Pacific, whereas high diversity of species frequenting the open ocean peaked across broad mid-latitudinal bands in all oceans. In deep water and on the deep-sea floor, the Census discovered patterns of life on ridges, seamounts, abyssal plains, and the margins of continents and defined new provinces and classifications.

The same Census data reveal where explorers have not yet looked, the unknown ocean. For more than 20 percent of the ocean's volume, the Census database still has no records at all, and for vast areas very few.

Abundance

After establishing historical baselines from sightings, catches, and even restaurant menus, the Census documented declining numbers and sizes, too, even within a human generation. In enough cases to encourage conservation, the Census documented the recovery of some species. History shows people began catching marine life long ago, and their extractions are far broader in scope than once thought. Historically, overfishing and habitat destruction lead the ranking of threats to marine life associated with human activities.

With sound, the Census observed tens of millions of fishes assembling swiftly and swimming in coordinated schools as large as Manhattan island, and also saw hosts of animals commuting at regular hours, moving back and forth to the surface from hundreds of meters below.

The Census affirmed that by weight most marine life is microbial, up to 90 percent. The weight of Earth's marine microbes equaled about 35 elephants for every living person.

Analyzing indirect observations from oceangoing vessels since 1899, Census researchers discovered that the food-producing phytoplankton near the surface has declined, globally. The Census maps of the global seafloor showed that the delivery of food in a "snow" from water above controlled the mass of living things on the floor. On the seafloor, the quantity of life peaks toward polar regions, along continental margins where cool currents well up toward the surface, and where equatorial currents diverge. On the deep-sea margins, the Census unexpectedly discovered mats of bacteria and reefs of coral extending hundreds of kilometers.

While patchy evidence from the phytoplankton near the bottom of the food chain and more extensive evidence from large animals at the top of the food chain suggest decline, whether the total weight of life in the ocean is changing remains unknown.

Legacies

At the end of its decade, the Census bequeaths legacies of knowledge, technology, and work habits.

Regarding knowledge, the Census recorded its findings in more than 2,600 papers, many freely accessible online. The Census built the largest repository of data about marine species by compiling observations and adding its own, and then made it a publicly accessible infrastructure for future research, which governments have committed to sustain. The Census drew baselines to help nations and the international Convention on Biological Diversity select areas and strategies for greater protection of marine life. Its baselines will help assess habitat changes such as warming water or damage from oil spills.

Regarding technology, the Census proved new technology, such as DNA barcoding for the identification of marine life. It arrayed microphones from California past Canada to Alaska to pioneer a global ocean tracking network for animals, invented Autonomous Reef Monitoring Structures to standardize global assessment of reef life, and fostered acoustic systems to measure abundances over tens of thousands of square kilometers. Together, these technologies show that the incipient Global Ocean Observing System can observe life as well as water temperature and waves.

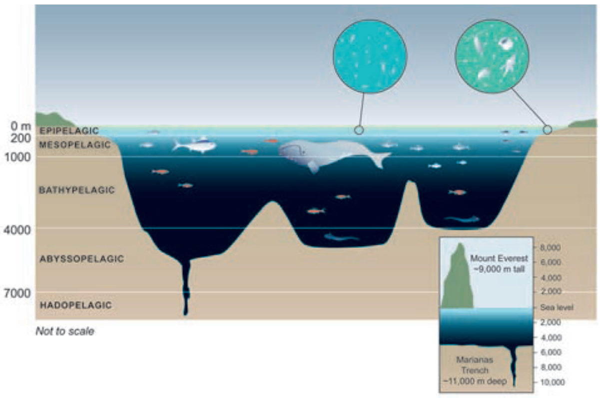
Regarding work habits, the Census brought scientists with different interests from different nations together under one umbrella, to use standard protocols for sampling marine life from the deep sea to the near shore, to speed the adoption of good techniques, to build capacity economically, and to jump start initiatives in marine research. It strengthened partnerships of scholars in the humanities and natural and social sciences to use archival research to build the picture of life in oceans past and assess changing diversity, distribution, and abundance.

As it worked, the Census found that the causes separating the known, unknown, and unknowable about marine life fall into five categories: the invisibility of the lost past, the vast expanse of the oceans, difficulties of assembling knowledge of parts into knowledge of a whole, blinders we put on ourselves by choosing not to learn or spend, and unpredictable disturbances such as tsunamis.

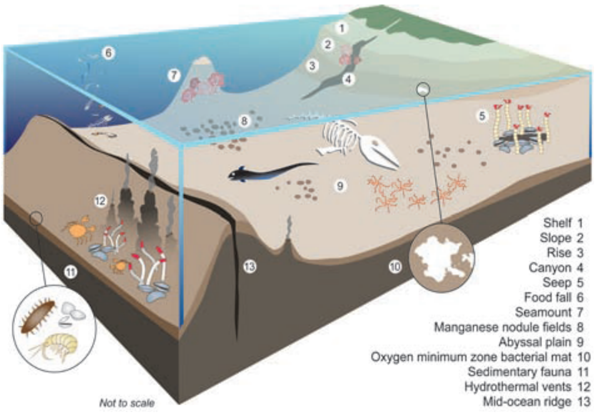
The Census showed that we know less about the small than the large and that generally knowledge is inversely related to size. But some patterns exceed our field of vision, and for these the Census devised "macroscopes," tools to make sense of very large regions or datasets, to overcome limits to knowledge.

The Census encountered an ocean growing more crowded with commerce and transparent through technology. Setting out to draw baselines of the diversity, distribution, and abundance of species, the first Census of Marine Life documented a changing ocean, richer in diversity, more connected through distribution and movements, more impacted by humans, and yet less explored than we had known. The Census has multiplied the qualified experts, developed and spread technologies for discovery and monitoring, improved access to data, and informed decisions about conserving marine species and regions. The legacies of the Census—the baselines of knowledge, the cascade of new technology, the collaboration across borders—promise more benefits for humanity and the oceans.

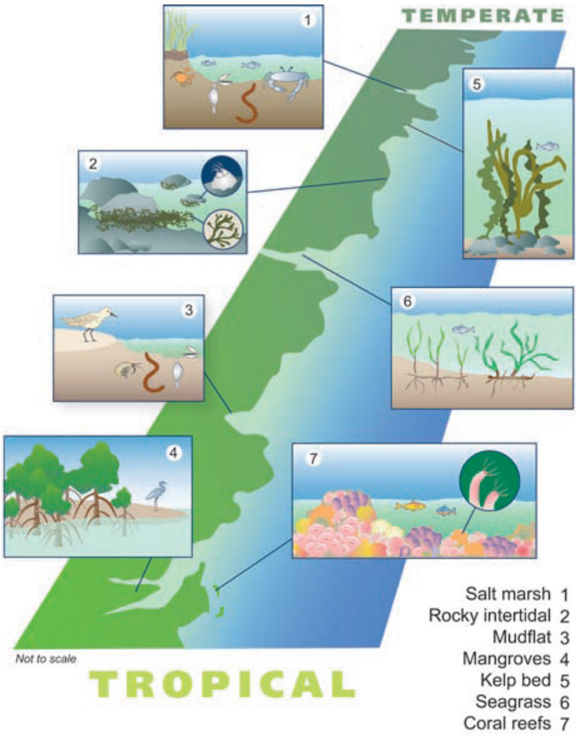
Marine habitats



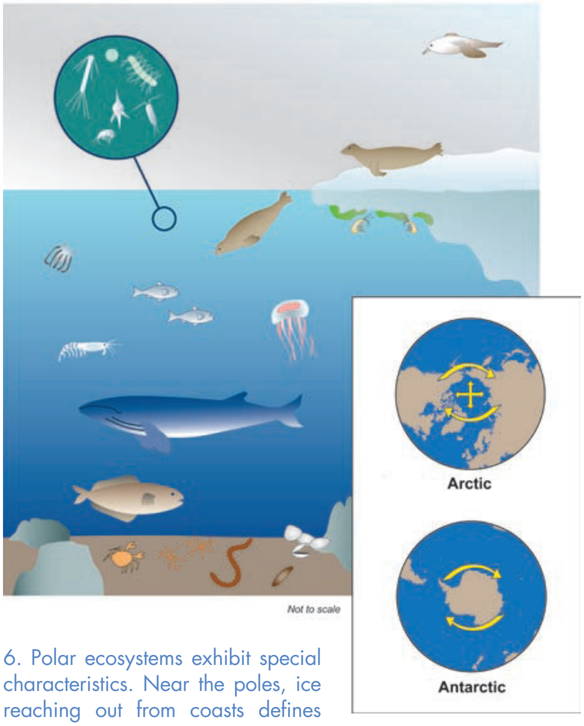
3. In "pelagic" or open ocean ecosystems, differences in light, temperature, salinity, and nutrients determine productivity. Productivity, in turn, limits what kinds of creatures can live there. The prefixes to pelagic in the left of the figure refer to depth zones. *Image: Lianne Dunn*



4. An array of specialized habitats exists on the deep-sea floor, thousands of meters below the surface. The Census standardized datasets to enable comparisons of kinds of life among these specialized habitats. *Image: Lianne Dunn*



5. The Census studied many different coastal habitats from the tropics near the equator up to temperate environments at midlatitudes. Each habitat has unique characteristics and its own suite of species. *Image: Lianne Dunn*



6. Polar ecosystems exhibit special characteristics. Near the poles, ice reaching out from coasts defines seasons and thus defines changes in food and habitat. Land surrounds the waters of the Arctic Ocean, whereas the water of the Southern Ocean surrounds Antarctic land. *Image: Lianne Dunn*

INTRODUCTION

Beginning as it did with the origins of humanity, our use of the oceans proceeded for millennia with a knowledge of ocean life only along coasts and on the surfaces where our boats dared to venture. Visits to new and deeper waters regularly revealed unexpected and unfamiliar life. Now, detailed navigational and seafloor charts and accurate storm forecasts demonstrate growing knowledge of the physical ocean and marine life continues to surprise us. In Australia, explorers encountered a shrimp thought to have gone extinct 50 million years ago. Off Africa's Mauretanian coast, they found relics of cold-water corals extending over 400 kilometers in waters 500 meters deep in one of the world's longest reefs. Near Chile, they found giant mats of microbes covering an area of seafloor about the size of Greece or Nicaragua.

As astonishing discoveries continue and even increase, the oceans grow more crowded and transparent. Along shores, our cities, ports, aquaculture, and windmills increase. Farther offshore, our oil wells, shipping, fisheries, cables, and soon perhaps deep-sea mining spread. The different uses interact, as when shipping ports displace fishing harbors, and oil becomes a greenhouse gas in the atmosphere that acidifies and warms the oceans. Meanwhile, divers and submarines as well as robotic ears and eyes, some carried by animals themselves, render even the dark, deep waters transparent for humans. The crowding requires, and transparency enables, more exploration of marine life to buoy wise policies.

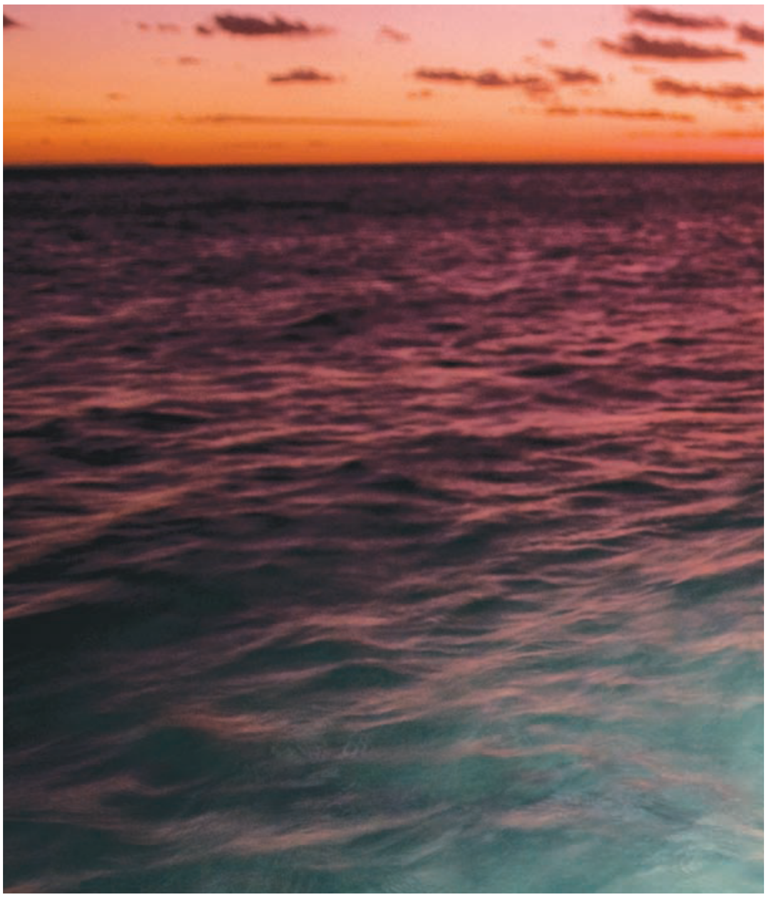
Thus in the year 2000, the Census of Marine Life began its decade-long exploration of life in the global ocean. It sought to assemble and better organize the known, shrink the unknown, and specify what will be very hard to know or even unknowable. Its strategic categories were learning the diversity, distribution, and abundance of marine life from microbes to whales. It engaged thousands of scientists from all continents on hundreds of expeditions and invested hundreds of millions of dollars. It employed divers, nets, submersible vehicles, genetic identification, sonars, electronic and acoustic tagging, listening posts, and communicating satellites. The Census spanned all oceanic realms, from coasts down slopes to the abyss, from the North Pole across tropics to the shores of Antarctica. It followed flying seabirds and collected cores from the seafloor. It ranged from the long past to the future. It systematically compiled information from new discoveries and historical archives and made it freely accessible. Census explorers found life wherever they looked, a riot of species.

This collection of highlights tells who took the Census and lessons from their collaboration during joint explorations and efforts around the world. First, it answers readers' questions about life in the global oceans from the store of knowledge about the oceans, especially new knowledge added to the store during the fruitful decade of the Census.

Overcoming limits to knowledge

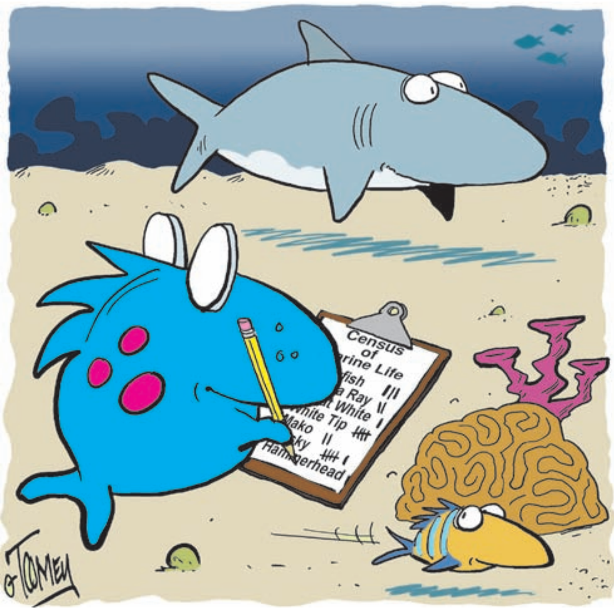
Calling Earth by the name Planet Ocean helps to understand the span of knowledge of the seas stretching around the globe. Humanity is a species that breathes air, which focuses our eyes and lives on Planet Earth. We might better call a globe covered 70 percent by water Planet Ocean, as did Arthur C. Clarke, science fiction author and conceiver of the communications satellite. In fact, more than 80 percent of Earth's Southern Hemisphere is ocean, and 70 percent of the entire ocean is an abyss with a floor averaging 4,000 meters below the sea surface and descending to 10,924 meters at the deepest point. Apart from microbes living in rocks, 99 percent of Earth's biosphere is in or under marine waters. At the outset of the Census, oceanographers estimated that only 5 percent of the ocean had been systematically explored for life.

Faced with a vast unknown, the Census adopted a deliberate strategy to understand the limits to knowledge. Some limits separate the known from the unknown. Experience teaches that money, organization, work, and time can often move unknowns into the province of the known. As the Census steadily discovered new kinds of life, learned where species lived and traveled, and count-



7. Image: Gary Cranitch

ed or weighed the species, it shrank the unknown and enlarged the known. Beyond the unknown and across a dark boundary lies the unknowable about marine life. Wonders of the Internet, submersible vehicles in the deep, and genetics that extract information from a single cell occasionally jump the boundary between unknown and unknowable. Still, much of what we would like to know about the oceans remains very hard to learn.

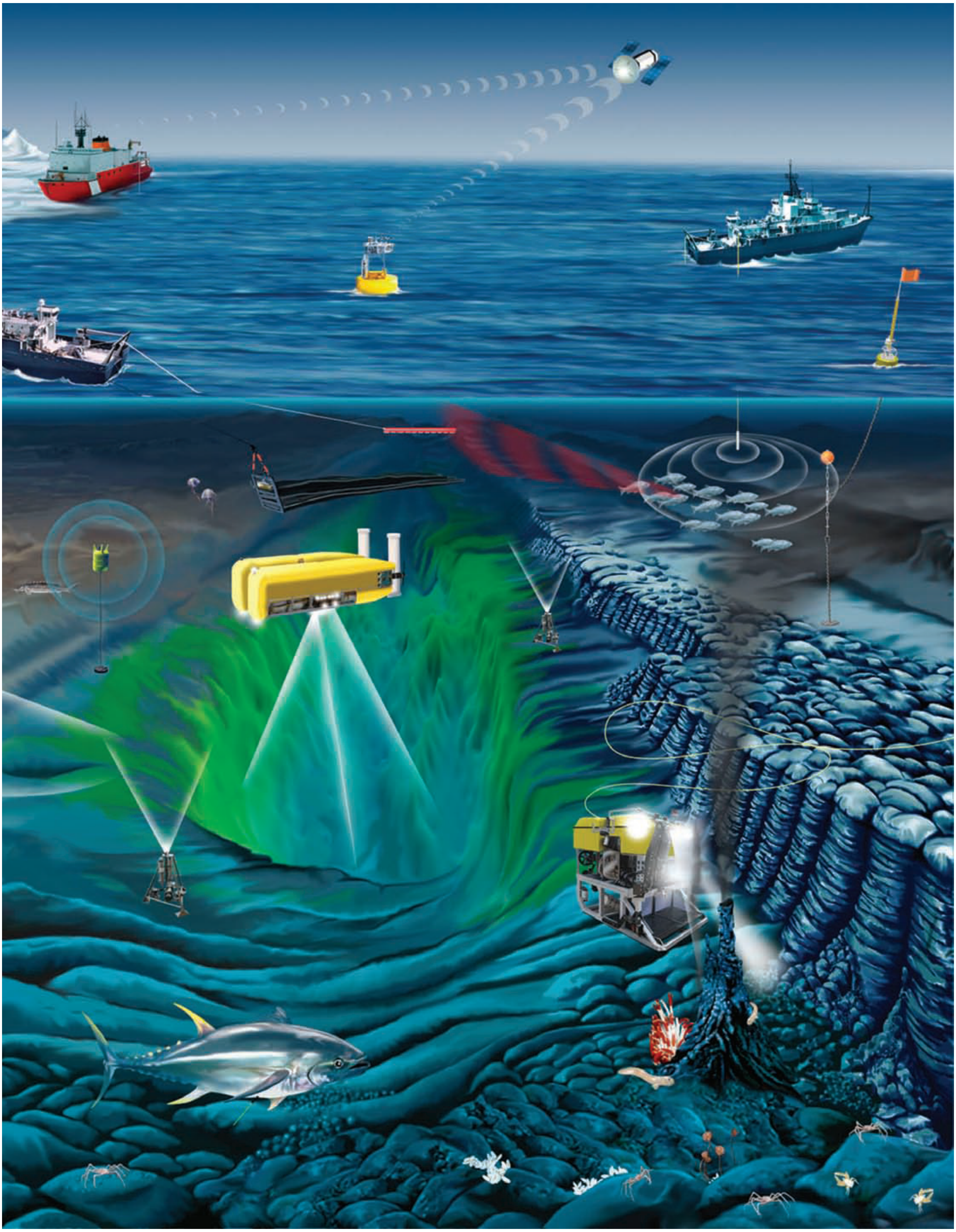


8. The idea of learning everything that lives in the sea plus their addresses and numbers brings smiles to people's faces. Cartoonist Jim Toomey imagined how sea animals might themselves conduct a Census of Marine Life. Fortunately, the opportunity for discovery and the scale of the Census also attracted thousands of scientists from more than 80 nations, who rallied around learning the diversity, distribution, and abundance of marine life in the past, present, and future. *Image: Jim Toomey*

In considering ocean life, the causes that separate the known, unknown, and unknowable are numerous and diverse but fall into five families: the invisibility of the lost past, the vast expanse of the oceans, difficulties of assembling knowledge of parts into knowledge of a whole, blinders we put on ourselves by choosing not to learn or spend, and unpredictable disturbances such as tsunamis. The loss of an archive or extinction of a species makes some of yesterday's marine life unknowable. The immense variety and rapid evolution of microbes may make some of today's marine life unknowable. A lack of experts may keep some kinds of tomorrow's life unknown if not unknowable.

As the Census studied neglected archives and encountered species thought to be extinct, arrayed listening posts for migrating salmon, and employed genetic barcoding to distinguish new species, it penetrated and jumped limits to knowledge. The Census deployed a fleet of new tools for exploration as well as traditional nets, quadrats to frame areas for sampling, and coring devices to retrieve seafloor mud and its residents. Perhaps most powerful was the collective database of the Census, a macroscope that allowed researchers to see patterns that before had been too large to see.

9. Census investigators explored on and beneath polar ice. Their aircraft remotely sensed animals through properties of scattered light. Marine animals themselves carried tags that stored records of their travels and dives and communicated with satellites. Fish carried tags that revealed their migration past acoustic listening lines. Sounds that echoed back to ships portrayed schools of fish assembling, swimming, and commuting up



and down. Standardized frames and structures dropped near shores and on reefs provided information for comparing diversity and abundance. Manned and unmanned undersea vehicles plus divers photographed sea floors and cliffs. Deep submersibles sniffed and videotaped smoking seafloor vents. And nets and dredges still caught specimens, shallow and deep, for closest study. *Image: E. Paul Oberlander*

10. *Image: Bodil Bluhm*

DIVERSITY

The number of different species of animals, plants, and fungi indicates biological diversity or biodiversity. Just as diversity is considered an attribute of security in financial investment, biologists often use biodiversity as a measure of the health of biological systems. Scientists may elaborate the simple definition of diversity as the number of species, and may calculate indices or zoom in to diversity of genes or out to diversity of the inhabitants of a region. Still, species typically serve as the common currency, and the inventory of species as the capital stock of biodiversity. Species stand at the base of the sequence of taxonomic groups or taxa and make up broader groups, first genus and then family, order, class, and phylum. The inclusive word taxa and its singular number taxon may mean any of the groups in the sequence.

Hence, to accomplish a biological census and compile the needed inventory in its first category, diversity, the Census focused on species. A common definition of species is that of a group of organisms capable of interbreeding and producing fertile offspring of both sexes (except in the case of asexually reproducing species), and separated from other such groups with which interbreeding does not normally happen. The Census compiled tens of millions of species-level observations obtained before and outside the Census and added millions of its own. It very likely discovered more than 6,000 new species and completed, for more than 1,200 of them, the formal descriptions meeting the high standards of the science of systematic biology. The Census even discovered a few species thought extinct. Census data on known and new species and the locations where they were reliably observed are recorded in the Ocean Biogeographic Information System (OBIS), an online, open-access, globally distributed network of systematic, ecological, and environmental information. The Census invented, constructed, and operated OBIS, demonstrating its power for mapping where species lived and traveled as well as graphing the number of described species, a number that rises toward the total number of living species and thus diversity of marine life. OBIS has grown past 28 million records, spanning 120,000 species assembled from nearly 1,000 datasets. Scientists have already analyzed the OBIS data to find global patterns of marine life, while OBIS adds 5 million records per year.

The Census also helped speed compilation of an unprecedented listing of all marine species ever described. The tally of the World Register of Marine Species, the authoritative and comprehensive online list of names of marine organisms, exceeds 190,000 names in early September 2010. And the Census partnered with the Encyclopedia of Life, an online reference source and database, to offer a Web page with vetted content for every marine species. Such pages, infinitely expansible, now cover more than 80,000 marine species. Neither of these online resources existed in 2000.

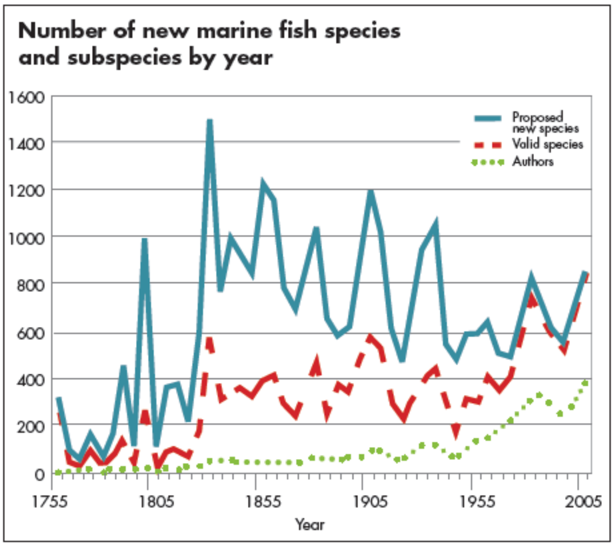
The continuing encounters with new species make it difficult to identify a single Age of Discovery for marine life. A timeline for marine fishes, probably the most studied sea life, shows at least eight peaks of discovery during the past 300 years. Peaks associate with scientific revolutions such as Linnaeus' binomial system for classifying species, great expeditions, heroic careers of individual experts, and technological advances that open new areas for exploration, including deep and cold regions. Increasingly aided by molecular biology and genetics, taxonomists are describing new marine species of fish alone at a rate reaching about 150 per year. Clearly the Age of Discovery continues for marine life, even for fishes, and diversity measured by the number of known species is expanding rather than shrinking.

Indeed, the total yearly addition to the number of all marine species has averaged about 1,650 since the Census began in the year 2000. While crustaceans (452 per year) and mollusks (379 per year) lead the way, the known sponges and echinoderms have been accumulating at yearly rates of 59 and 30, respectively. The best expert estimate of known marine species has risen from 230,000 early in the Census to at least 244,000 in 2010. Over the next few years, as old records are sorted out and new species described, the World Register should reach 250,000 kinds of marine life that have earned the rank of species.

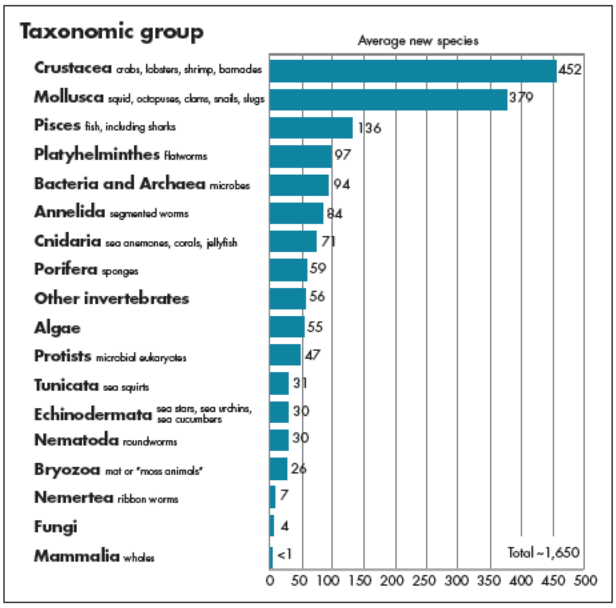
An optimist expects that eventually the total of all species will be found, and an extrapolation of the accumulating list of species holds a clue to what that total species and diversity will be. About 36,000 species of all kinds live in the well-explored European waters, and Census scientists anticipate that more than 40,000 marine European species exist, an addition of 10 percent. Because European waters are probably the world's best known, the proportion of species yet to be discovered may be higher elsewhere. In the Arctic, expected numbers of mollusk, arthropod, and echinoderm species exceed the present numbers by about 40 percent. The accumulating number of valid fish species in the oceans reached 16,754 in February 2010, leaving an estimated 5,000 more to be discovered.

Census researchers tried statistical methods to estimate how many forms of marine life remain to be discovered. Alas, or perhaps wonderfully, the eventual number remains unknown. The upward curve of accumulation of new species for most taxa and regions has yet to bend enough to calculate a firm plateau. Australian experts judged that the 33,000 known species in Australian waters amount to only 10–20 percent of estimated total species. Finding 1,200 species of crabs, about 7 percent of the total known global list of the group, in a few square meters of a single coral reef leads to speculation that reefs alone may provide habitat for 1 million to 2 million marine species.

When the Census began, its founders estimated that 1 million to 10 million marine species might exist. Expert judgment of Census scientists examining knowledge by region and taxa affirms that at least 1 million species of marine life likely exist, and thus at least three species



11. People often feel that everything must already be known, as discoveries grow and libraries accumulate. The continuing discovery of new fish species (and subspecies) demonstrates that the Age of Discovery is not over. The smaller number of species validated than proposed as new species illustrates the thorough evaluation needed before a species is declared truly new. The rising number of authors of species descriptions reflects the growing interest in marine biodiversity. *Source: William N. Eschmeyer and colleagues, 2010.*



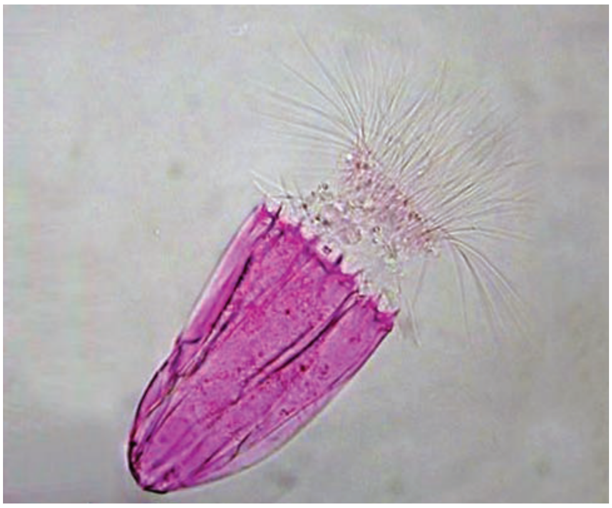
12. An average of about 1,650 new marine species were described each year between 2002 and 2006. Although the numbers of new Mollusca and Crustacea are highest, an average of 156 new species in the well-studied Pisces or fish group astonishes even Census researchers. Census researchers both collected specimens that might be new species and helped collate data worldwide about newly described marine species, including many described from specimens collected before the Census began or on expeditions not flying the Census flag. *Source: Philippe Bouchet and Benoit Fontaine.*

remain to be discovered for each already known. No firm basis exists for an estimate of the upper bound.

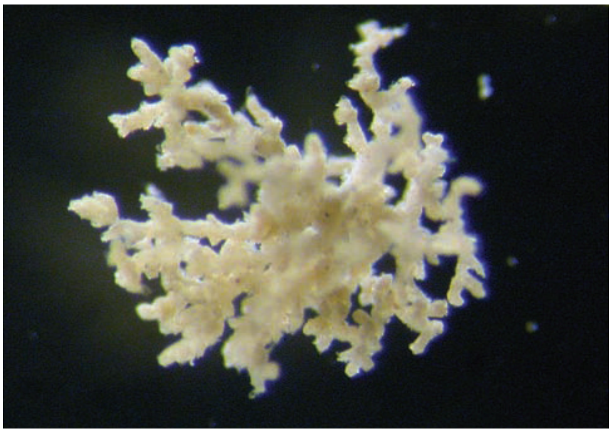
While species are the currency of diversity for animals, plants, and fungi, for most microbes or microorganisms we must speak of kinds or, more technically, phylotypes. Marine microbes include protists, bacteria, and archaea. Like the cells of animals and plants, the cells of protists contain a nucleus, and protists thus belong to the eukaryotes, one of the three basic domains of life. Protists span animal-like protozoa and plant-like algae, and for most protists, we may speak of species. The other two basic domains of life, the bacteria and the archaea, together form the grouping of the prokaryotes. Unlike cells of animals and other eukaryotes, bacterial and archaeal cells do not contain a nucleus.

Microbial cells in the oceans' water column number roughly 100 x 1 billion x 1 billion x 1 billion (10 to the 29th power) and collectively weigh the equivalent of 240 billion African elephants, or 35 elephants of marine microbes per person living on Earth. Although they constitute up to 90 percent of all ocean biomass, most kinds of marine microbes remained hidden until technological marvels, especially fast extraction and sequencing of DNA from large numbers of specimens, revealed their diversity. Even short snippets of DNA can often identify kinds of microbes as well as species of animals and plants. Genetic analysis for identifying plant and animal species is customarily called barcoding because of its analogy to the scannable numbers identifying merchandise in shops. The analogous exercise for microbes is referred to as phylotyping because it relies upon gene sequences that tell about phylogeny or evolutionary relationships to other organisms. From more than 1,200 sites worldwide, Census scientists assembled 18 million DNA sequences of microbial life spanning more than 100 major phyla. Revelations about the microbial world within the single decade of the Census have multiplied estimates of diversity up to 100 times as many microbial genera as previously thought. A single liter of seawater can contain more than 38,000 kinds of bacteria; a gram of sand, between 5,000 and 19,000. Within a particular range of body sizes studied by the Census, 20 million or more types of microbes are likely to exist. Encompassing a wider span of sizes and including parasites and all the microbes that live within marine animals—in the gut of a fish or jelly, for example—up to 1 billion kinds of marine microbes may live in the oceans. Between 100 and 1,000 kinds of microbes may exist for each larger marine species.

The continually rising number of known kinds of life reinforces the conclusion that the Age of Discovery has not ended. Opportunities abound to discover marine species and kinds of marine microbes. We now share some recent discoveries, beginning with a surprise from the Mediterranean, illustrating that the qualities as well as numbers and quantities of biodiversity matter. In the deep Mediterranean, scientists encountered three new species from a little-known group called loriciferans that dwell in seafloor sediment and spend their whole life cycle without oxygen. These loriciferans are the first animals known to thrive without oxygen. They may resemble life forms that thrived during Earth's early history, before oxygen came to abound in the atmosphere and oceans.



13. Anaerobic animals living without oxygen have been imagined by science fiction writers but were not proved to exist on Earth until 2010. In the deep Mediterranean, a Census team found and added three new species to the few known species of the group called loriciferans. Unknown until the 1980s, loriciferans can live their entire lives hidden in sediment on the seafloor without oxygen. The *Nanaloricus cinzia* grows to about 0.3 millimeter long and 0.1 millimeter wide, comparable to the head of a pin. *Image: Roberto Danovaro*



14. The foraminiferan-like protist called Komokiacea were unknown in the deep Southern Ocean. Census explorers uncovered 50 species there, of which 35 were unknown anywhere. The snowflake-like creature in the photograph measures a few millimeters, the size of a flea, and its shell made of sediment grains lends the light beige color. *Image: Andrew J. Gooday*

Like European waters, the Great Barrier Reef and Ningaloo Reef off Australia are much visited. Nevertheless, when Census scientists explored the two locales, they estimated between one-third and one-half of the hundreds of soft corals were new species. Just 22 small heads of dead coral from the Central Pacific contained about 30 percent of the crab diversity of all Europe-

15. This remarkable red worm, between 20 and 30 centimeters long, discovered by scientists investigating the Mid-Atlantic Ridge turns out to belong to a completely new family. In fact, it is not a worm, as they initially thought, but an "enteropneust" that has more in common with vertebrates than with worms. *Image: David Shale*

16. In the inhospitable environment on a vent in the southeast Pacific near Easter Island, Census explorers discovered the yeti crab, *Kiwa hirsuta*. Given a species name for its hirsute appearance, its white, hairy look has prompted the nickname yeti for the abominable snowman, or yeti. The remarkable crab belongs to a new species and new genus and family, too. *Image: Cindy Lee Van Dover*

an seas; nearly half of the species, recognized by DNA barcoding, were found just once and over three-quarters of the species were found in just one location.

To learn what new creatures colonize coral reefs, Census scientists developed Autonomous Reef Monitoring Structures (ARMS). Built of layered plastic, ARMS resemble empty dollhouses and mimic the "nooks and crannies" of a natural reef. When creatures drifted or moved into ARMS on the French Frigate Shoals near Hawaii and scores of other sites, researchers could perform standard surveys contributing to a global picture of reef biodiversity.

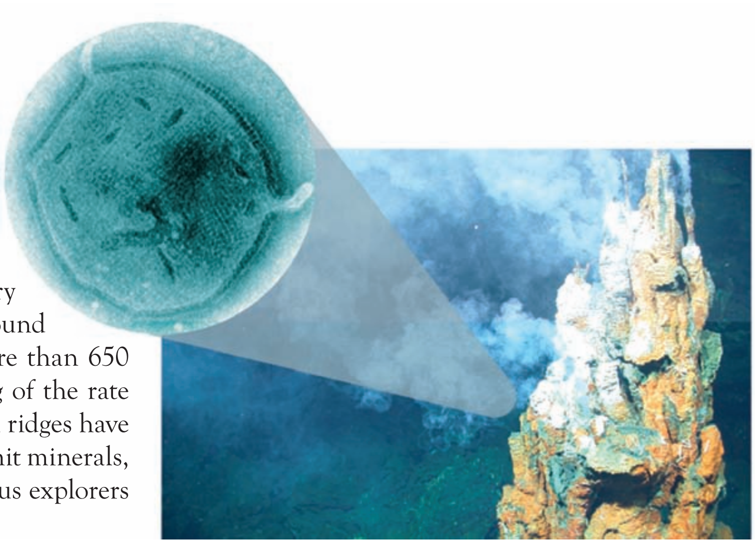
In less familiar waters, unknown species of course also abound. A survey in the Southern Ocean around Antarctica multiplied the number of Antarctic gelatinous zooplankton two to three times. Expense has discouraged sampling, especially in the Southern Ocean below 1,000 meters. During the International Polar Year (2007–2009), however, Census expeditions sampled the abyss, finding more than 700 likely new species among the 1,400 species of invertebrates they sampled. For example, although the protists called Komokiacea were not known to live in the Southern Ocean deep sea, now 50 species are reported, of which 35 were unknown species. Census explorers even found marine life photosynthesizing in the dim light under ice.

In the Ryukyu Trench near Japan, deep-ocean explorers photographed the deepest comb jelly ever recorded. It was attached to the bottom at 6,000 meters below sea level, about two-thirds the height of Mt. Everest (8,848 meters). Even in the well-studied Gulf of Maine, just a few samples in one basin revealed numerous new regional occurrences of species, and expeditions to the less-explored areas such as the slope and seamounts nearest to the Gulf uncovered new species.

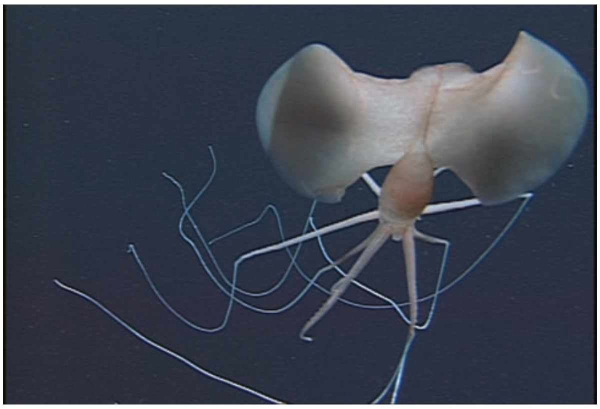
One Census investigation lowered rather than raised diversity, in this case, affecting the diversity of fishes. Because an animal may change shape as it passes through stages of life, the young and old may be mistaken as different species. But its genes will not change, and DNA sequences can reveal that the two stages are the same species. Previously, the alien-like Mirapinnidae (tapetails), Megalomycteridae (bignose fishes), and Cetomimidae (whalefishes) constituted three different families in taxonomy based on their appearance and behavior. Census investigations aided by DNA showed, however, that species assigned to those three families were in fact the larvae, males, and females of one single family, the Cetomimidae.

Census investigators, in a sense, compensated for this "loss" of diversity that existed only because of a taxonomic misunderstanding by discovering many new species, one of them a photogenic and authentic new crab in an inhospitable place, an underwater hydrothermal vent. Hydrothermal vents, some called black smokers, occur along ridges where tectonic plates pulling away from each other make new rock. Cold seawater circulates down through cracks between two plates and heats up as it passes through hot rock. The hot solutions carrying minerals and sulfides emanate from the vents and fuel life in extreme conditions and without photosynthesis. On a vent in the southeast Pacific near Easter Island, Chile, Census explorers discovered the yeti crab, *Kiwa hirsuta*, which is not only a hairy new species, but also a new genus and a new family. Other Census scientists have fully cataloged yeti and its known kin among the squat lobsters in oceans worldwide.

For sports, books of records compile extremes, such as fastest sprint or fastest pitch. The Census established records. The records, beyond attracting the eye, establish the span of marine diversity. Census prospectors of vents located the deepest (5,000 meters), hottest (407°C), northernmost (73° N, Arctic), and southernmost (60° S, Antarctic) “black smoker” hydrothermal vents known so far. Since the discovery of the first one in 1977, scientists have found about 1,000 hot vents and described more than 650 new species from them with no lessening of the rate of discovery. Only 15–20 percent of ocean ridges have been surveyed. Cold vents or seeps also emit minerals, methane, and sulfides, but are cool. Census explorers found 600 new species around seeps.



17. This newly described microbe, a thermoacidophilic archaeon found in a hydrothermal vent deposit from the Eastern Lau Spreading Center in the South Pacific near Fiji, exemplifies the rare biosphere. Wherever Census researchers looked, they found many species in a sample represented by less than one in 10,000 of all individuals, including those that occurred only once. *Microbe image: Anna-Louise Reysenbach and colleagues, 2006. Vent image: Anna-Louise Reysenbach*



18. In waters deeper than 1,000 meters, scientists found a group of large, unusual squids up to 7 meters long and waving large, long fins. They constitute a new family Magnapinnidae, aptly called bigfin squids. *Image: © Monterey Bay Aquarium Research Institute*

Biggest also qualifies as a record and extends diversity. A new giant species of spiny lobster, *Panulirus barbarae,* found off Madagascar weighs 4 kilograms and its main body extends 50 centimeters. Census expeditions found frequent gigantism in Antarctic waters. They collected huge scaly worms, giant crustaceans, sea stars, and sea spiders as big as dinner plates, testifying to longevity in cold conditions where slow growth prevails. Giant *Macroptychaster* sea stars grow up to 60 centimeters across.

Census scientists described large, unusual squids that had recently been discovered around the world in waters deeper than 1,000 meters. Up to 7 meters long, these squids have large fins. Their long, thin arms and tentacles have a strange elbow-like bend near the body. Since their discovery, scientists have found that these squids are adults of the newly described family Magnapinnidae, or bigfin squids.

Just as the too-far or too-deep are rich in new kinds, so too are the too-tiny to see. During an 11-month study in 2007, scientists sequenced the genes of more than 180,000 specimens from the western English Channel alone. The rare was common. One in every 25 readings yielded a new genus of bacteria (7,000 genera in all), quantitatively demonstrating that humans know less about the small than about the large. Many rare species in a sample contradict the generality of a few species predominating. Wherever Census researchers looked, they found many kinds of microbes in a sample represented by less than one in 10,000 of all individuals, including individuals that occur only once. They hypothesized that many kinds, now rare, could become dominant if environmental changes favor them.

Researchers found some marine microbes are everywhere, while others have limited distributions. The rare make up most of the microbial diversity in the oceans. Indeed, rare is common not only for marine microbes but for many taxa and regions.

Rescuing marine life from the category of extinct stands high among the gratifying increases of diversity encountered by Census scientists. They confirmed a contemporary Jurassic “shrimp” thought extinct 50 million years ago in Australian waters. As a record of antiquity, *Neoglyphea neocaledonica,* found on an underwater peak in the Coral Sea, ranks as one of the oldest marine organisms discovered by Census scientists, followed closely by a living fossil found in the Caribbean. *Pholadomya candida* is the only known remaining species of a genus of deep-water clams that flourished worldwide for more than 100 million years from Triassic to Cretaceous times (200 million to 65 million years ago). Thought since the 1800s to be extinct, this living fossil was found at 3 meters depth along Colombia’s Caribbean coast. The discovery also confirmed that the clam lives in shallow water, feeds by filtering suspended material rather than by trapping bottom detritus as previously thought, and provides the opportunity for genetic sequencing of an ancient lineage of bivalves to learn its evolution.

Lifespan as well as antiquity distinguish species. In the Northeast Atlantic, Census scientists discovered a new species of oyster, *Neopycnodonte zibrowii,* that forms reefs on deep cliff sides. Radiocarbon dating revealed that individuals reach 100 to 500 years

19. Species thought to be extinct have been rediscovered. For example, Census scientists found a Jurassic shrimp, *Neoglyphea neocaledonica* (left) thought to have become extinct 50 million years ago, and they also encountered a living Caribbean fossil, *Pholadomya candida* (right), the only remaining species of a genus of deep-water clams that flourished worldwide for more than 100 million years and was thought during the 1800s to have vanished long ago. *Shrimp image: Bertrand Richer de Forges and Joelle Lai. Clam image: Juan Manuel Díaz*

20. Sampling near the shore of the Aleutian Islands (Alaska, USA) in 2008 uncovered a new species of large brown seaweed, the Golden V kelp, *Aureophycus aleuticus,* distinct enough to be assigned to a new genus. This kelp with characteristic V-shaped blades, or "leaves," can grow as long as 3 meters. Even the relatively well known nearshore environment still harbors unknown species. *Image: Max K. Hoberg*

of age, placing them among the longest-lived mollusks yet known. For even more astounding longevity, Census takers at cold seeps found straw-like tube worms, *Escarpia laminata,* a meter long at the sunless seafloor with an estimated age of 600 years.

Large and conspicuous species in relatively well known shallow waters still await discovery. Sampling in the Aleutian Islands (Alaska, USA) in 2008 revealed a new species of large brown seaweed, the Golden V kelp, *Aureophycus aleuticus,* distinct enough to be assigned to a new genus.

Beyond colorful examples of diversity found and refound, Census work—especially the decade-long compilation of occurrence records for marine species in OBIS—allows mapping of the levels of biodiversity in different regions of the oceans and for different taxa, and then analysis of which environments favor diversity. Two major patterns emerged from a global study of 13 taxa from zooplankton to mammals: diversity in the open oceans peaked in mid-latitude or in subtropical "strips" in all oceans, while coastal species were most diverse in tropical areas such as Indonesia, southeast Asia, and the Philippines. Sea surface temperature was the only environmental predictor highly related to diversity across all 13 taxa. An unprecedented review of all known marine biodiversity in 25 regions confirmed the coastal pattern.

While the Census firmly established the major patterns, exceptions are the rule. Some locations with temperatures near freezing had higher diversity than some locations with tropical waters. And some taxa do not always follow the general latitudinal trend of highest diversity in tropical regions. Along rocky shores, echinoderms and gastropods display regional hot spots rather than continuous gradients in diversity, while some seaweeds (macroalgae) peak in diversity (and biomass) at higher latitudes. Much deeper, along the continental margin sloping from the shelf to the abyssal plain, the diversity of bottom dwellers peaks at mid-slope between 2,000 and 3,000 meters deep. Here depth matters more than latitude.

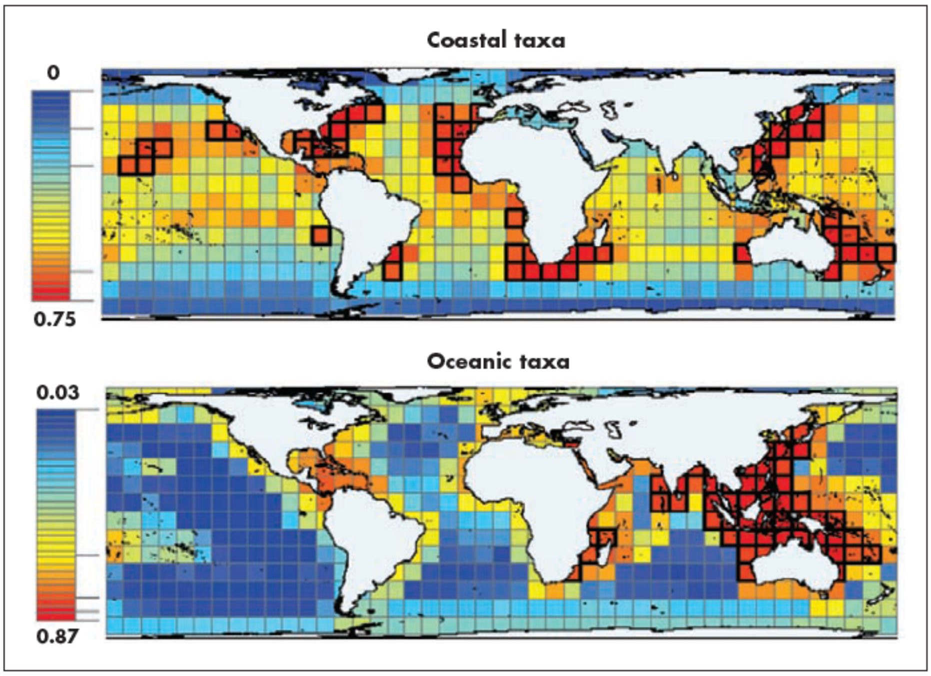
The Census database facilitates creation of comprehensive lists of known species (excluding most microbes) for all regions, whether defined by politics, economics, or geography. The set of studies involving 25 regions extending from Australia, China, and India to the Caribbean, Mediterranean, and Antarctica yielded species lists ranging between about 3,000 in the Canadian Arctic and 4,000 in the Baltic to about 33,000 in species-rich regions such as Australia and Japan. The median region had about 10,000 known species. Crustaceans, mollusks, and fishes are the most numerous in this array and comprise about half of known species diversity.

Census scientists also inventoried astonishing diversity of deep-sea species that have never experienced sunlight. Revealed by deep-towed cameras, autonomous free-swimming robots, and smart nets that open at programmed depths, animals known to thrive in an eternal watery darkness now number 17,650, a diverse collection of species ranging from crabs to shrimp to worms. Most have adapted to diets based on meager droppings from the sunlit layer above, but others live off bacteria that break down oil, sulfur compounds, and methane, the sunken bones of dead whales, and other unlikely foods.

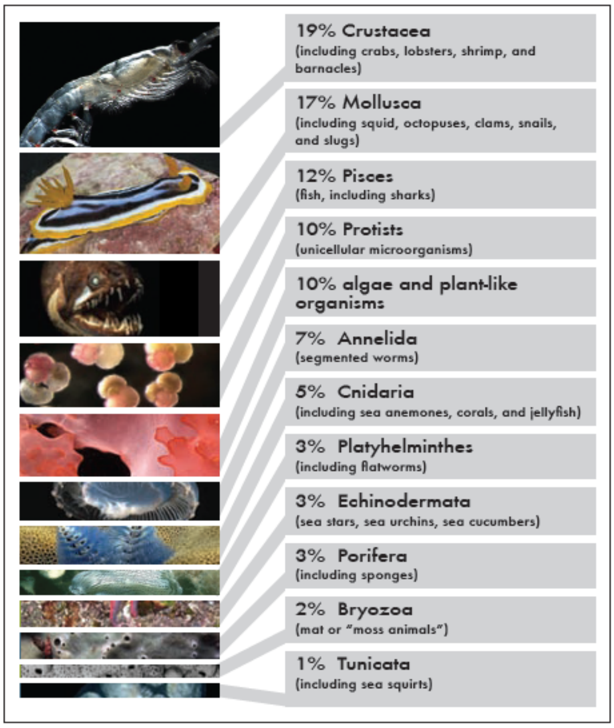
While opening opportunities for discovery, the accumulating mass of data sometimes overwhelms the mind's ability to comprehend. When considering 10,000 species or specimens at one time, DNA again comes in handy. DNA is fundamentally digital. Each nucleotide in a strand of DNA is a thymine, cytosine, adenine, or guanine and can be coded in zeros and ones, or as a colored stripe. A short "barcode" region distinguishes the species to which a specimen, including a fin or tentacle or other fragment of tissue, belongs. This technique was first published in 2003; the fast-growing reference library of marine species with barcodes now tops 35,000 covering more than 20 phyla.

Statistical analysis and graphics help extract meaning and pattern from diversity recorded in large databases. One approach that the Census applied innovatively converts nucleotide sequences of barcode regions into "indicator vectors" and then calculates how closely these vectors resemble each other from the distances among them. Displays of the correlation matrices, dubbed Klee diagrams for their resemblance to the geometric paintings of Paul Klee, graph the separation of species and the intensity of relations among species. A single Klee diagram illuminates the relations and descent of animals of more than 5,000 species in 8 widely separated groups. Colors and distances reveal discontinuities corresponding to species- and higher-level taxonomic divisions. Sponges and bony fishes have the least kinship among eight major phyla, while sea stars (echinoderms) and sharks (elasmobranchs) make surprising neighbors. Klee diagrams also offer colorful "fingerprints" characterizing the diversity of life in different bodies of water. For example, DNA samples from the zooplankton of the Sargasso Sea versus the Celebes Sea make distinct Klee patterns.

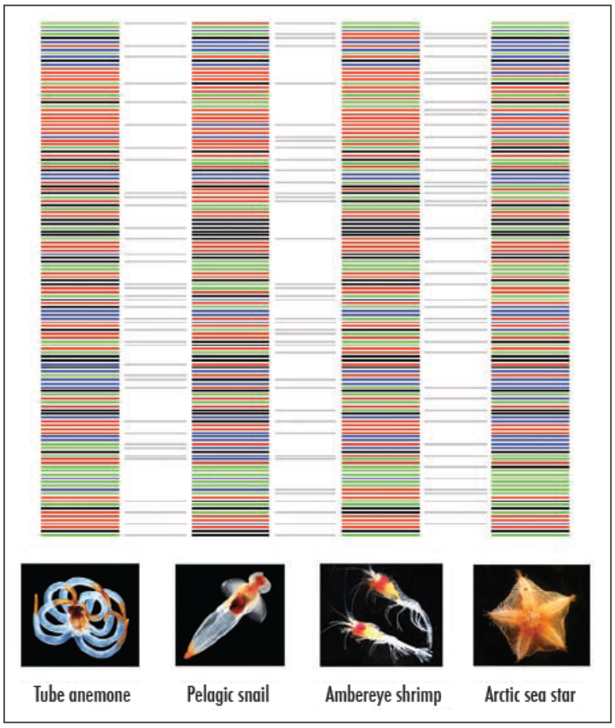
Exploring diversity in all realms of Planet Ocean, Census of Marine Life explorers newly observed millions of specimens. More than 1,200 of the collected specimens are now formally described as new species, while 5,000 more are probably new to science and awaiting description and addition to the marine catalog of diversity. Globally, the collective efforts of all marine biologists drawing on specimens collected over many decades are adding more than 1,600 marine species per year. Partnering with other groups and aggregating information, Census scientists affirmed the probable existence of about 250,000 named, known species and helped to make an authoritative, accessible list of these now approaching 200,000 and to develop Web pages for more than 80,000. They sequenced DNA identifiers for more than 35,000 species that make possible a compact new view of the relatedness of all marine life. Capturing DNA for tens of thousands of kinds of marine microbes, Census researchers estimated that up to a billion exist. While at least a million kinds of life earning the rank of species are estimated to live in the ocean, no firm basis exists for a range or upper limit. Of all the life that survives in the oceans, smaller forms appear to outnumber larger forms by 100 to 1,000 times. The oceans burgeon with discovered and undiscovered diversity.



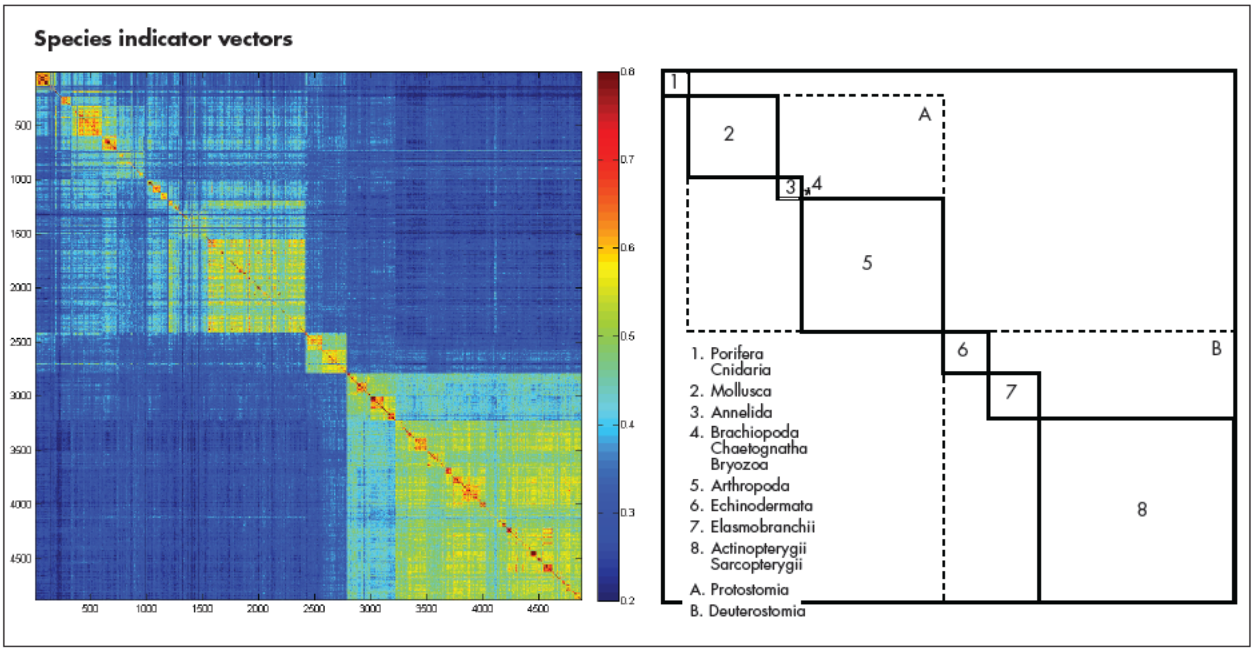
21. Records of 11,000 marine species from tiny zooplankton to sharks and whales assembled in the Ocean Biogeographic Information System of the Census revealed hot spots of species diversity. The diversity of coastal species such as corals and coastal fishes tended to peak around Southeast Asia, whereas the high diversity of open-ocean creatures such as tunas and whales spread more broadly across the mid-latitude oceans. Red indicates areas of high diversity. Horizontal tick marks to the right of the color ramps indicating quartiles of diversity show it takes more diversity in coastal regions to qualify for a high ranking. *Source: Derek P. Tittensor and colleagues, 2010*



22. A census of 25 key oceanic regions rests on information collected during past centuries plus descriptions of thousands of new species during the decade-long Census. Most of the species fall into a dozen groups, including many crustaceans and mollusks, fewer fishes, and only 2 percent other vertebrates. The scarce 2 percent of species that are well-known vertebrates such as whales, seals, and walruses compared with the 98 percent of other creatures in the Census reflects the great diversity of marine life hidden among the other creatures. The regional lists of species set a baseline for measuring changes that humanity and nature will cause. *Images: Russ Hopcroft, Gary Cranitch, Julian Finn, Larry Madin, John Huisman, Katrin Iken, Bernard Picton, and Piotr Kuklinski*



23. Genetic sequences from anemone (*Ceriantharia* sp.), snail (*Clione limacina*), shrimp (*Hymenodora glacialis*), and sea star (*Hymenaster pellucidus*) illustrate the analogy between a sequence of genetic units in the cells of a specimen and the barcodes on items for sale in a supermarket. Each of the four colors represents one of the four nucleotides—cytosine (blue), adenine (green), thymine (red), and guanine (black)—that compose DNA sequences. The gray lines between the colored bars signal genetic differences. The differences among barcodes enable the assignment of a specimen, even a fragment such as a fin or scale, to a species. Specimens of the same species will have identical or almost identical barcodes. *Barcodes: Mark Stoeckle. Images: Cheryl Clarke-Hopcroft, Russ Hopcroft, Bodil Bluhm, and Katrin Iken*



24. Klee diagrams, named for their analogy to the paintings of Paul Klee, display the genetic separation of species and the intensity of relations among species. Blocks of high correlation (red or yellow) on the diagonal reflect affinities within groups of species, corresponding to taxonomic divisions. Each species contributes a line, and a group of closely related species, such as fishes, becomes a group of lines that form a box. Klee diagrams illuminate broad patterns in the genetic structure of biodiversity. The color map depicts correlations for 5,000 marine species from 10 phyla. Elasmobranchii, Actinopterygii, and Sarcopterygii are respectively cartilaginous, ray-finned and lobe-finned taxa of fishes The correlations coalesce into a coherent picture of categories of marine life. *Image: Dirk Steinke*

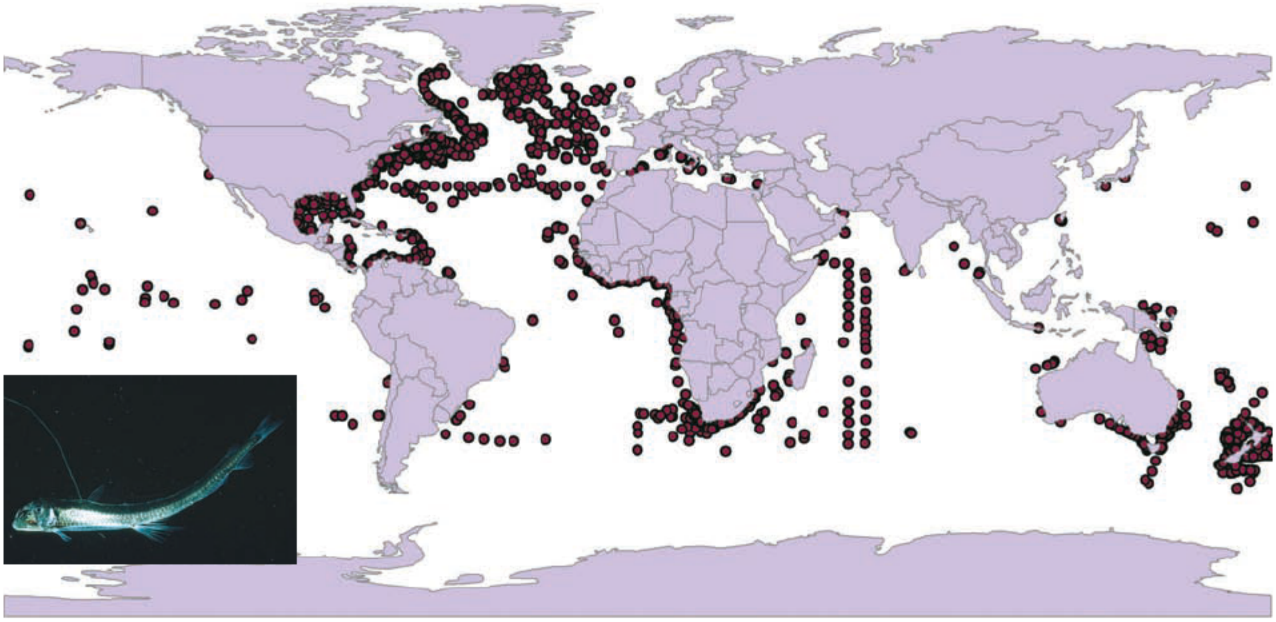
25. *Image: Bodil Bluhm*

DISTRIBUTION

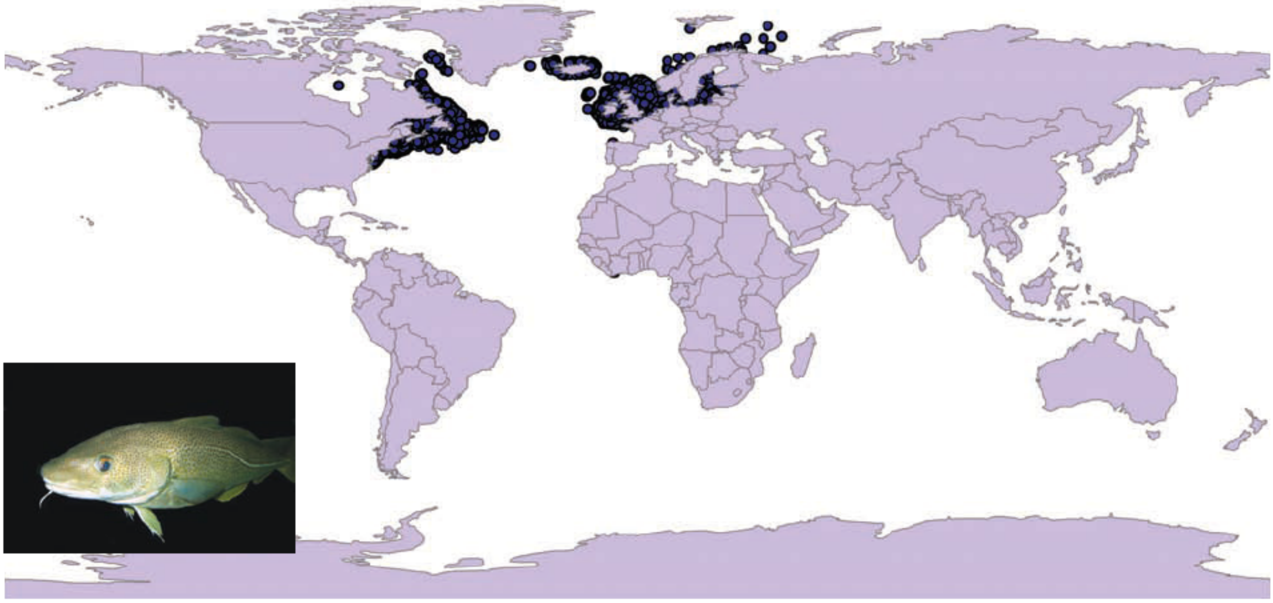
Beyond the kinds or species of life, a census must show the distribution, the addresses and travels, of individuals. Distribution displays where a species is born, eats, and breeds. Congregation shows where it meets its kind and mates. Routes of migration and travel trace the environments where a species prospers, ekes out a living, or merely survives. The distribution maps of a species identify the habitats that will nourish, stress, or starve it.

The millions of OBIS records assembled during the Census decade quickly display where species have been reported. Visiting www.iobis.org and entering the name of a species calls forth a global map of its distribution. Specifying either viperfish or *Chauliodus sloani*, for example, promptly displays its wide range. Entering the Atlantic cod, *Gadus morhua*, maps its narrower range.

Long before a species becomes extinct, circumstances may eliminate it from one of its habitats, an event that its distribution will reveal. Distribution will, of course, reveal elimination or change only if a baseline has been established. For the Gulf of Mexico, 140 taxonomic experts from 80 institutions and 15 countries associated with the Census established the baseline in a book that has been converted into a digital database (www.nbii.gov/portal/server.pt/community/gulf_of_mexico_biodiversity/1950). The data allow anyone to ask how many species of each taxonomic unit live in different sections of the Gulf of Mexico, at what depth, and in what substrate.



26. Entering the URL www.iobis.org accesses the tens of millions of what/where/when records assembled in the global marine life database OBIS. Among fish, the manylight viperfish, *Chauliodus sloani,* whose distribution is shown here in dark red, can be considered the Everyman of the deep ocean. Census data show the fish has been recorded in more than one-quarter of the world's marine waters.
Source: Ocean Biogeographic Information System. Image: Encyclopedia of Life

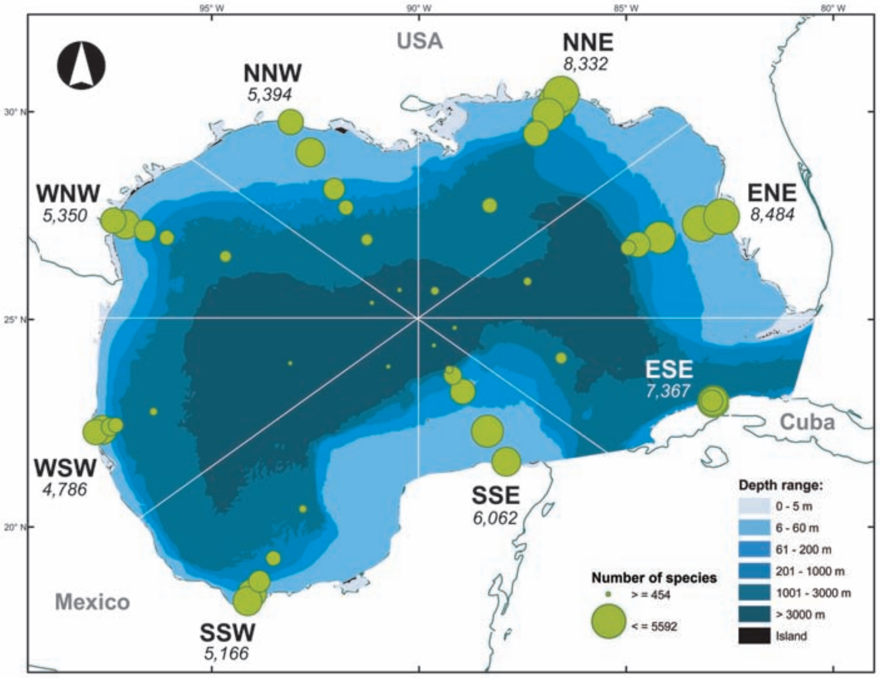


27. Specifying the Atlantic cod, *Gadus morhua,* produces a map of its range, restricted to the North Atlantic and nearby Arctic waters.
Source: Ocean Biogeographic Information System. Image: Encyclopedia of Life

The April 2010 explosion of the Deepwater Horizon rig spilled oil onto the coast, margin, and great depths in the north-northeast octant of the Gulf of Mexico. Decades of survey integrated in the new database set a baseline of 8,332 species in all depths of that octant. Including only major taxonomic units or taxa of animals at all depths in the region of the spill, there are 1,461 mollusks, 604 polychaetes, 1,503 crustaceans, 1,270 fishes, 4 sea turtles, 218 birds, and 29 marine mammal species. Although many species remain to be discovered in the Gulf, the database provides a baseline as of 2009 for assessing the effects of such events as the oil spill and the recovery following its cleanup. The baseline establishes the reference for future measurements.

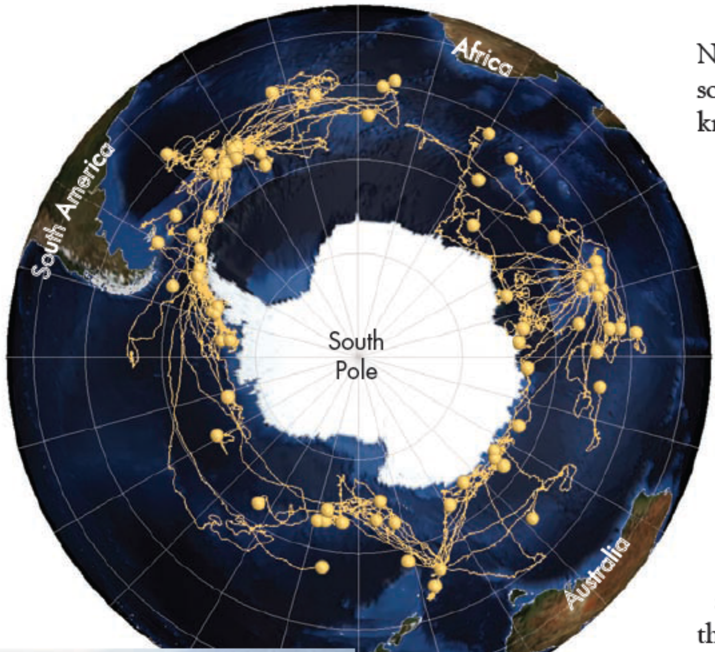
Where marine animals travel, as well as where they live, affects their success. Their travels set records. Sailfish, *Istiophorus albicans* and *Istiophorus platypterus,* swim fast sprints at 110 kilometers per hour. Atlantic bluefin tuna, *Thunnus thynnus,* migrate east to west and west to east across the North Atlantic about 6,000 kilometers between Europe and North America, and Pacific bluefin tuna, *Thunnus orientalis,* make multiple crossings of the Pacific. Equally impressive as marathon swimmers, humpback whales, *Megaptera novaeangliae,* complete annual north–south migrations of more than 8,000 kilometers. Circumnavigating the entire Pacific, a small seabird, sooty shearwater, *Puffinus griseus,* makes a 64,000-kilometer round trip from New Zealand to Japan to Alaska to Chile and back to the Southern Ocean. This trip, averaging about 40 kilometers per hour, marked the longest-ever electronically recorded migration.

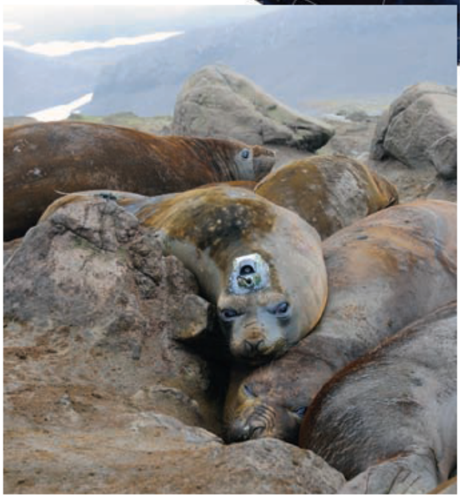
The trials of anadromous fishes as they ascend rivers from the sea for breeding and of their young as they migrate to the sea before returning to their native river exemplify the hazards of travel. Adults going upstream and the young passing down must surmount rapids and fish ladders, and then, escape predators and find food in the ocean. For decades, scientists attached small tags to fish, hoping someone would return them. Some tags were returned, many were lost, and none could tell where a fish had traveled.



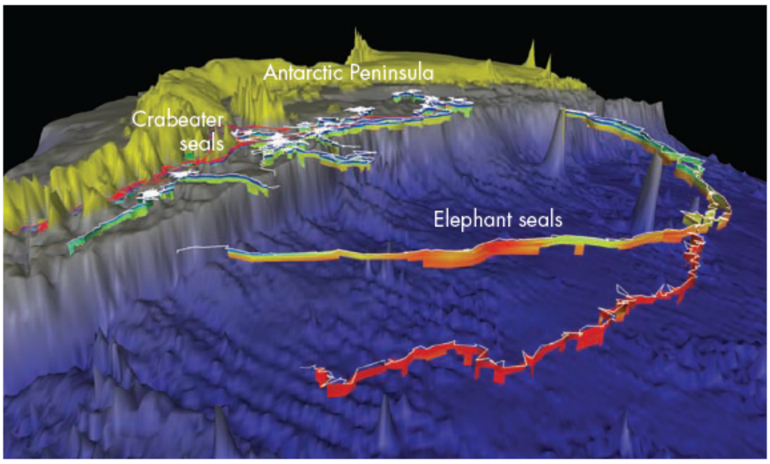
28. A map of marine life establishes a baseline for evaluating the outcome of an oil spill in the Gulf of Mexico. One hundred and forty taxonomic experts from 80 institutions and 15 countries associated with the Harte Research Institute, a Census affiliate, established the baseline of known species in the Gulf of Mexico in 2009 and made it available online shortly thereafter. The data answer graphically how many species of each taxonomic group live in different sections of the Gulf of Mexico, at what depth, and on what substrate. The new database sets a baseline of 8,332 species in the north-northeast sector of the Gulf, where the Deepwater Horizon rig tragedy occurred in 2010.
Image: Harte Research Institute

29. The continental-scale acoustic curtains arrayed by the Census tracked migrations of 18 species, including juvenile Chinook salmon, *Oncorhynchus tshawytscha,* thousands of kilometers along the Pacific coast of North America and in rivers, too. The red spots on the map indicate the curtains through which animals swim, signal their passage, and give clues where and how they survive in the oceans. The orange line shows migration of the salmon the size of a banana spanning 2,500 kilometers in three months. The acoustic curtains also revealed an unexpected, long migration of the threatened green sturgeon, *Acipenser medirostris,* along the continental shelf from U.S. to Canadian waters. A surprising group swam north for the winter. *Image: Pacific Ocean Shelf Tracking Project*





30. Biologging, the use of miniaturized electronic tags to track animals in the world, revealed unknown behaviors, movements, physiology, and environmental preferences of a variety of ocean animals. Biologging has shown that communities of southern elephant seals, *Mirounga leonina,* from different islands surround the harsh environment of Antarctica, demonstrating the principle that animals inhabit even the farthest reaches of the ocean. *Source: Southern Elephant Seals as Oceanographic Samplers (SEaOS) Image: Daniel Costa*



31. Carrying electronic tags that measure location, temperature, depth, and salinity and communicating with satellites as they swam and dove, more than 20 species became auxiliary oceanographers in the Census of Marine Life, reporting the environment that they experienced. The electronic tags on two elephant seals, *Mirounga leonina,* exploring seamounts down to 2,300 meters deep off the Western Antarctic Peninsula reported their paths, and the ribbons of colors on their paths show the temperature and depth measurements that they added to Census data. Seamounts seem to be refueling stations for migratory species. Crabeater seals, *Lobodon carcinophagus,* made tracks closer to shore. *Image: Daniel Costa*

Now acoustics, electronics, and satellites have shifted some of what was unknowable to the provinces of unknown and even known.

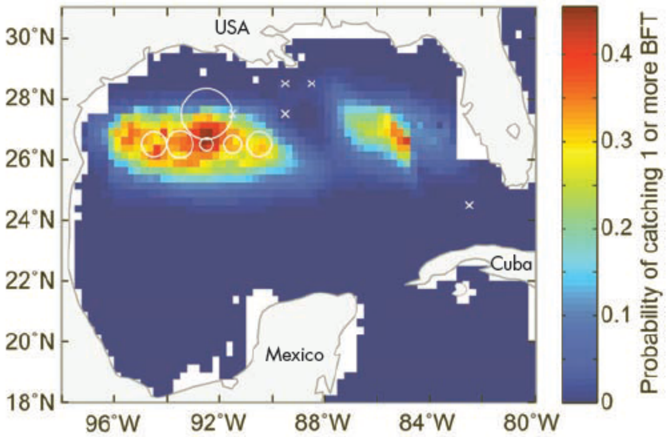
The Census arrayed curtains of acoustic receivers on the seabed to track 18 species of acoustically tagged fish more than 3,000 kilometers from California to Alaska, year-round. The searchable public database from the network now contains more than 9 million detections from more than 16,000 tagged animals of all 18 species. The exercise demonstrated that miniature sonic tags and the curtains listening for them could follow the travels of even small animals, such as a salmon the size of a banana, over long distances and through dissimilar waters. Among the many tracked, two juvenile Chinook salmon, *Oncorhynchus tshawytscha,* survived a 2,500-kilometer trip that took more than three months—from the Rocky Mountain headwaters of the Columbia River to the Pacific Ocean and north along the continental shelf of Canada's British Columbia to the coast of Alaska. The research learned about life cycles, movement, and behavior from the point of view of the fish and showed how the mortality of young salmon is apportioned among the habitats they encounter during their early life.

Where and why animals die in the oceans is one of the master questions for a census, and especially challenging for those that migrate long distances. A survey of 3,500 juvenile salmon suggests that only about one of six survives its first month in the ocean, while between 1/25 and 1/100 will survive two years and return to their native river to spawn. Another way to consider the early marine survival of migrating steelhead, *Oncorhynchus mykiss,* and sockeye salmon, *Oncorhynchus nerka,* is to note that survival per week of travel of a group of fish tracked by the Census ranged between about 40 percent and 80 percent.

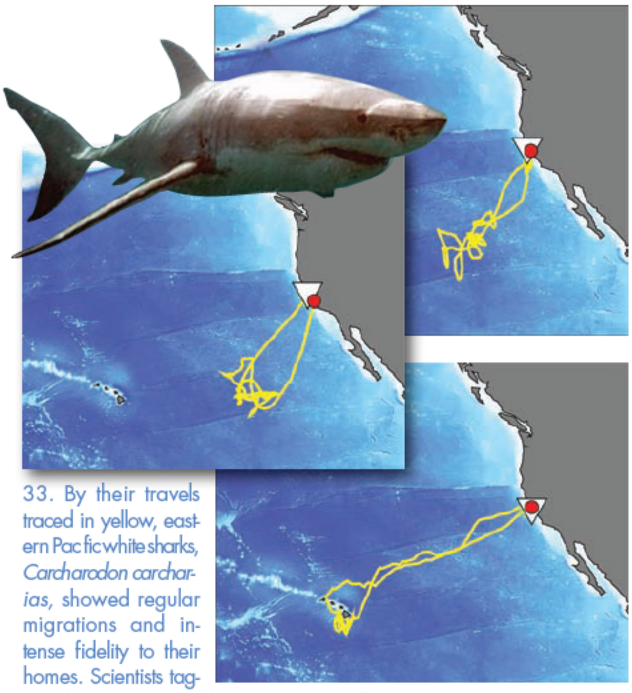
For species less familiar than Pacific salmon, just knowing where and when they travel expands knowledge. In the case of the threatened green sturgeon, *Acipenser medirostris,* the receiver array revealed annual migration along the continental shelf from U.S. to Canadian waters. A surprising group of sturgeon swam north for the winter. Frequent detection of tagged sturgeon allowed estimating an annual survival of 83 percent.

Tracking marine life in the open ocean requires a different method than tracking them through rivers and along narrow and shallow continental shelves suitable for present curtains of listening devices. Satellites now must communicate with the animal's sensors from afar. The Census researchers devised tags to measure water temperature, light, depth, and salinity around a tagged animal and other tags to sense its pulse and body temperature. Light and pressure sensors on tags estimated chlorophyll, and thus phytoplankton abundance and potential productivity of other life. The light sensors allow calculation of longitude and latitude from the hour of sunrise and sunset. So-called biologging now brings together behavior, physiology, and oceanography to show how an animal uses its environment. The animals show us their blue highways and why the highways follow the routes they do.

To record a tuna's location, depth, and body temperature as well as the temperature and light in breeding waters in the Gulf of Mexico, Census scientists tagged 28 Atlantic bluefin tuna, *Thunnus thynnus*, some weighing up to 300 kilograms. The spawning stock for these bluefin has dropped 90 percent in 30 years. Most of the tagged tuna swam near the Florida Straits and in the western Gulf where the continental shelf is steep and surface temperatures are 24 to 27 degrees Celsius.



32. Conservation requires knowledge of mating areas and nurseries. Spawning Atlantic bluefin tuna (BFT), *Thunnus thynnus,* swim along the slopes in the western and eastern Gulf of Mexico. Red and blue colors on the map indicate high and low probabilities of encountering a bluefin when fishing with longlines in the Gulf of Mexico during 2002 and 2005. A long line caught no tuna at the X's on the map. The narrow band of 24° to 27° Celsius where most tuna swam prompts the speculation that a small change in temperature would change the timing and location of spawning. *Source: Steven L. H. Teo and Barbara A. Block, 2010*



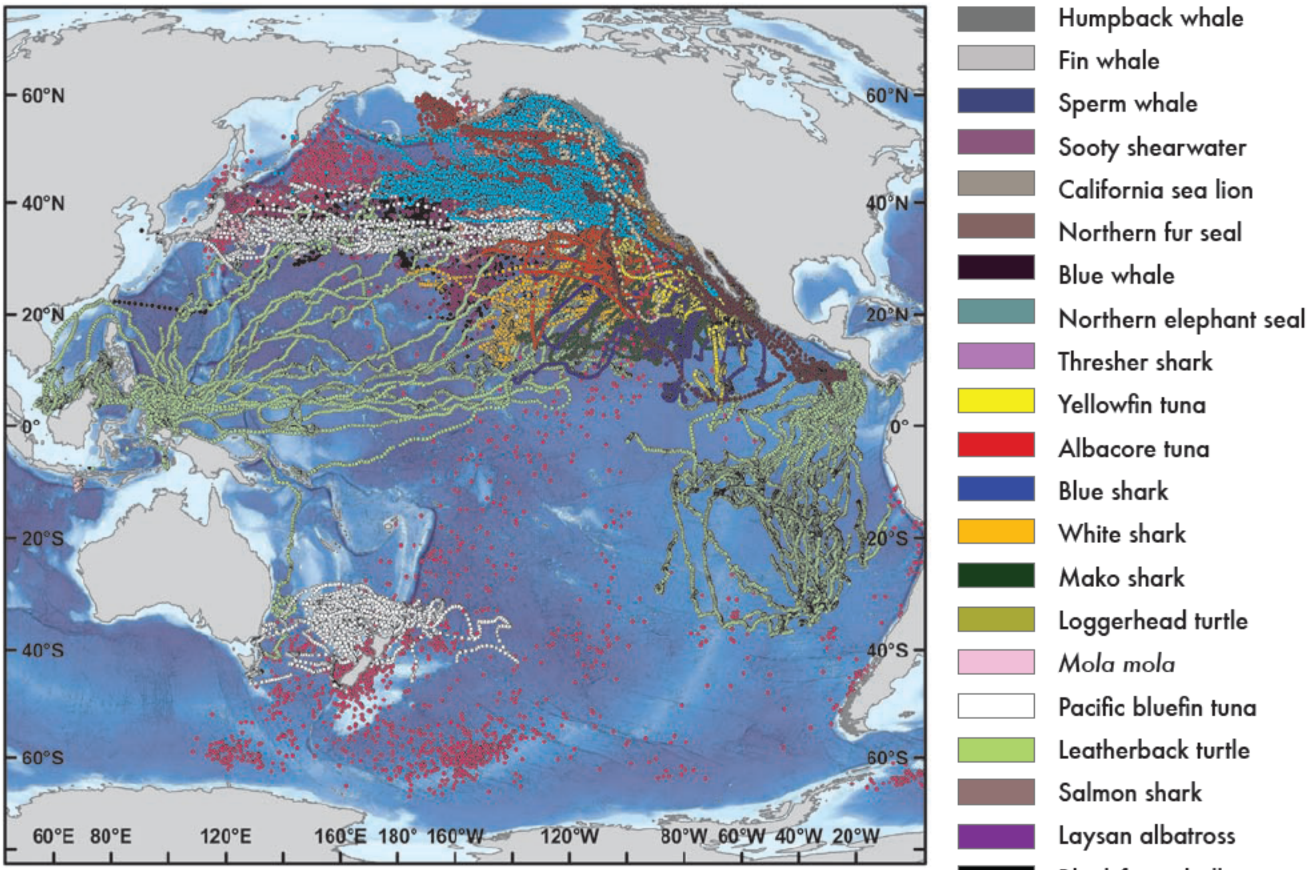
33. By their travels traced in yellow, eastern Pacfic white sharks, *Carcharodon carcharias,* showed regular migrations and intense fidelity to their homes. Scientists tagged them in the triangles, and their satellite tags later popped up in the red circles on the central California shelf. One shark swam to Hawaii, two circled in the White Shark Café halfway to Hawaii. Genetic analysis shows that distinct populations persistently return to the same network of coastal places after oceanic migrations.
Source: Salvador Jorgensen and colleagues, 2010

Combining satellite tagging, passive acoustic monitoring, and genetics, Census trackers found that white sharks, *Carcharodon carcharias,* follow a regular migratory cycle in the eastern Pacific. The sharks migrated from coastal California to a meeting place the Census dubbed the White Shark Café. Visiting the café between Baja California and Hawaii and traveling back, they demonstrated their homing instincts. After journeys of more than 200 days extending to 5,000 kilometers offshore, each shark would return to its precise California address in water about 30 meters deep.

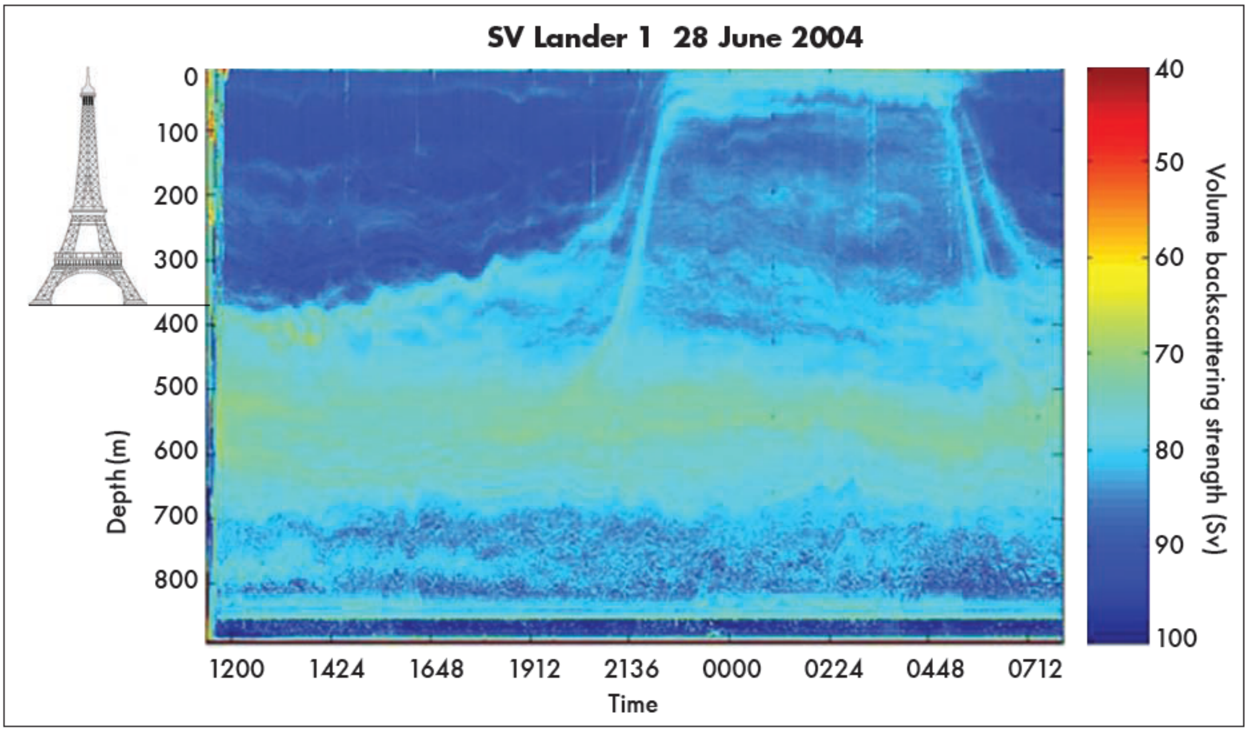
Satellite tracking of leatherback turtles, *Dermochelys coriacea,* in the eastern Pacific during 2004–2007 recorded 12,095 days of travel. During the past two decades, collection of eggs and catching turtles while fishing for other targets has depleted many populations of these turtles by 90 percent. Census tracking located their habitat and migration routes. Combined oceanography and tracking defined the turtles' migration corridor from Costa Rica, across the equator, and into the South Pacific Gyre, a vast region with little food. Consequently, fisheries were closed during the migration, a beginning for conserving the turtles. Further, Census scientists located habitats of female leatherback turtles between nesting periods, when they are endangered by fisheries near the shore and by development on the shoreline. The nearby marine Caletas Wildlife Refuge and improved zoning within the Costa Rican exclusive economic zone are now protecting leatherbacks during this critical phase in their life cycle. The Great Turtle Race Web site created by the Census enabled people to follow the migration of individual turtles and encouraged them to support measures to conserve the animals.

Improved statistical methods pinpointed the locations of tagged animals so closely that other tools could identify behaviors of the animals as they experience their environment. The tools helped show, for example, that male and female grey seals use shelf regions of the northwest Atlantic differently and feed on predictable shallow banks that are restaurants for numerous species.

The sum of tagging and tracking data for a region paints an eye-opening picture of neighborhoods and seaways. While an ocean may look uniform and opaque from an airplane window, underneath the dark blue surface species of tuna and turtles, seals and whales, sharks and squid are each using specific habitats and connecting east and west, north and south, shallow and deep. Evidence from the North Pacific and from the Southern Ocean around Antarctica suggests that every



34. Reports from birds, fish, whales, and other animals carrying small tags reveal highways and neighborhoods of the vast Pacific. Census biologgers followed bluefin tuna, *Thunnus orientalis,* commuting between Japan and California and leatherback turtles, *Dermochelys coriacea,* between Borneo and Mexico. Traveling animals connect all the oceans. *Source: Tagging of Pacific Predators. Image: Blackwell Publishing Ltd.*



35. At dusk in June above the Mid-Atlantic Ridge, scientists encountered a rush hour when animals rise to the surface to feed, as if returning home for supper. Throughout the hours from noon on the left through the night to about 0800 hours on the right, an echo sounder reflected the presence in green of many animals between depths of 400 and 800 meters. During the night from 2100 to 0500 hours, the echoes shown by colors show the upward rush hour, even up to the surface. This daily vertical commute of about 400 meters exceeds the distance from bottom to top of the Eiffel Tower. Spectacular during the summer, the upward commute shrinks during autumn and almost disappears in winter.
Image: Patterns and Processes of the Ecosystems of the Northern Mid-Atlantic project

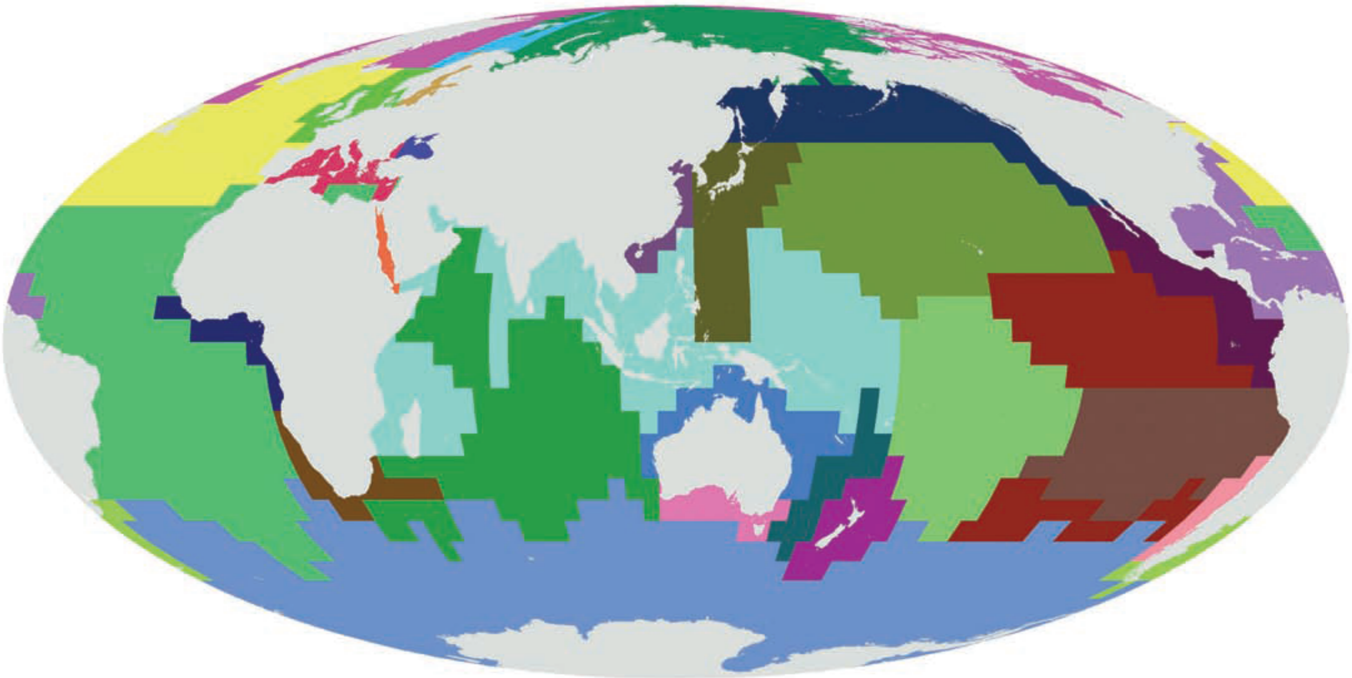
36. Image: Daniel Costa

neighborhood receives visitors from far away. And every species of tagged animal went to unexpected places and did unexpected things, such as white sharks visiting their café or Humboldt squid eating salmon.

In the three-dimensional ocean, living things travel vertically as well as horizontally across maps. Since the 1960s, cameras on animals have logged where they swim or dive. In the Census, tags attached to northern elephant seals, *Mirounga angustirostris,* followed their routine dives down to 600 meters and occasional ones to 1,550 meters. Species that breathe air at the surface often dive to dine. Seals and whales dive from the surface down hundreds or even thousands of meters to find prey with whistling and sonar.

Fishes as well as crustaceans and other invertebrates hide in the dark deep where predators cannot see them, but then surface at night to feed. For fishes and invertebrates, these vertical migrations create a dawn and dusk "rush hour," where predators and prey commute to and from their preferred deep locations. Some move up from 500- to 1,000-meter daytime depths, rising higher than elevators carry humans in the tallest skyscrapers.

Using new types of echo sounders that could sense events fully to the deep ocean floor as well as sonars that looked upward in deep water, the Census observed a summer rush hour when animals rise to the surface to feed as if returning home to supper. The echo sounder moored 1,000 meters below the water near the Mid-Atlantic Ridge recorded fishes and plankton rising about 400 meters at approximately 2100 hours to the zone where sunlight and photosynthesis had produced food. About 0600 hours, they descended to twilit water below.



37. Spanning microscopic plant-like organisms to whales, the Census produced the first all-taxon maps of global marine species using the distributions of more than 65,000 species from the Ocean Biogeographic Information System. Thirty marine biomes summarize the distributions of many species, each biome representing a region with a distinctive fauna and flora. *Image: Mark J. Costello*

Of course, swirling eddies, large and small, combine horizontal and vertical motion. In the mid-Atlantic, Census researchers found communities with scores of species structured by eddies a thousand meters deep and tens of kilometers in diameter. Large waves traveling deep within the ocean also shape the distribution of life. While a layer rich in life between 300 and 800 meters deep had been known since the 1950s, the Census added evidence of other, deeper layers, 1,500 and 2,300 meters down in the Atlantic.

A different question about distribution that has intrigued biologists for decades is whether some animals thrive in both polar regions. While we know that polar bears inhabit only the Arctic and penguins the Antarctic, biologists have wondered about bipolar mollusks, crustaceans, and fishes. Census researchers identified more than 300 species recorded in both Arctic and Antarctic regions. DNA tests, however, revealed considerable differences, and those showed that few, if any, species truly are bipolar.

Finally, "biogeography" summarizes the distribution of life, marine or terrestrial. Census researchers compared the distributions of 65,000 species of marine animals, plants, and protists to produce the first all-taxa map of global marine species diversity. These analyses distinguished 30 biogeographic regions worldwide.

Such classifications tend to represent the near-surface, which is richer in observations, better than the deep sea. Since the middle of the nineteenth century biologists have discovered 27 habitats from the edge of the continental shelf to the deep trenches, including such recently discovered habitats as whale falls, reefs of cold-water corals, and methane seeps. For most habitats, the global area is unknown or roughly estimated. On the global deep-sea floor, areas that have been carefully sampled are no larger than a few football fields. Nevertheless, with available information about species and the environmental context, researchers have recently offered a new geography for the deep water and deep-sea floor. Divided into four depth ranges, it describes 30 provinces in the water column and 38 for the seafloor, as well as 10 provinces for hydrothermal vents.

More than 100,000 seamounts, undersea mountains that do not rise high enough to be islands, interrupt the deep-sea floor. Because not all seamounts are the same, Census scientists set forth an objective classification. The investigators found previously unexplored seamount habitats, for example, areas dominated by brittlestars, that already bore trawl marks and lost fishing gear upon their first scientific discovery, complicating the attempts to assign seamounts to classes.

Deep or shallow, changes in ocean temperatures, currents, and chemistry would redistribute much marine life. Census researchers predict a decline in diversity in a tropical ocean that becomes warmer, and an increase of diversity at latitudes of about 50 to 70 degrees in both hemispheres.

Up, down, and sideways in the connected water of Planet Ocean, marine life travels in search of food and its own kind, without passports and encountering changing temperature, chemicals, and predators. Some swim, some drift, some stay buried in the mud or attached to a rock. Extreme is normal. No longer opaque, the ocean increasingly reveals its traffic patterns and neighborhoods.

38. *Image: François Sarano*

ABUNDANCE

After naming the kinds of marine life and charting their locations, a census must count or weigh their abundance. Rising abundance indicates a species' health, and declining abundance sends a warning long before the tragedy of its extinction. Counting or weighing the abundance of swimming and drifting life in the three dimensions of the interconnected global ocean confronted the Census with difficulties to overcome. Nevertheless with historical archives, calculation of primary production of food, and new technology to scan vast schools of fish, the Census did penetrate the boundary between unknown and known and occasionally jumped into the province of the formerly unknowable.

For a head start to detection of future trends, Census historians reached backward from the present with unearthed records of fossils, fish tales, and taxes on products made from sea life. In some regions, such as the Mediterranean, humans already removed consequential amounts of sea life 2,000 years ago. History shows people began catching marine life long ago, and their extractions were more widespread and affected a broader range of species than once thought.

Indeed, since prehistory, our ancestors collected mollusks for their meat and shells. The Census documented shell deposits, or middens, in the Americas, Africa, Europe, Japan, and Papua New Guinea. Studies of the queen conch, *Strombus gigas,* now a threatened species in the Caribbean, suggest depletion by intense Amerindian exploitation before 1492. From the sixteenth to the nineteenth centuries, the conch populations recovered to face a second depletion in the early 1980s.

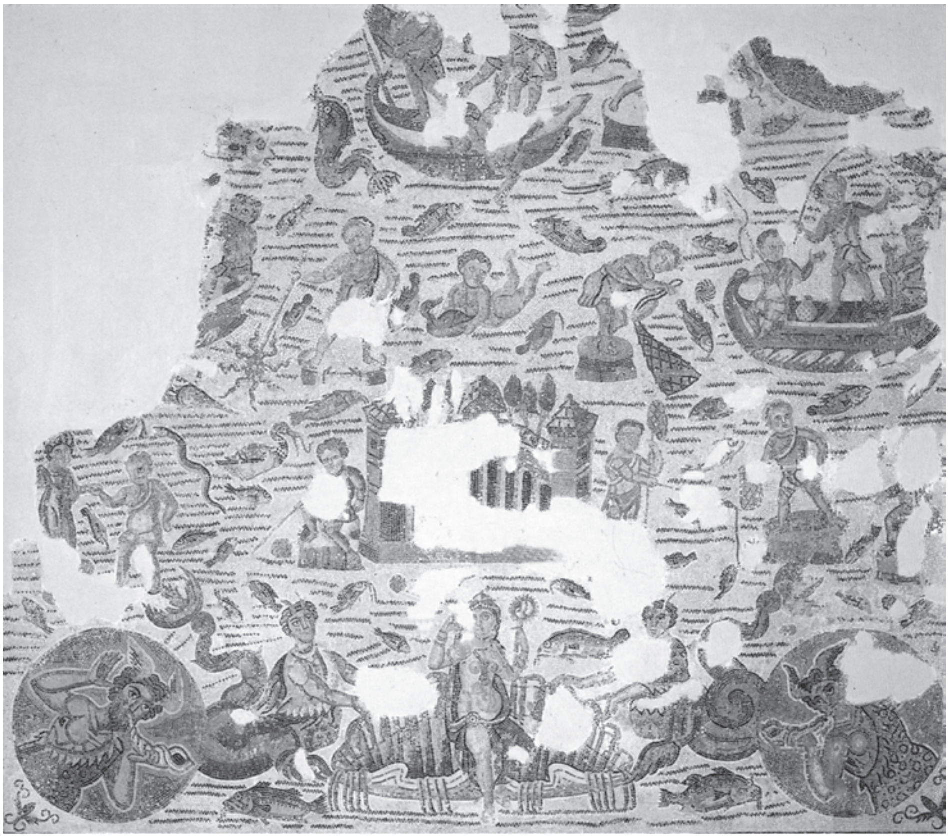
Since written records began accumulating in archives and libraries five to six centuries ago, fish stories have been saved. John Cabot (1450–1498) provided an example when he wrote that fish along the Canadian coast were "so numerous you could walk across the bay on their backs." Others wrote of native Americans spearing salmon migrating upriver from coastal waters. Even though removals were substantial, some large animals remained.

Even where removals were not yet great, abundance fluctuated. The herring caught in Denmark between 1600 and 1800 provide a quantitative clue to changing abundance, fluctuating by a factor of five, probably owing mostly to variations in weather and climate. Variable climate also appears to have changed salmon populations in the Russian High North long ago.

In a later era, the fluctuating Baltic catch of cod, herring, and sprat during the twentieth century provides data to dissect for causes of change. With accompanying observations of climate, nutrients in the water, and predatory marine mammals, scientists can analyze historical records for the causes of the changing populations. Without some understanding of the causes of these former fluctuations, forecasting changes following natural and human perturbations will be difficult and uncertain.

Recreational fishing also provides valuable observations. Recreational fishers often seek large "trophy" fish and take photographs when they catch them. While fishermen are famously nostalgic for times of greater abundance, their nostalgia appears true.

39. In villages along the Italian coast, lobstering was still an integral part of life in the nineteenth century. *Image: Ente Nazionale Italiano per il Turismo*



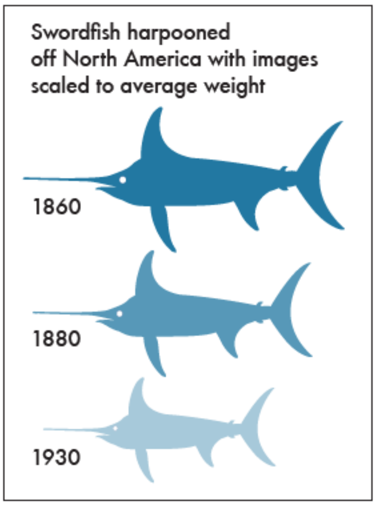
40. A Carthaginian mosaic from the end of the fourth century displays the range of nets, rods, spears, and tridents for catching fish during the Roman era. Thousands of years ago, people caught sea life near the shore and near the surface across wide regions such as the Mediterranean. *Image: "Il mare Com'era"*

41 and 42. While recreational fishing removes much less sea life than commercial fishing, recreational fishers do sample marine life, especially large animals. In 1958, after an excursion on a Key West, Florida (USA) charter boat, a family of recreational fishers displayed their trophies, especially large groupers, subfamily Epinephelinae. In 2007, the size of the fish displayed by the same charter enterprise had plummeted, and the mix of species had changed. *Images: Monroe County Library (left) and Loren McClenachan and colleagues, 2009*

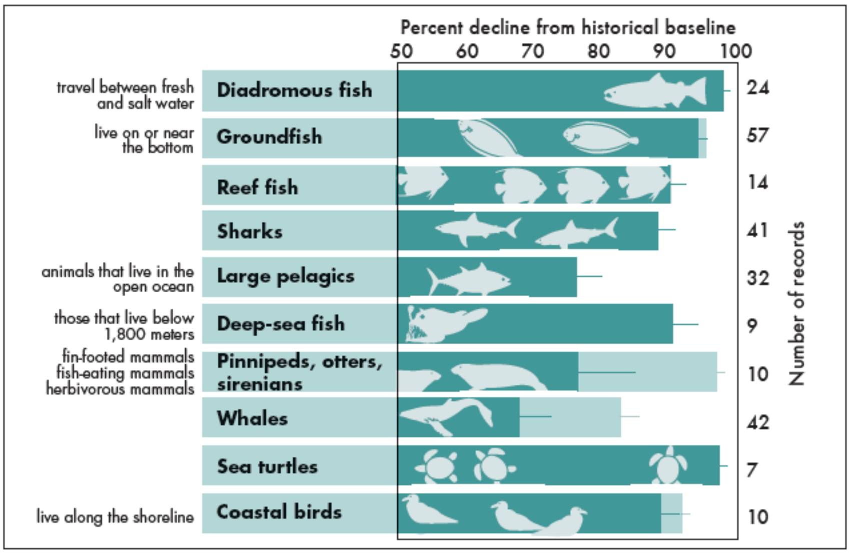
Off the North American coast after the mid-1800s, commercial fishers caught swordfish, *Xiphias gladius,* in numbers varying by a factor of ten. The fish population and the effort expended in fishing raised or lowered the numbers. On the other hand, the average weight of the fish, caught by either harpoons or lines, declined from as much as 270 kilograms in 1860 to near or less than 100 kilograms during the decade of the Census.

To alleviate the historical amnesia of focusing only on trends in the recent 20 to 50 years, Census scientists mined data sources from palaeontological and archaeological evidence to molecular markers, historical records, and fisheries statistics. They established historical baselines for 10 groups of large marine animals to compare with recent abundance. At their low point, the 10 groups had declined by nearly 90 percent on average. Historically, overfishing and habitat destruction lead the ranking of threats to marine life caused by human activities. Since reaching their low point, four groups of species have recovered somewhat. Whales and seals recovered about a fifth. Because the available data are mostly about highly valued, commercially important species, these estimates represent large, exploited species in particular rather than all marine animals. For these valuable animals, the data confirm the feared declines but also offer a few instances of hopeful recovery.

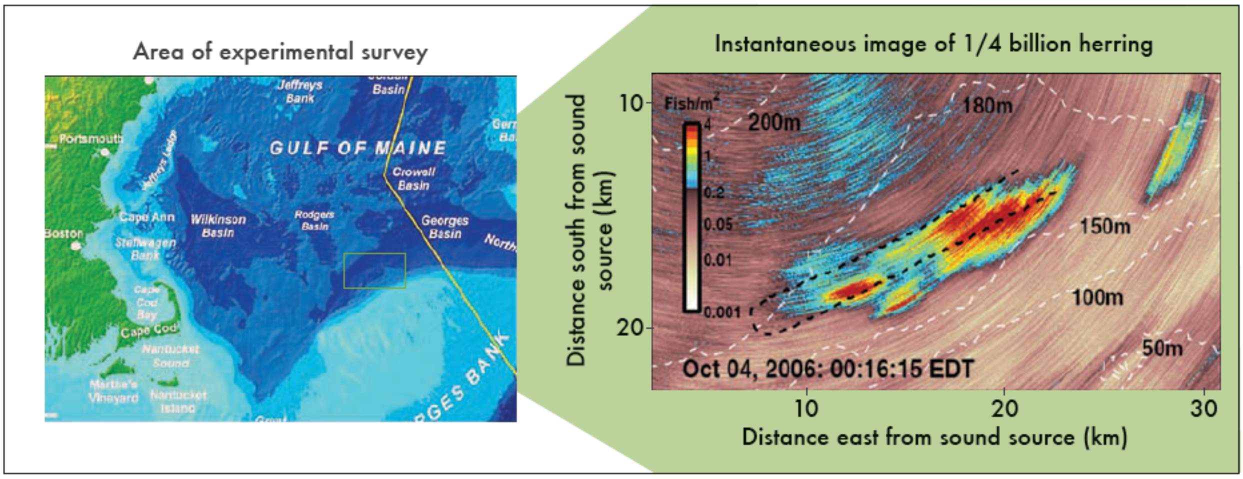
Extractions of target species sometimes cause fast changes, as the trawl fishery off Southeast Australia between 1914 and 1950 demonstrated. First tiger flathead *(Neoplatycephalus richardsoni)* plummeted from early, high catch-rates, and then Ocean leatherjacket *(Nelusetta ayraudi)* and latchet *(Pterygotrigla polyommata),* species



43. From 1860 to the present, the average weight of swordfish, *Xiphias gladius,* caught off the North American coast by either harpoons or lines declined from as much as 270 to near or less than 100 kilograms. A big drop occurred from 1860 to 1930. *Source: Karen Alexander, Brian R. MacKenzie, and William Leavensworth*



44. Dark-shaded bars indicate that the estimated declines in populations of large marine animals from their historical levels average about 90 percent. Nevertheless, some recovery (shown by light-shaded bars) has been achieved by four groups, including seals, whales, birds, and such bottom-dwelling fish species as flounder and sole. These estimates for exploited species in particular, rather than all marine animals, confirm the feared declines and offer a few hopeful instances of recovery. *Source: Heike K. Lotze and Boris Worm, 2009*



45. Census scientists deployed a new acoustic system to track vast fish populations over tens of thousands of square kilometers of sea along the continental shelf. In a snapshot from continuous monitoring along Georges Bank where the Gulf of Maine begins, the new sonar maps tens of millions of Atlantic herring, *Clupea harengus,* maintaining a school formation as large as Manhattan island, sometimes as densely as eight fish per square meter. *Image: Nicholas Makris and Purnima Ratilal*

abundant in the initial years of the fishery, virtually disappeared from catches in later years. In contrast, recoveries tend to be slow. Increases are most marked for species whose exploitation ended at least 100 years ago and species that became protected in the early to mid-twentieth century.

For the valuable and long-lived tuna, historians of the Census examined the boom of catches from 1900 to 1950 that preceded the collapse of once-abundant populations of Atlantic bluefin tuna, *Thunnus thynnus,* off the coast of northern Europe. Dusting off sales records, fishery yearbooks, and other sources, the researchers found majestic bluefins teemed in northern European waters for a few months each summer until an industrialized fishery geared up in the 1920s and literally filled the floors of European market halls with them. Generations ago Atlantic bluefins arrived in the northern waters by the thousands in late June. During the mid-1800s, fishermen welcomed these tuna as partners who pursued garfish into nets set close to shore. Before World War I, the bluefins were rarely captured, and even coastal sightings were exciting events. One 2.7-meter tuna washed up on a German shore in 1903.

After World War I, more boats, know-how, and equipment such as harpoon rifles and hydraulic net lifts helped fishermen increase annual catches from virtually nothing in 1910 to almost 5,500 tons of tuna by 1949. In 1929, Denmark built a tuna cannery. In 1949, Norway had 43 boats pursuing tuna and soon 200 boats. The booming catches helped strip the Atlantic bluefin population in a blink of time—1910 to 1950. The species virtually disappeared from the region in the early 1960s and is still rare today.

Farther up the chain from sea to restaurants, Census scientists found another index of marine abundance. Over 150 years of inflation-adjusted prices from menus, most from American cities such as New York, Boston, and San Francisco, revealed shifting tastes and supplies of lobster, swordfish, abalone, oysters, halibut, haddock, and sole. For example, on San Francisco menus, which started to feature the slow-growing abalone in the 1920s, prices spiked when stocks along the California coast declined in the 1930s and again in the 1950s. Finding 10,000 archived menus that showed date and city expanded the province of the known.

If a form of sea life disappears from a menu, has it disappeared from the oceans? Census researchers struggled with the question of regional or global extinction. A basic statistical problem is to evaluate the role of "false absences," that is, where a species was present in the local community, but not found in recent surveys from that community. The vastness of the oceans makes certainty about extinction hard except for large animals that spend lots of time at or near the surface. The Census developed new methods to adjust for false absences and to compare historical lists of marine species prepared in a largely qualitative way with data from modern quantitative surveys. Application of these methods during the next decade should provide more accurate assessment of marine extinctions. Now, existing information shows many species becoming rare but proves few extinctions.

Beyond inferences from catches, sightings, and calculation, Census scientists observed the abundance of marine life directly. They deployed a new sensor system to track vast fish populations, or shoals, as well as small schools, over tens of thousands of square kilometers of sea along the continental shelf. The shoals are sensed by sonar, which locates objects by bouncing harmless sound waves off them. The low-frequency sonar waves travel farther and return observations with informative signals far less intense than earlier sonar. The new sonar ranges over an expanse of ocean a million times wider than could previously be studied.

The new technology works best along the continental shelf, so the researchers focused on the shelf waters south of Long Island, New York, and over Georges Bank in the Gulf of Maine. When they first started, they were not looking for fish at all—they wanted to see if their device could locate ancient riverbeds under the ocean floor. But when their reconnaissance images did not match the riverbeds, the researchers went back, and determined that they were seeing fish—tens of millions of them. The new sonar images, updated every minute, continuously monitor the size and density of the millions in the shoals and also the shape of the shoals as they change from hour to hour.

With sonar, the Census scientists saw an abrupt daily queuing of tens of millions of Atlantic herring rising from the seafloor. Beginning from small clusters, tens of millions of fish queued across tens of kilometers along the northern flank of Georges Bank in tens of minutes. The rapidity, synchronicity, and regularity with which these long queues of spawning fish assembled showed the pressure on individuals, first to join, and then to conform with large groups. Beginning with a density of less than one fish per square meter, they became as crowded as eight per square meter.

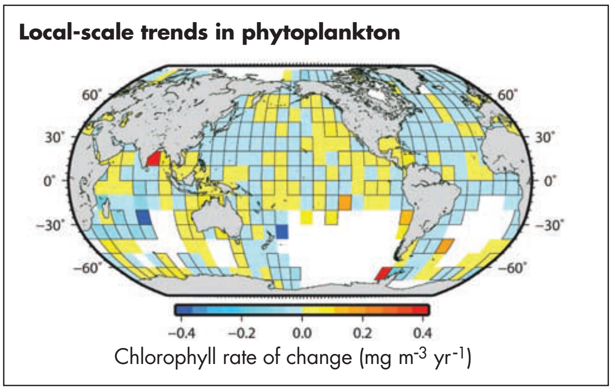
Also exemplifying high abundance, microbial filaments form mats covering an underwater territory of nearly 130,000 square kilometers, about the size of Greece, on an oxygen-starved seafloor off the central and northern coasts of both Chile and Peru. They are among Earth's largest living structures. The massive, diverse microbial community thriving mostly on methane-associated hydrogen sulfide probably represents a living fossil ecosystem of the Proterozoic era 2.5 billion to 650 million years ago, before and during the transition to an oxygenated atmosphere. At mid-depths of the ocean where the mats spread, little oxygen mixes down from the surface or up from the cold, oxygenated water that sinks at the poles and oozes like poured cream along the seafloor to other regions. With so little oxygen, most multicelled life cannot survive. But microbes, such as the large multicellular filamentous ones making up the gigantic mats, can successfully thrive. The largest filaments are about half the width of a human hair and, unlike most bacteria, are visible to the naked eye.

Census explorers found the long bacteria in sulfide seeps at the Galapagos Archipelago, Ecuador, and off the Pacific coasts of Panama and Costa Rica, and speculate that these microbial mats in oxygen-poor layers in the ocean may run from southern Chile to Colombia. Some things are unknown or unknowable because they are too small to see, others because they are too big to see.

Globally, on the deep-sea floor, the Census showed the ubiquitous high abundance of small sea creatures resembling worms (polychaetes, nematodes) and bugs (copepods) as well as localities with high biomass along margins and ridges where methane and sulfur-charged geothermal fluids stream from the seafloor.

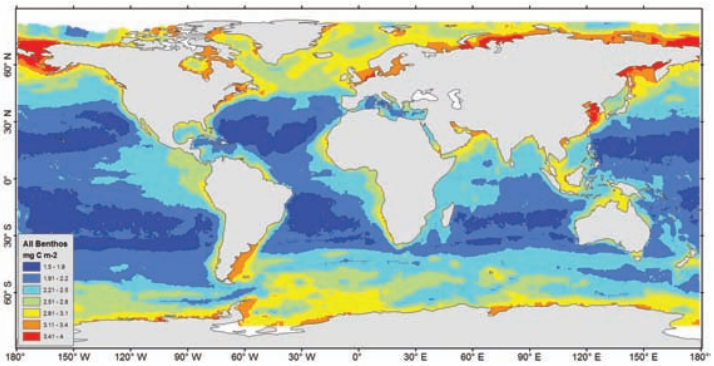
While changes in abundance of particular taxa have been obvious since humans first collected shells along the shore, the question of whether global changes are occurring in all the life that constitutes a trophic level has remained controversial. Most attention has gone to

46. Small life can form large structures. Off Chile, filamentous bacteria of the genus *Thioploca* wove mats covering an area the size of the nation of Greece. Census scientists estimated the mats to weigh about 14 million tons, about one-seventh of the weight of the annual world harvest of commercial fisheries. *Image: Victor A. Gallardo and Carola Espinoza*

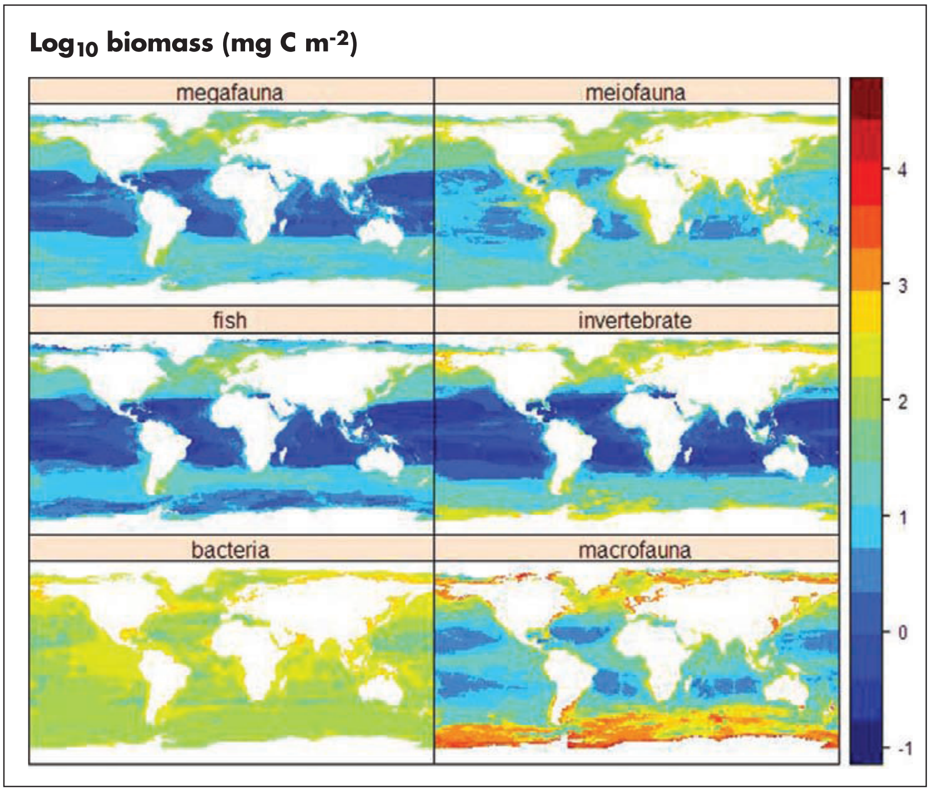


47. Since 1899, phytoplankton chlorophyll measured first by ships and recently by satellites, too, declined in 59 percent of the 364 map cells with sufficient observations for a determination. It increased in the yellow and red cells and declined in the blue. The cells bordered in black experienced statistically significant changes, while white cells had insufficient data. *Source: Daniel G. Boyce and colleagues, 2010*

Estimated seafloor biomass



48. Census scientists used nearly 200 studies to estimate the biomass on the seafloor globally from bacteria through fish and other large animals. The yellow-to-red zones in the map show seafloor biomass reaching 3 to 10 grams of carbon per square meter, or 30 to 100 kilograms per hectare, along several temperate and frigid shores. Carbon typically makes about half of living biomass. This level of carbon accumulation is small compared with the tons accumulated per hectare of land in a forest or even a crop of maize, but still considerable when added over the vast oceans. In general, the tropical seafloor is poor in biomass while the temperate and polar seafloors are rich. *Source: Chih-Lin Wei and Gilbert T. Rowe*



49. A map of the estimated seafloor biomass of bacteria and other kinds of life grouped by size (the small meiofauna that pass through a 0.3-millimeter sieve, the intermediate macrofauna up to 3 centimeters, and the larger megafauna encompassing both invertebrates and fishes) shows that despite the microscopic size of bacteria, their numbers make their mass far greater than the mass of larger and hence clearly visible animals such as fish. Bacteria reach densities of 100 to 1,000 milligrams of carbon per square meter (log$_{10}$ equal 2 or 3) in the tropics and near continents, whereas fish only reach densities of 1 in the tropics and 10 (log$_{10}$ equal 0 or 1) elsewhere. *Source: Chih-Lin Wei and Gilbert T. Rowe*

changes in top predators, such as whale and seal populations, which shrank and now are rebounding. Census researchers examined the other end of the food chain. Is the productivity or biomass of the meadows of the oceans, the phytoplankton that feed upper trophic levels, changing? An initial global study involving Census researchers who used indirect observations from ocean-going vessels since 1899 suggests a patchy but significant global phytoplankton decline.

As noted earlier, up to 90 percent of all the weight of life in the oceans and seafloor mud is microbial. "Pyrotag sequencing," the DNA technique pioneered by Census researchers to ascertain the diversity of bacteria, archaea, and protists, also captures information about relative abundance. Census microbiologists drew diagrams resembling city skylines to show the relative abundance of different kinds of microbes for hundreds of locations. The skylines show a few tall buildings, some of intermediate height, and many low structures that form the "long tail" of the distribution that constitutes the rare biosphere.

Calculation and measurement as well as the history of marine life sighted and caught can be used to estimate abundance as well as extinction and the recovery of some depleted species after intervention. With the exception of such living things as the bacteria in the giant mats off Chile that have an alternative means of synthesizing food, the abundance of life at the bottom of the ocean, the biomass on the seafloor, usually depends on primary food production by photosynthesis in the sunlit water above and its settling to the floor as marine snow. The fall of organic particles largely determines how many thousands of organisms live on a square meter of seafloor and the weight of their biomass.

Census scientists estimated seafloor biomass from primary production, the fall of organic particles, and topography of the seafloor. Primary production concentrates around land where plant nutrients reach the sea. The map of total seafloor biomass which consists about half of carbon, shows its biomass reaching 3 to 10 grams of carbon per square meter or 30 to 100 kilograms per hectare, along several temperate and frigid shores. In turn, calculations can translate the seafloor biomass into estimates of populations of individuals in groups of animals such as fishes and invertebrates and in bacteria. By weight, the populous seafloor bacteria equal about ten times the sum of larger seafloor marine life.

With about a quarter of a million known species and life distributed everywhere in the vast oceans, measuring abundance is finally more difficult than measuring diversity or distribution. In contrast to diversity, which tends to peak in temperate and warmer waters, abundance appears to peak in temperate and cooler waters. Much life, such as the microbial mats, continues to be discovered. Evidence shows that most species entering human commerce decline, often sharply. It remains unknown whether the declines in the few thousand commercially important species have changed the global total biomass of all marine life, but an initial global study suggests a patchy twentieth century decline in the grass of the oceans, the phytoplankton. Overall, we seem to see declining abundance at the top and near the bottom of the food chain, with fishing practices, habitat destruction, and ocean temperatures the most powerful causes. Systematically measuring the abundance of the approximately 250,000 known species and the kinds of microbes as well remains as a task for the next decade. Estimating the abundance of undiscovered species adds mystery and glory to the task.

LEGACIES

The Census imparted urgency to its explorations by setting for itself a life of 10 years, enough time to organize and build to a crescendo in 2010. Much of the worth of such a brief life lies beyond its decade in legacies that go on.

Broadly, three sorts of legacies can already be discerned. Knowledge resting on sound research and recorded with moderation and caution by Census scientists will inform the future. The technology that they invented, improved, and spread will power future discovery. And to the extent that they succeed, they demonstrated work habits—organization and working together—that can make research in future decades more efficient and effective.

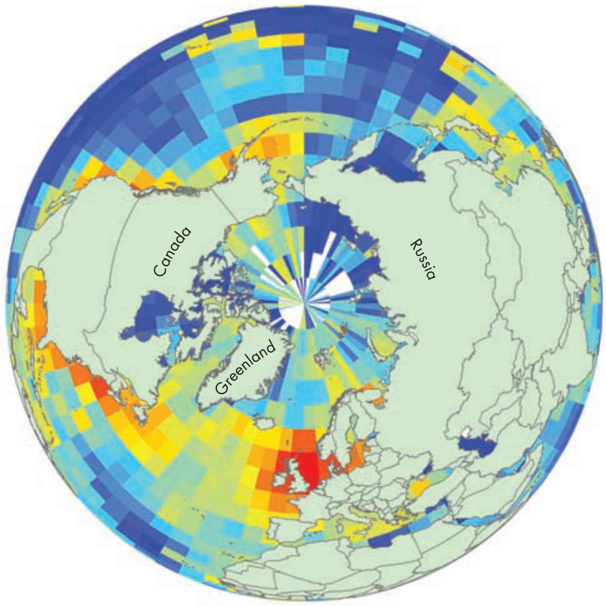
Regarding knowledge, the Census published its results in more than 2,600 scientific papers. Some, the compilation and organization of the known, reveal regional and even global patterns, past and present, and show how marine life fares in different environments and eras. Other papers record new species and many species in new places. They record the travels of marine life and its abundance.

Publicly reported in scientific papers, Census research informs and propels new discovery. Publication of its series of reports in the Public Library of Science and other open-access sites will prove a special legacy because anyone with a computer can read them on the Internet, for free, now and in the future.

With existing data plus its own, the Census built OBIS, the largest archive of data about marine species. In a crescendo of results at the end of the decade, Census scientists proved the power of the globe-encompassing archive to reveal patterns of diversity, distribution, and abundance. Governments have committed to sustain OBIS. By opening OBIS to the public and arranging its continuity and integration with the Encyclopedia of Life and other elements of the "e-Biosphere," the Census created a legacy of infrastructure for future research.

Without reference baselines for today's state of marine life, claims of change due to warmer water and damages from fishing and oil spills can only fuel contention. Similarly, claims of benefits from protection of areas and from regulation of drilling and fishing require proof that the baseline of the present state provides. Selections of marine protected areas by nations and the international Convention on Biological Diversity need baselines. To all these interests, the Census wills a legacy of baselines of marine diversity, distribution, and abundance at the beginning of the twenty-first century.

Technology of an earlier Age of Discovery, such as ships that could span oceans to another hemisphere, continued as legacies to later centuries. Similarly, the Census grants a legacy of barcoding and similar genetic methods for distinguishing species by their DNA sequences, some species too small to see with the naked eye and some cloaked in similar shapes or confused by changing shapes. Going beyond seeing that specimens are different, the Census adds the legacy of a way to chart the closeness or separation among species by correlating their lengthy DNA sequences.



50. The global marine life database built by the Census exposes gaps in our knowledge of the known and unknown. The color spectrum from red to blue ranges from many to few records. Blank areas have no records of reliably indentified marine life. Explorers have yet to explore much of the high Arctic Ocean for life. *Source: Ocean Biogeographic Information System (OBIS)*

As a physically tangible legacy, the Census bequeaths to future generations curtains of microphones that can identify individuals migrating along thousands of kilometers of routes from California past British Columbia in Canada to Alaska. It demonstrates that fish only 20 centimeters long can carry sonic tags to trace their passage through the curtains. Larger animals can carry biologgers that record the temperature, depth, and other environmental properties as they swim and dive and then report the data via satellite.

The Census helped devise and leaves the legacy of a sonic system that detects the formation, abundance, and coordinated swimming of schools of fish extending over tens of thousands of square kilometers. The Census helped motivate nations to build research vessels so quiet they would not disturb animals or interfere with listening and so stable that DNA sequencers could operate aboard.

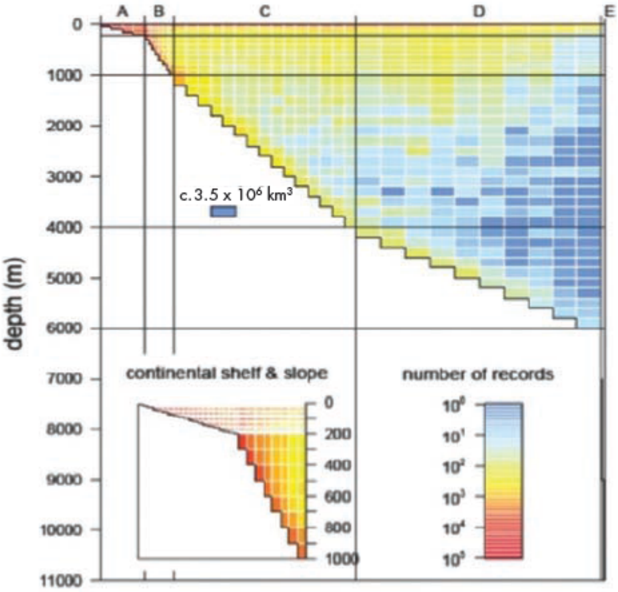
To standardize the global assessment of life on coral reefs and render worldwide analysis of distributions and measurement of change, the Census innovated Autonomous Reef Monitoring Structures. In the same vein, the Census leaves a legacy of standardized methods for appraising marine life near shores and in the deep sea. Taken together, the technologies invented and proven by the Census show that the incipient Global Ocean Observing System, analogous to the system long in operation to monitor the atmosphere, can observe life as well as physical parameters.

Work habits, many good ones, honed during the Census decade will live on and make future global explorations effective. The habit of assembling scientists; choosing a goal like diversity, distribution, and abundance; recruiting more scientists or training new ones; keeping focus on their initial target; and recording their results for all to see—all within a decade—is a legacy for future work. The social networks of experts who span all taxa and oceans and more than 80 nations form a legacy that could speed a second Census and other research programs that societies may value.

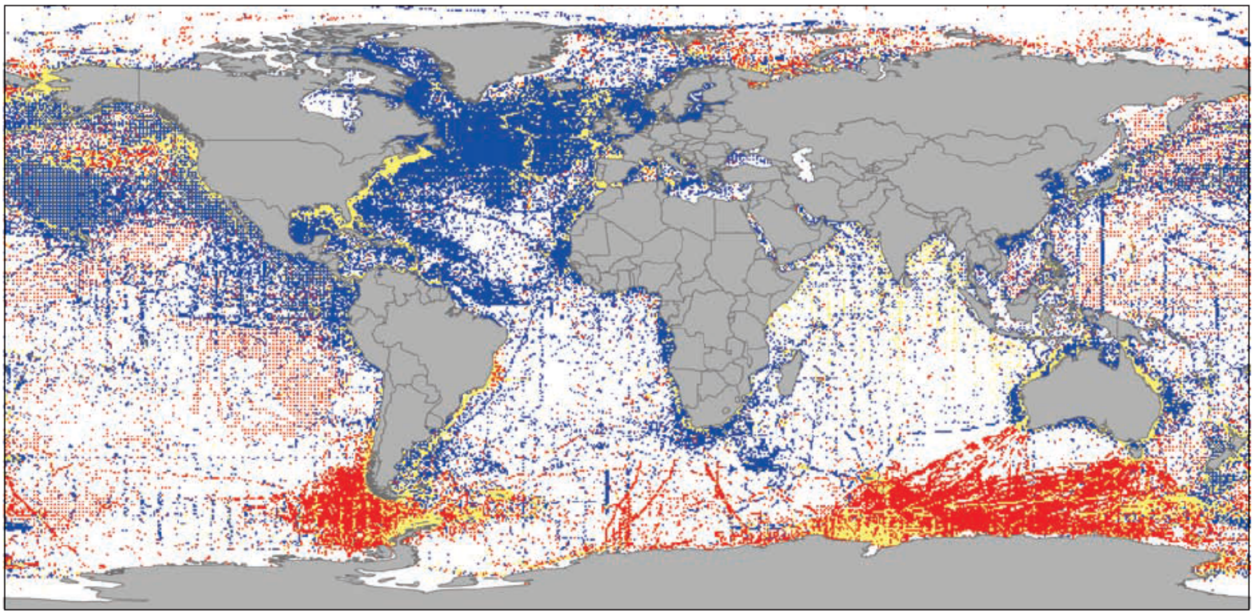
As it worked, the Census sought to establish the habits to identify, systematically, the limits to knowledge and to speak candidly about the unknown and unknowable as well as about what we know. The Census quantified that we know less about the small and showed generally that knowledge is inversely related to size. But some patterns exceed our field of vision, and for these the Census devised macroscopes to overcome limits to knowledge.

The macroscope of OBIS lets everyone see with revolutionary resolution both the known and the unknown ocean. We can see where scientists observed marine life before the Census began and how the Census and other research during the past decade filled in the map. Viewing the density of observations on the surface of the globe shows vast areas in the Eastern Pacific, Southern Ocean, and Arctic, for example, remain almost virgin for exploration for marine life. Viewing a slice of the oceans from the surface to the seafloor beckons explorers to the poorly explored mid-waters.

The Census encountered an ocean growing more crowded with commerce and transparent through technology. Setting out to draw baselines of the diversity, distribution, and abundance of species, the first Census of Marine Life documented a changing ocean, richer in diversity, more connected through distribution and movements, more impacted by humans, and yet less explored than we had known. The Census has multiplied the qualified experts, developed and spread technologies for discovery and monitoring, improved access to data, and informed decisions about conserving marine species and regions. The legacies of the Census—the baselines of knowledge, the cascade of new technology, the collaboration across borders—promise more benefits for humanity and the oceans.



51. OBIS exposes the still-to-be-explored ocean by depth as well as latitude and longitude. On a cross section of the global oceans, the spectrum from red to blue extends from many to few or no records. The records are concentrated near shores and in shallow waters, while the largest habitat on Earth, the vast middle waters, is largely unexplored. *Source: Ocean Biogeographic Information System*



52. A global map of the nearly 30 million OBIS records of 120,000 species from more than 800 datasets shows the known and unknown ocean in half-degree squares by latitude and longitude. In blue areas, the Census has aggregated data from before the Census began and from partner programs and institutions, often assembled by OBIS regional and thematic nodes. Yellow indicates regions with data both from Census partners and from the Census's own expeditions. Red indicates regions with data from Census expeditions where there were no prior data. The records attributable to and supplemented by the Census are numerous in the Southern Ocean, North Pacific, and along the Mid-Atlantic Ridge. Wide regions, such as the Eastern Pacific, remain largely unexplored. *Source: Ocean Biogeographic Information System*

53. Image: Alison K. Stimpert

HOW THE CENSUS WORKED

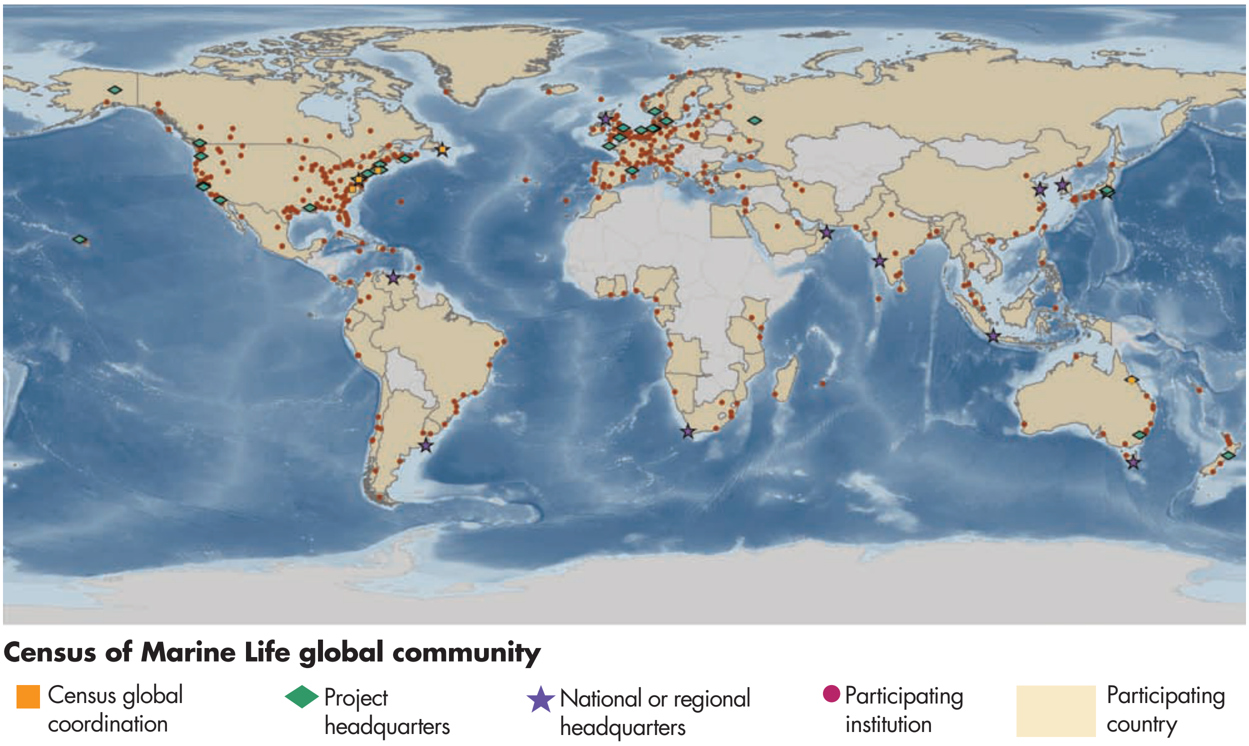
How did the Census work? Agreeing during the 1990s that more was said than done to set a comprehensive and solid foundation of science under the striking scenes and fascinating glimpses beneath the seas, scientists around the globe organized for the first-ever Census of Marine Life. They demonstrated their earnestness by establishing a definite, decadal life for the Census, beginning in the year 2000 and concluding in 2010. They concentrated on learning the diversity (how many different kinds), distribution (where they live), and abundance (how much) of marine life.

To encompass Planet Ocean and engage specialized knowledge about its diverse waters, the Census engaged 2,700 marine scientists from more than 670 laboratories, universities, natural history museums, and aquariums from more than 80 nations and all continents. Three years of discussion and dozens of planning meetings preceded the first expedition flying a Census flag. During the decade, the Census Secretariat at the Consortium for Ocean Leadership in Washington, D.C., coordinated the international network, 66 implementation meetings, and five Census-wide meetings. The Census recognized differing capacities from place to place. Where possible, countries provided ships, funding, and researchers. They gave their intellectual resources, and they opened access to their seas.

Participation grew rapidly in the first half of the decade and continued to grow in the second half. During 9,000 days at sea in more than 540 oceanographic expeditions, Census researchers explored cold, temperate, and tropical seas, from top to bottom and shore to shore. The Scientific Steering Committee of the leaders kept the focus of the Census on global span and on diversity, distribution, and abundance.

Fourteen field projects investigated the major habitats and groups of species in the global ocean to paint a picture of present marine life. Eleven of these projects explored habitats, such as seamounts, vents, and coral reefs. Or they explored regions, such as the Arctic and Southern oceans, the Mid-Atlantic Ridge, or the Gulf of Maine. Three projects surveyed animals, such as the top predator tuna that swim Planet Ocean or small plankton and microbes that drift around the globe.

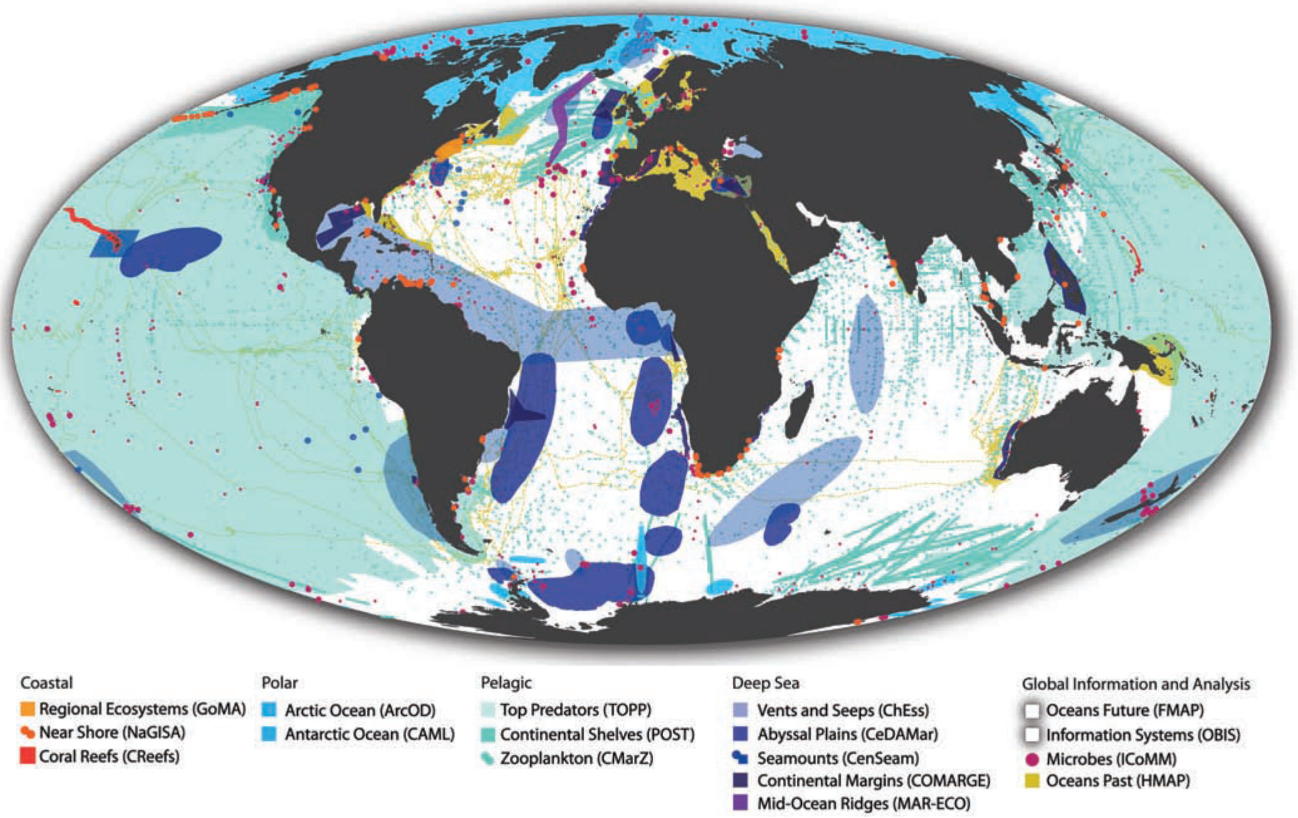
Two other projects and OBIS completed the roster of Census projects. The first project reconstructed a baseline of past oceans from, for example, old ship logs, monastery records, fish bones, and shell middens. Complementing the reconstruction of the past, another project modeled or projected the effects of variables such as fishing and climate change to anticipate marine life in future oceans. OBIS, the collective data repository, has been described above. National and Regional Implementation Committees provided leadership in 13 regions around the world and extended access to expertise and resources.



Census of Marine Life global community

54. Shading shows the global span of 80 plus nations that participated in the Census of Marine Life. The 2,700 scientists participating came from more than 600 institutions and worked in 14 field projects spanning ocean realms from near shore to abyss and latitudes from poles to tropics. The global span of National and Regional Implementation Committees, headquarters of the field projects, and participating institutions such as museums ensured access to expertise and seas. *Image: Census of Marine Life Mapping and Visualization Team*

Census of Marine Life project areas



55. Census field projects sampled all major zones and realms of the oceans.
Image: Census of Marine Life Mapping and Visualization Team

The Census of Marine Life Community

GLOBAL LEADERSHIP

Scientific Steering Committee

Ian Poiner, Chair, Australia
Victor Ariel Gallardo, Vice Chair, Chile
Myriam Sibuet, Vice Chair, France
J. Frederick Grassle, Past Chair, USA
Vera Alexander, USA
D. James Baker, USA
Patricio Bernal, France/Chile
D. Chandramohan, India
David Farmer, USA/Canada
Serge Garcia, Italy
Carlo Heip, Netherlands/Belgium
Poul Holm, Ireland/Denmark
Yoshihisa Shirayama, Japan
Michael Sinclair, Canada
Song Sun, China
Meryl Williams, Australia/Malaysia

Past Committee Members

Donald Boesch, USA
Olav Rune Godø, Norway
Andrew Solow, USA

Partners

Encyclopedia of Life
National Geographic
Galatée Films

Projects

Arctic Ocean
ArcOD

Antarctic Ocean
CAML

Mid-Ocean Ridges
MAR-ECO

Vents and Seeps
ChEss

Abyssal Plains
CeDAMar

Seamounts
CenSeam

Continental Margins
COMARGE

Continental Shelves
POST

Near Shore
NaGISA

Coral Reefs
CReefs

Regional Ecosystems
GoMA

Microbes
ICoMM

Zooplankton
CMarZ

Top Predators
TOPP

Oceans Past
HMAP

Oceans Future
FMAP

Global Marine Life Database
OBIS

Affiliated Projects & Collaborators

Marine Barcode of Life
Ocean Tracking Network
Great Barrier Reef Seabed Biodiversity Project
Gulf of Mexico Biodiversity Project
World Register of Marine Species
MarBEF • HERMES
Google Earth • PLoS ONE
Convention on Biological Diversity (CBD)
Scientific Committee on Oceanic Research (SCOR) Technology Panel

GLOBAL PARTICIPATION

National and Regional Implementation Committees

Arabian Sea: Michel Claereboudt, Oman
Australia: Nic Bax
Canada: Philippe Archambault
Caribbean: Patricia Miloslavich, Venezuela
China: Song Sun
Europe: Isabel Sousa Pinto, Portugal
Henn Ojaveer, Estonia
Indian Ocean: Mohideen Wafar, India
Indonesia: Gabriel Wagey
Japan: Katsunori Fujikura
Republic of Korea: Youn-Ho Lee
South America: Diego Rodriguez, Argentina
Sub-Saharan Africa: Charles Griffiths, South Africa
United States of America: Andrew Rosenberg

SYNTHESIZING RESULTS

Synthesis Group

Paul Snelgrove, Chair, Canada
Jesse Ausubel, USA
Darlene Trew Crist, USA
Michele DuRand, Canada/USA
J. Frederick Grassle, USA
Patrick Halpin, USA
Sara Hickox, USA
Patricia Miloslavich, Venezuela
Ron O'Dor, USA/Canada
Myriam Sibuet, France
Edward Vanden Berghe, Belgium
Boris Worm, Germany
Kristen Yarincik, USA

GLOBAL COORDINATION

Secretariat, Consortium for Ocean Leadership, USA
Education and Outreach, University of Rhode Island, Office of Marine Programs, USA
Mapping and Visualization, Duke University, Marine Geospatial Ecology Laboratory, USA

56. Image: Census of Marine Life Education and Outreach Team

Projects affiliated with the Census of Marine Life

The Census extended its reach by affiliation with other projects and programs. It formed a partnership with the National Geographic Society to expand cartographic resources and outreach. The Census Mapping and Visualization Team boosted the creativity and quality of work throughout the program and served as the liaison with National Geographic's cartographers and also with Google Earth, whose ocean layer integrates Census findings.

The Encyclopedia of Life (EOL) is documenting on the Internet all 1.9 million known living species of animals, plants, and fungi. Its infinitely expandable page for each species includes text and also images, graphics, video, and sound. It is compiled from existing databases and from contributions throughout the world. Partnering with EOL, Census scientists helped create Web pages for 80,000 species, which comprise about a third of known marine species. These species in turn come from the master list of another Census partner, the World Register of Marine Species, formed in 2006 to provide in perpetuity an authoritative and comprehensive list of names of marine organisms. A partnership with Aquamaps allows quick creation of standardized distribution maps for species of fishes, marine mammals, and invertebrates in OBIS.

The Census also benefited from the formation in 2004 of the Consortium for the Barcode of Life. The Consortium and the international Barcode of Life initiative aim to offer a reference library of DNA barcodes for more than 500,000 species by the year 2015. The efforts to speed barcodes of marine species operate within the subprograms Marine Barcode of Life Initiative (MarBOL) and Fish Barcode of Life Initiative (FISHBOL), both headquartered at Ontario's University of Guelph.

Affiliated projects and programs added depth and scope to Census work in Australia's Great Barrier Reef, the Gulf of Mexico, the margins of European seas (HERMES, see below), ecosystem functioning (MarBEF), fisheries science (ICES, PICES, and FAO), seas beyond national jurisdiction (IUCN), and global change (IGBP/DIVERSITAS). Cooperation with the Partnership for Observation of the Global Oceans (POGO), the Scientific Committee on Oceanic Research (SCOR) Technology Panel, Scientific Committee on Antarctic Research (SCAR), the Intergovernmental Oceanographic Commission (IOC), and the Group on Earth Observations (GEO) helped integrate the Census with the development of ocean observing systems.

HERMES: Hotspot Ecosystem Research on the Margins of European Seas
MarBEF: Marine Biodiversity and Ecosystem Functioning, European Union Network of Excellence
ICES: International Council for the Exploration of the Sea
PICES: North Pacific Marine Science Organization
FAO: Food and Agriculture Organization
IUCN: International Union for Conservation of Nature
IGBP-DIVERSITAS: International Geosphere-Biosphere Programme Initiative for Biodiversity

During the final four years of the Census, a Synthesis Group continually integrated results and prepared for the culminating events of the Decade of Discovery. The Synthesis Group worked closely with a Mapping and Visualization Team that provided advice and solved problems for all Census teams and projects.

Census scientists tagged 41 species of animals. The 23,000 animals carrying instruments might be added to the 2,700 humans who participated in the Census.

Between 2000 and 2010, by an accounting that incorporates national expenditures on existing fleets, labs, and staff that collaborated as well as activities that occurred only because of the existence of the Census, the program spent US$650 million. Support came from scores of government agencies as well as private foundations, companies, and individuals. From conception, the Alfred P. Sloan Foundation of New York City provided indispensable core support totaling about US$75 million.

For its expenditure on the Census, the world received a stream of knowledge throughout the decade. Census scientists reported progress in more than 2,600 scientific peer-reviewed publications. The Census strongly favored free, open-access Internet publication, which took off during the latter years of the program. An increasing number of Census papers are appearing in the biodiversity hub of the Public Library of Science, which has also established flexible, growing collections of papers for many Census projects and themes.

Five books added to the reports. At the end of the Census decade in 2010, one book gave the public an overview of insights from the Census, their implications, and a glimpse of marine life still unknown.

- *Discoveries of the Census of Marine Life: Making Ocean Life Count,* Paul V.R. Snelgrove, Cambridge University Press, 2010.

A second book summarized the findings and discoveries of the 17 Census projects for scientists with a chapter from each project.

- *Life in the World's Oceans: Diversity, Distribution, and Abundance,* Edited by Alasdair D. McIntyre, Blackwell Publishing, Ltd., 2010.

A third, extensively illustrated book profiled Census research and findings through early 2009 to a public audience.

- *World Ocean Census,* Darlene Trew Crist, Gail Scowcroft, and James M. Harding, Jr., Firefly Books, UWA Publishing, 2009.

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57. Research along the Mid-Atlantic Ridge inspired Norwegian Anne Berg Edvardsen's sculpture *Spikes*. Made of paper and clay and about 40 by 40 centimeters, the sculpture suggests an animal trying to lift itself, maybe to change direction. *Image: Anne Berg Edvardsen*

58. The Census inspired the public to examine marine life, too. *Image: Megan Moews*

59. As marine creatures helped the Census by measuring their environment with electronic tags, so too did their form and color help the Census catch the interest of the public. The incongruity of the hairy Kiwa hirsuta that suggested its nickname yeti crab has broad appeal and prompted many to capture its magic, including skateboarders in search of a wild ride. *Image: Nathalie Roland*

A fourth book presented portraits of about a hundred species.

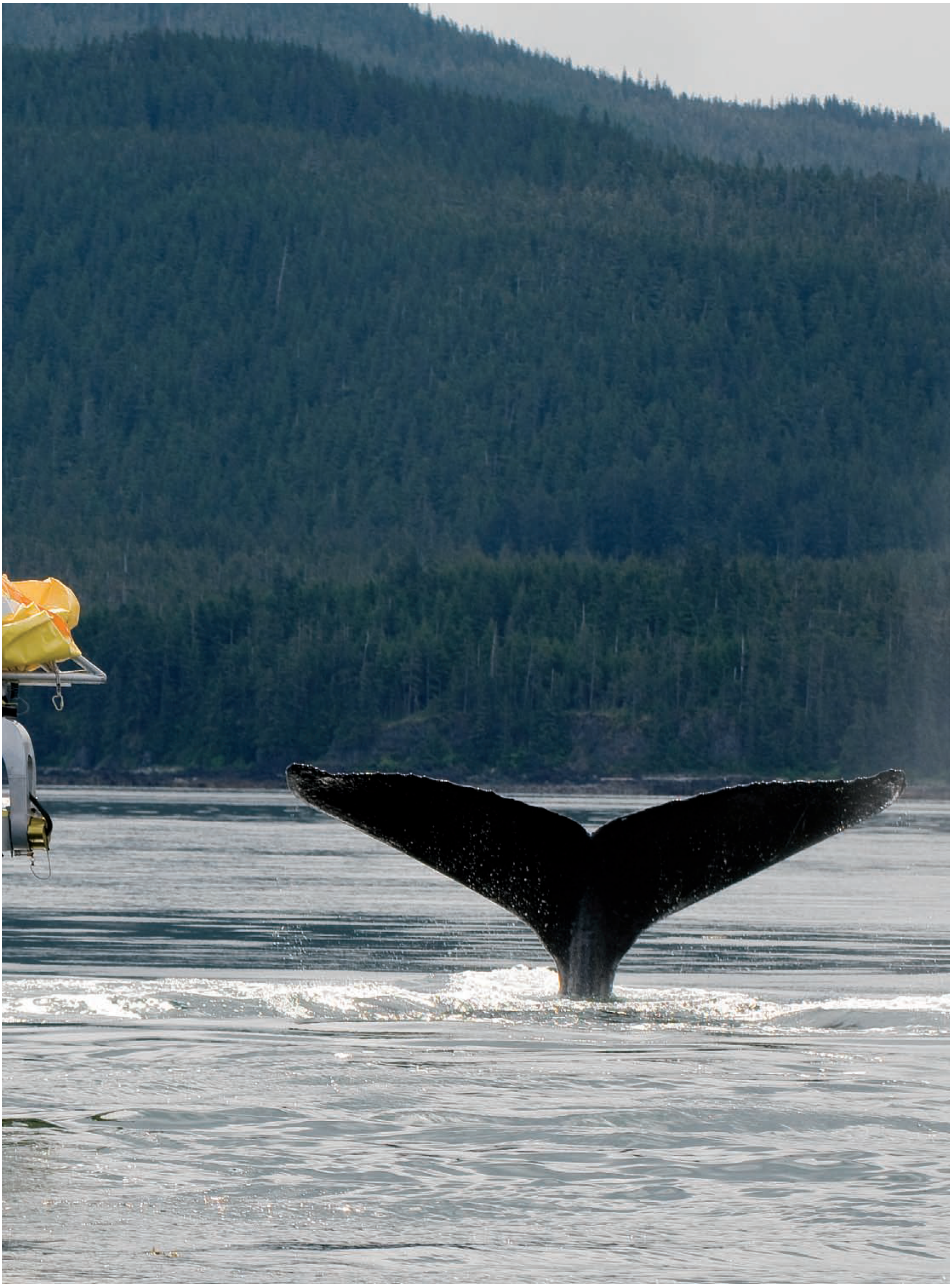
- *Citizens of the Sea: Wondrous Creatures from the Census of Marine Life,* Nancy Knowlton, National Geographic, 2010.

A fifth book portrayed a major expedition examining life and environment in the middle of the North Atlantic from the surface to the floor of the sea.

- *Life in the Mid Atlantic,* Peter Boyle, Bergen Museum Press, 2009.

These and other books formed part of the Census education and outreach effort, which also included Web sites, video and still photographs, museum exhibits, and other products tailored for a range of audiences and stakeholders. The Census reached out early to artists, including photographers, cinematographers, painters, sculptors, and musicians to invite them to participate in the Census and share their own observations of the marine life the Census encountered. Every Census project designated an education and outreach liaison, and a team based at the University of Rhode Island coordinated the network. The Rhode Island team also took responsibility for popular summaries of initial knowledge in 2003 and highlights in 2004, 2005, 2006, and 2008.

60. In a notably fruitful collaboration, the Census lent support to Galatée Film Productions to photograph the film *Oceans* at 54 locations, globally distributed. Census scientists helped conceive the film and ensure its scientific accuracy, and co-authored with Galatée an illustrated guide with taxonomic information about all the species in the film. In return, Galatée provided still images and more than 400 hours of film for Census researchers to study animal behavior in situ.
Image: François Sarano



61. *Image: Gary Cranitch*

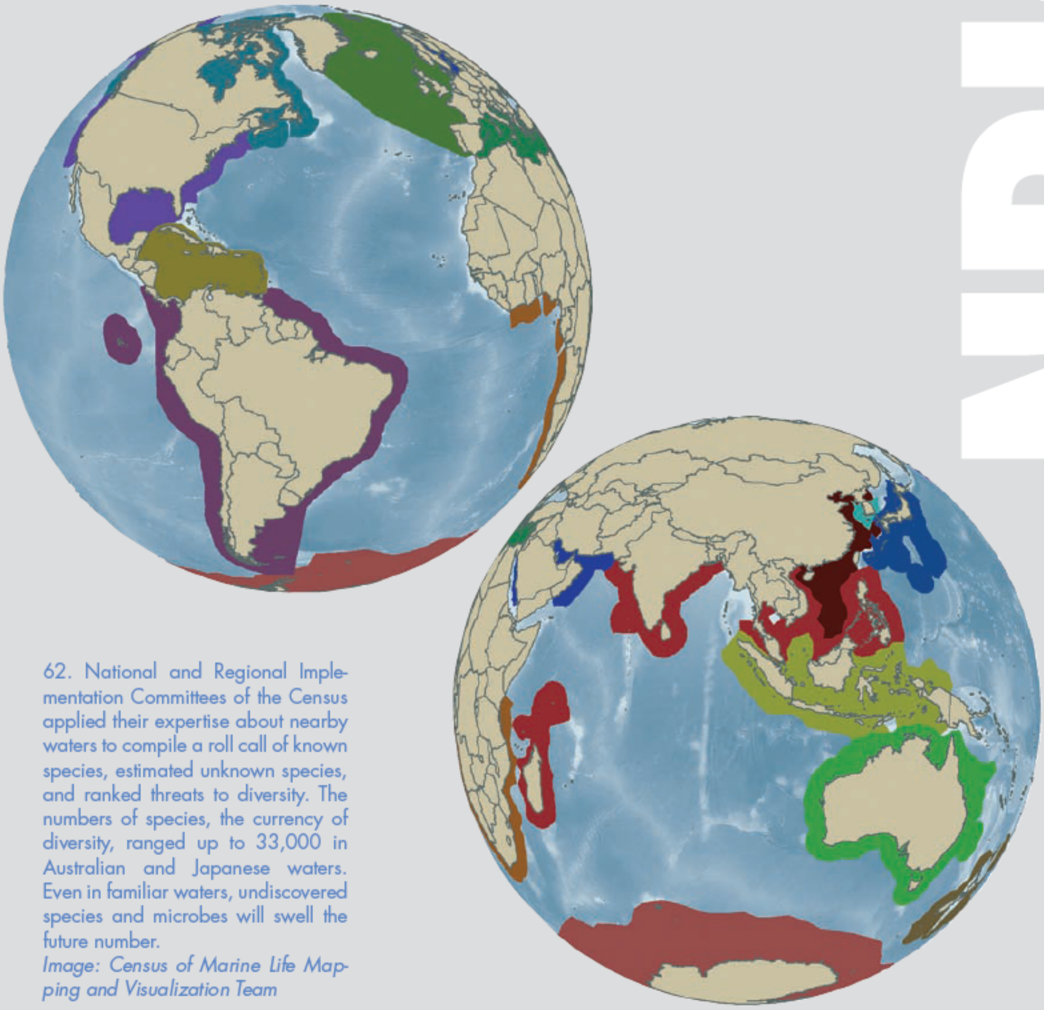
THE CENSUS TEAMS

To inventory life in Planet Ocean, its diversity, distribution, and abundance, the Census had a big job. It had to span all oceanic realms, from coasts down slopes to abyss, from the North Pole across tropics to the shores of Antarctica. It had to encompass giant animals and hidden and almost invisible life, rare individuals and immense schools. It had to range from the long past to the future. It had to compile information from new discoveries and historical archives and make it freely accessible.

National and Regional Implementation Committees began the Census strategy of encompassing the world. Field projects in Arctic and Antarctic seas and along a ridge that connected them ensured exploration from pole to pole. Others explored the vents on ridges, the abyssal plains between ridges and continents, and seamounts that interrupt the plains. Projects explored the continental margins and also the water near shores and reefs. A project in the Gulf of Maine spanned tidal pools, the shelf, and the margins and even touched the nearest seamounts. Other projects examined the ubiquitous microbes, drifting plankton, and swimming top predators that connect the oceans. One project delved into the history of marine life, and another projected its future. A global system made all past and expanding names, addresses, and circumstances of marine life universally available as a baseline for measuring change.

NRICS

National and Regional Implementation Committees extended the reach of the Census of Marine Life globally. Over 360 scientists combined centuries-old information with new Census observations and databases into a roll call of species in representative regions from the Antarctic through temperate and tropical seas to the Arctic. About a fifth of all known, named species were crustaceans, which, with mollusks and fishes, make up half of the roll call. The unprecedented geographical and taxonomic integration showed how collaboration between developed and developing countries expedites discovery.



62. National and Regional Implementation Committees of the Census applied their expertise about nearby waters to compile a roll call of known species, estimated unknown species, and ranked threats to diversity. The numbers of species, the currency of diversity, ranged up to 33,000 in Australian and Japanese waters. Even in familiar waters, undiscovered species and microbes will swell the future number.
Image: Census of Marine Life Mapping and Visualization Team

ArcOD

The **Arctic Ocean Diversity** project established the baseline of marine life in the region. Its search on, in, and under sea ice, in deep basins, and along continental shelves cataloged more than 7,000 animal species, of which at least 70 are new, plus thousands of microbes. Project researchers documented recent northward extensions of ranges of invertebrate and fish species, and a rising ratio of warm- to cold-water species. Making more than 250,000 records accessible online, the project allows measuring changes in Arctic life caused by humanity and natural forces.

Project Leaders

Bodil Bluhm United States
Rolf Gradinger United States
Russ Hopcroft United States

63. Ian MacDonald, 64. Katrin Iken, 65. Rolf Gradinger, 66. Katrin Iken

67. Deep in the frigid Canada Basin, a remotely operated vehicle of the Arctic Ocean project captured the pictured jellyfish of the genus *Crossota*. *Image: Kevin Raskoff*

CAML

Coordinating 18 research voyages in the widest-ever survey of the region, the **Census of Antarctic Marine Life** project provided the baseline for marine life in the Southern Ocean and then helped establish the monitoring of its change. The project documented more than 16,500 taxa, including hundreds of new species. The researchers identified a single region of seafloor life under the fastest current on the planet, found colonists from deeper water beneath melting ice shelves, and showed how Antarctic waters may incubate new species.

Project Leaders
Michael Stoddart Australia
Victoria Wadley Australia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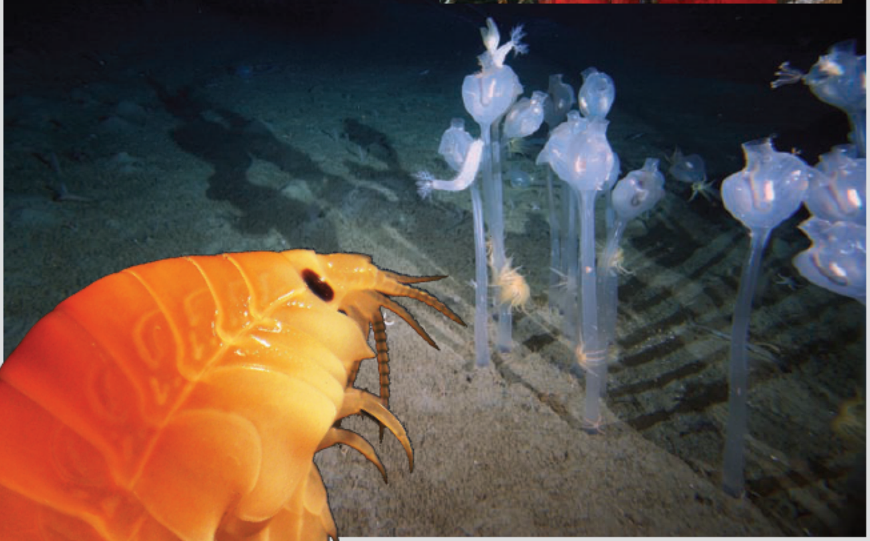


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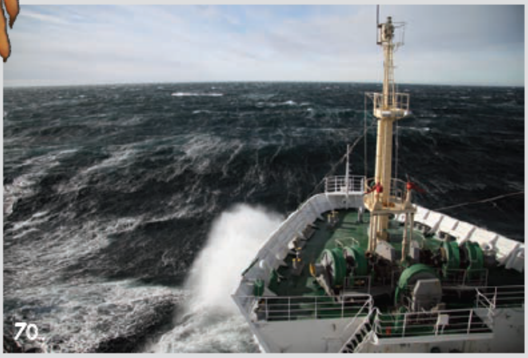
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68. Australian Antarctic Division © Commonwealth of Australia
69. *National Institute of Water and Atmospheric Research New Zealand*
70. *Philippe Koubbi*

71. In the region of the Polar front near Elephant Island at the tip of the Antarctic Peninsula, scientists investigating the Southern Ocean found the pictured lysianassoid amphipod. The small crustacean encountered during an expedition of the R/V *Polarstern* most likely belongs to both a new species and a new genus. *Image: Cédric d'Udekem d'Acoz*

MAR-ECO

The **Patterns and Processes of the Ecosystems of the Northern Mid-Atlantic** project explored marine life along the world's longest mountain range, which rises from the seafloor 4,500 meters deep. The explorers found approximately 1,000 species, from small crustaceans to whales, including at least 30 new species. They found both mid-water animals from deep basins and bottom-living animals along slopes. Abundance generally peaked where cool and warm waters met. Project findings supported protection of areas of the Mid-Atlantic Ridge against harmful bottom fishing totaling 330,000 square kilometers, larger than Italy.

Project Leader
Odd Aksel Bergstad Norway

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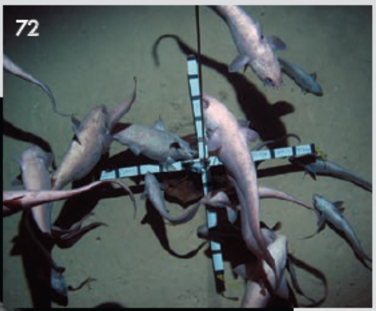

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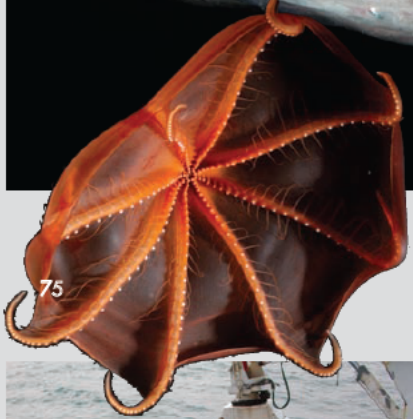

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72. Nicola King
73. David Shale
74. Thomas de Lange Wenneck
75. The deep-sea octopod, *Stauroteuthis syrtensis* was photographed in 2004 during the *G.O. Sars* expedition. It measures 13 cm x 8 cm, about the size of a grapefruit. Image: David Shale
76. Klokkargaardens Film AB
77. Thomas de Lange Wenneck
78. David Shale

ChEss

The **Biogeography of Deep-Water Chemosynthetic Ecosystems** project explored life at seeps, vents, and whale falls, where fluids cool, hot, corrosively acidic or rich in natural oils nourish marine life. Here, abundant life thrives, fueled by chemical reactions rather than sunlight. Using advanced robots, the project extended the known limits to such life—farther north (72° N) and farther south (60° S), deeper than 4,900 meters and hotter than 407°C. Project scientists described about 200 new species, bringing to more than 1,000 the number of described species known to live without the sun's energy.

Project Leaders
Paul Tyler United Kingdom
Maria Baker United Kingdom
Chris German United States
Eva Ramirez-Llodra Spain

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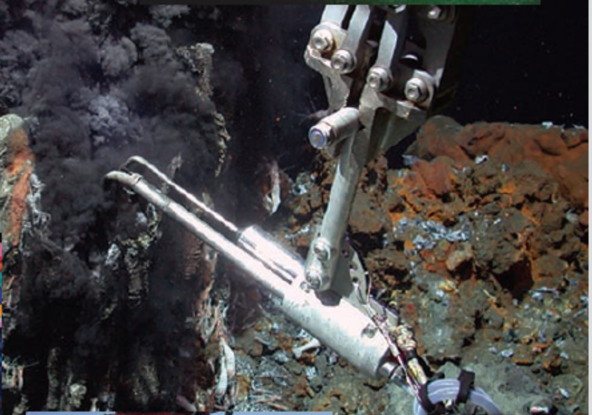

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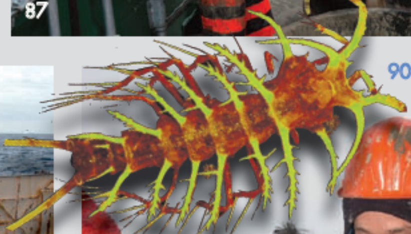
79. *Craig Smith*
80. *MARUM, University of Bremen*
81. *Daichi Fujita*
82. *MARUM, University of Bremen*
83. *Anders Warren*

84. In the hot and sulfurous water from a vent in the Pacific-Antarctic Ridge in the South Pacific, explorers of vents and seeps found *Kiwa hirsuta* and named it after the goddess of shellfish in Polynesian mythology. Because its hairy appearance suggests the abominable snowman, it has become known as the "yeti crab."
Image: Ifremer/Alexis Fifis

CeDAMar

The **Census of the Diversity of Abyssal Marine Life** project explored the abyssal plains of major ocean basins, particularly the southern Atlantic and the Southern Ocean, described more than 500 new abyssal species from unicellular animals to large squid, investigated the feeding of abyssal organisms, and mapped the distribution of deep-sea life. The project compiled data for establishing protected seafloor outside national jurisdiction and documented that climate change, human debris, and seabed mining affect abyssal life.

Project Leaders
Pedro Martinez Arbizu Germany
Craig Smith United States



85. *Myriam Schueller*
86. *Wiebke Broekeland*
87–88. *Brigitte Ebbe*
89. *Wiebke Broekeland*

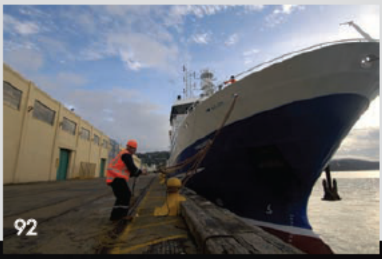
90. The tiny copepod *Ceratonotus steiningeri*, about three or four times as long as a hair is wide, was found in the Angola Basin.
Image: Jan Michels

CenSeam

The sphere of the **Global Census of Marine Life on Seamounts** project encompassed up to 100,000 seamounts rising 1,000 meters or more from the seafloor. The project discovered new seamounts, species, and communities and found that seamount inhabitants broadly resemble those on adjacent continental slopes. Yet, owing to isolation and slow growth of deep animals, life on seamounts can struggle to recover from disturbances such as fishing. The project's central repository of global seamount data is informing international negotiations about protecting areas in the high seas.

Project Leaders

Malcolm Clark New Zealand
Mireille Consalvey New Zealand
Ashley Rowden New Zealand
Karen Stocks United States



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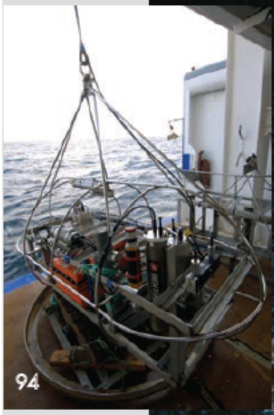

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91. The variety that seamounts contribute to ocean topography can also contribute to its biodiversity. In the photograph, a bright orange brisingid sea star is prominent among corals on a seamount. The sea star is feeding by raising its arms to capture passing food from the Antarctic Circumpolar Current. *Image: National Institute of Water and Atmospheric Research (NIWA), New Zealand.*

92. *Peter Marriott*
93–95. *NIWA*
96–98. *Global Census of Marine Life on Seamounts*

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COMARGE

The **Continental Margin Ecosystems on a Worldwide Scale** project explored slopes of all continents during more than 60 expeditions. They found a meager snow of detritus sustained ribbons of life in the mud along slopes and that the greatest diversity occurs at mid-slope. The project found deep-sea coral stretching over 400 kilometers long off Mauretania. Elsewhere, vast mats of microbes lived off seafloor methane. The project documented the sensitivity of continental slopes to global changes and to exploitation of deposits of gas and petroleum.

Project Leaders
Myriam Sibuet France
Robert Carney United States
Lenaick Menot France

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99. A close-up photograph of the sea cucumber *Enypniastes* caught at 2,750 meters on the continental margin in the Celebes Sea between Indonesia and the Philippines reveals its mud-filled intestine through its transparent body.
Image: Laurence P. Madin

100. *Joe F. Siebenauller*
101. *Continental Margin Ecosystems on a Worldwide Scale*
102. *Myriam Sibuet*
103. *Matt Kupchik*
104. *Continental Margin Ecosystems on a Worldwide Scale*
105. *Robert S. Carney*

POST

The **Pacific Ocean Shelf Tracking Project** deployed the first continental-scale array to track marine animals acoustically, and followed juvenile salmon thousands of kilometers from river to ocean, estimated survival of some ocean-migrating salmon stocks, and discovered surprisingly vast migrations of sturgeon across national boundaries. With an expanding library of 16,000 tracks from 18 different species from salmon to jumbo squid, the project built a clearinghouse for sharing telemetry data, contributed to the designation of critical habitat for threatened green sturgeon, and served as a prototype for the global Ocean Tracking Network.

Project Leader
James Bolger Canada/United States

Past Leaders
George Jackson Australia
Gerry Kristianson Canada
David Welch Canada


107


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106. With acoustic tags implanted in five species of young Pacific salmon and detected by curtains of receivers along the coast, scientists reconstructed the direction, speed, and timing of migrating individuals. Signals from fish like those in the photograph showed the coastal regions and seasons that either favor or discourage survival. *Image: Galatée Films*

107–108. *Pacific Ocean Shelf Tracking Project*
109. *Melinda Jacobs*
110. *Fraser River Sturgeon Conservation Society*

NaGISA

The **Natural Geography in Shore Areas** project initiated the first global nearshore biodiversity inventory, sampling in seagrass beds and rocky shore communities using a standardized protocol to establish baseline information and long-term monitoring of nearshore sites. The project sampled over 200 sites and set up more than 40 long-term sites. It discovered new species and recorded species and habitats where they had not been previously found. Students in Egypt, Greece, Tanzania, the United States, Venezuela, and Japan contributed records to the Census through the project.

Project Leaders
Yoshihisa Shirayama Japan
Brenda Konar United States
Katrin Iken United States
Patricia Miloslavich Venezuela
Juan José Cruz Motta Venezuela
Lisandro Benedetti-Cecchi Italy
Edward Kimani Kenya
Gerhard Pohle Canada

111. Alaskan scientists studying the near shore photographed this *Nereocystis*, a marine alga commonly referred to as bull kelp. Near the shore and in shallow gulfs of the Pacific coast of North America, *Nereocystis* forms kelp forests on beds of rock. It can grow 70 meters long from a root-like holdfast of about 40 centimeters. *Image: Brenda Konar*

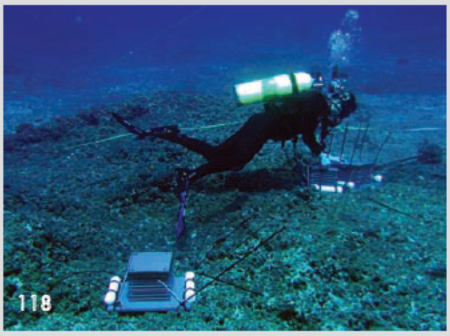
112. *Tohru Iseto*
113. *Ana Karinna Carbonini*
114. *Hyakubun Harada*
115. *Susan Ryan*
116. *Iacopo Bertocci*

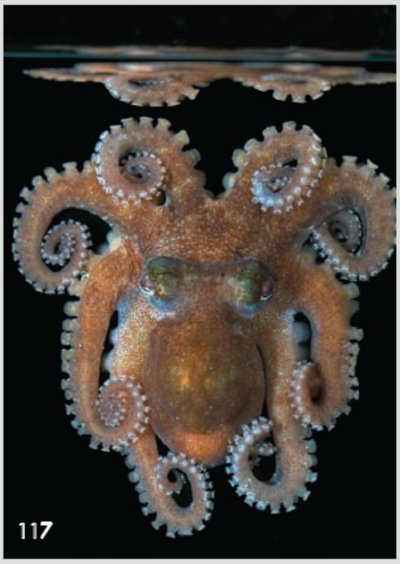
CReefs

The **Census of Coral Reef Ecosystems** project partnered to conduct the largest concerted exploration of life in the world's coral reefs. It discovered thousands of likely new species and familiar species in new places as well as highly diverse unidentified species in tiny samples of dead coral heads. The project developed a standardized tool, the Autonomous Reef Monitoring Structure (ARMS), to compare distributions of species on reefs as well as monitor changes such as warming and acidification. The 600 ARMS now deployed will reveal global patterns in uniform, standardized data.

Project Leaders

Nancy Knowlton United States
Russell Brainard United States
Julian Caley Australia


118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117. On a coral reef off northeastern Australia, near what Captain Cook named Lizard Island in 1770 for its many lizards, Census researchers collected this new octopus in an Autonomous Reef Monitoring Structure at a depth of 10–12 meters. The specimen is believed to be a new species. *Image: Julian Finn*

118. *Russell Moffitt*
119–121. *Megan Moews*
122. *Susan Middleton*


122

GoMA

Spanning tidal pools to seamounts, the **Gulf of Maine Area** project assembled more than 4,000 species in a new register and estimated abundance and diversity of microbes. Analyses showed that habitat explains about a third of variation in distribution and abundance of fishes and invertebrates. New sonars created instantaneous, continuous views of species distributions, including the assembling and swirling of shoals of millions of herring. The novel census of a large area helps managers consider not just one species at a time but an entire marine ecosystem.

Project Leaders
Sara Ellis Canada/United States
Lewis Incze United States
Peter Lawton Canada

Past Leaders
Ken Foote United States
Evan Richert United States

123

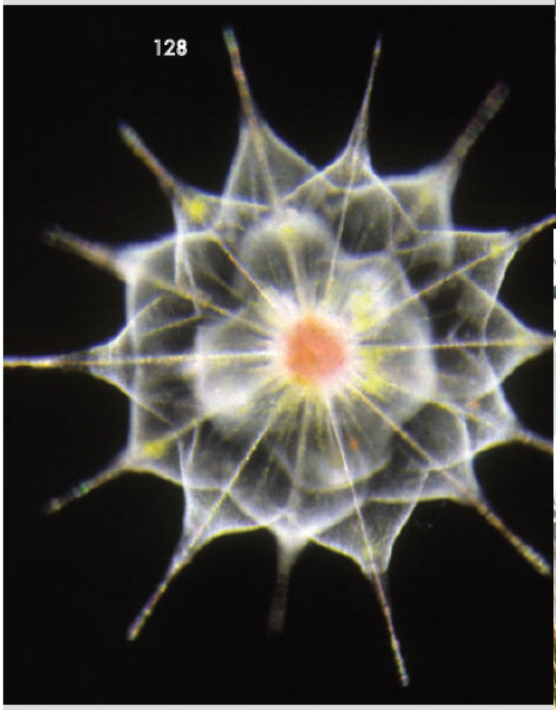

123. The 4,000 plus species in the Gulf of Maine searchable register include the pictured sea star, *Solaster endeca,* found along the shore of Cobscook Bay, Maine. The Census project found twice as many species and thus greater biodiversity in the Gulf than previously estimated. *Image: Christina Kulfan*

124. *Susan Ryan*
125. *Peter Stevick*
126. *Jon Witman*
127. *Kelly Bentham*

ICoMM

In the **International Census of Marine Microbes,** microbiologists from 25 countries determined the range of genetic diversity, distribution, and abundance of oceanic microbes. The investigators found diversity at least 10 to 100 times the previous estimate. A liter of seawater contained about 38,000 kinds of bacteria. In more than 1,200 widely distributed marine samples from water, sediment, and around animals, researchers found some microbes live everywhere, while others live in only a few places. They discovered a "rare biosphere" in which rare microbes account for most ocean diversity.

Project Leaders
Mitchell Sogin United States
Jan de Leeuw Netherlands
Linda Amaral-Zettler United States



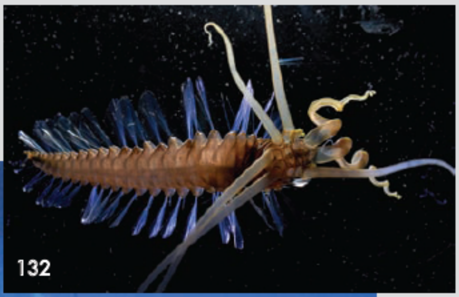
128. The acantharians are one of the four types of large amoebae (microbial eukaryotes) known to occur in marine open waters. The 2-millimeter-wide specimen, about the size of a flea, was captured off Bermuda.
Image: Linda Amaral-Zettler

129. *Carola Espinoza*
130. *MOVIE*
131. *Victor Gallardo*

CMarZ

The **Census of Marine Zooplankton** project produced a global view of diversity and distribution of holozooplankton, the animals that drift in ocean currents throughout their lifespan. Researchers collected more than 10,000 samples from every ocean basin. Training 250 new taxonomists, they discovered more than 85 new species, 7 new genera, and 2 new families, many of which are already formally described. They used genetic profiles to develop characteristic fingerprints for all the zooplankton life in any volume of water.

Project Leaders
Ann Bucklin United States
Shuhei Nishida Japan
Sigrid Schiel Germany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132. When U.S. and Filipino zooplankton scientists searched the Celebes Sea for new species in its deep water, they discovered and temporarily named this worm, about 10 centimeters long with tentacles, squidworm. One of the small animals that floats or swims weakly, the squidworm turned out to be a new species of polychaete in the class of annelid worms.
Image: Laurence P. Madin

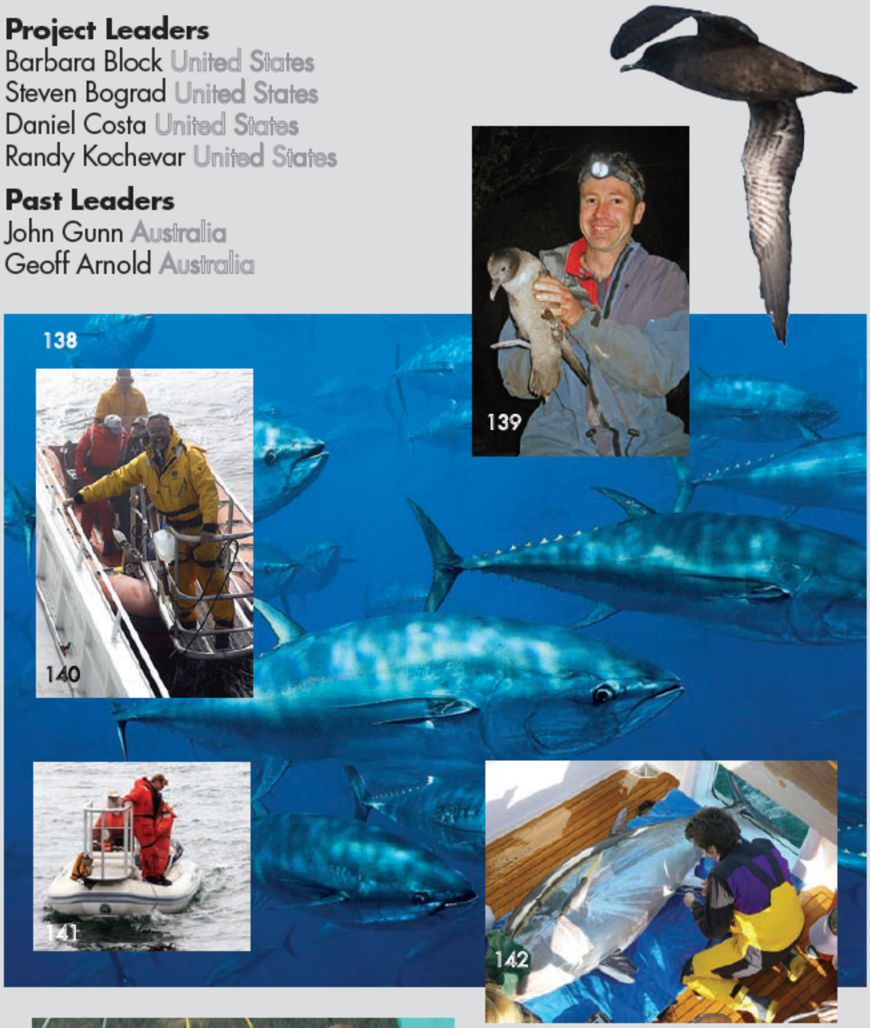
133. M.D. Allison
134. Nancy Copley
135. Laurence P. Madin
136. Bruce Cowden
137. M.D. Allison

TOPP

The **Tagging of Pacific Predators** project tagged and tracked 4,300 marine predators of 23 species on their journeys. Electronic signals from tags relayed to satellites and on to researchers—and sometimes to the public—displayed animals spanning entire oceans, moving from the poles to the tropics and from continent to continent. Other tags electronically measured and logged characteristics of the surrounding water as the animals swam and dove. Tagged animals frequently migrated along corridors to ocean "hot spots," where many individuals—and multiple species—congregate for extended periods.

Project Leaders
Barbara Block United States
Steven Bograd United States
Daniel Costa United States
Randy Kochevar United States

Past Leaders
John Gunn Australia
Geoff Arnold Australia



138. As bluefin tuna, *Thunnus thynnus*, traveled, their electronic tags recorded their journeys for researchers studying top predators. In all, 23 species were tracked feeding, mating, and migrating in the Pacific. *Image: Richard Hermann*

139. *Josh Adams*
140–143. *Tagging of Pacific Predators*
144. *Daniel Costa*

HMAP

Studying old and even ancient artifacts and archives, the systematic collaboration between humanities and sciences of the **History of Marine Animal Populations** project found evidence of how humanity and nature change marine life. The utility of the evidence for managing ocean life established the discipline of marine environmental history. Shell jewelry, mosaics, records of taxation on fishing boats, whaling logs, and menus revealed changing marine life and its causes—sometimes storms, sometimes climate, and especially, human harvest of animals and destruction of habitats.

Project Leaders
Poul Holm Ireland
Brian MacKenzie Denmark
Anne Husum Marboe Denmark
Bo Poulsen Denmark
Andrew Rosenberg United States

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146

In the South Atla
Sunday
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saw plenty of wh
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line and let him
breezes saw whales and chased waist boat struck and drawed.
So ends these 24 hours. Lat. 36..08
Long. 25..59.
Monday Nov 26th 1838.
Begins with
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from the Northwa
success, and caught
So ends the

147

148

145. Marine historians reconstructed the state of marine life when this seventeenth-century European gentleman dressed to go fishing. From past states and the present, the scientists assessed the changes caused by human and natural forces. *Detail of a print by Nicholas DeLarmessin*

146. *History of Marine Animal Populations*
147. *Andrzej Antczak*
148. *Pieter Bruegel the Elder*

FMAP

The **Future of Marine Animal Populations** project advanced tools for analyzing data from fishing and scientific surveys to determine changes in diversity, distribution, and abundance. Researchers used the entire Census database to define hot spots of diversity and to estimate undiscovered species. They identified the importance of water temperature in shaping diversity patterns and ways climate change might redistribute marine life. They documented how overexploitation caused rapid population declines and conservation helped recoveries. They uncovered patterns of animal movements that showed where animals tend to concentrate when feeding.

Project Leaders
Ian Jonsen Canada
Heike Lotze Canada
Boris Worm Canada

Past Leader
Ransom A. Myers Canada


150


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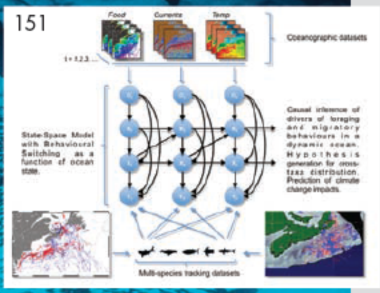
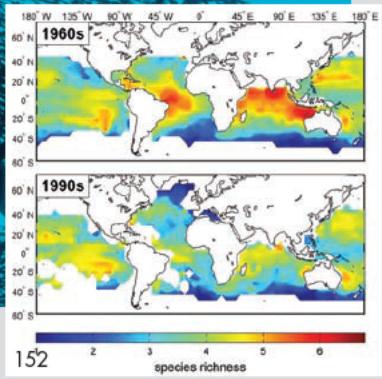

151


152


153

149. Sharks prey on circling fish near Cocos Island in the eastern tropical Pacific. While marine life thrives in some areas, large predators are threatened across much of their ranges. To project future marine life, scientists analyzed large sets of observations of past populations of a range of animals, including sharks. From the historical baselines that they established, they saw many declines and a few recoveries of numbers. *Image: © Bob Cranston*

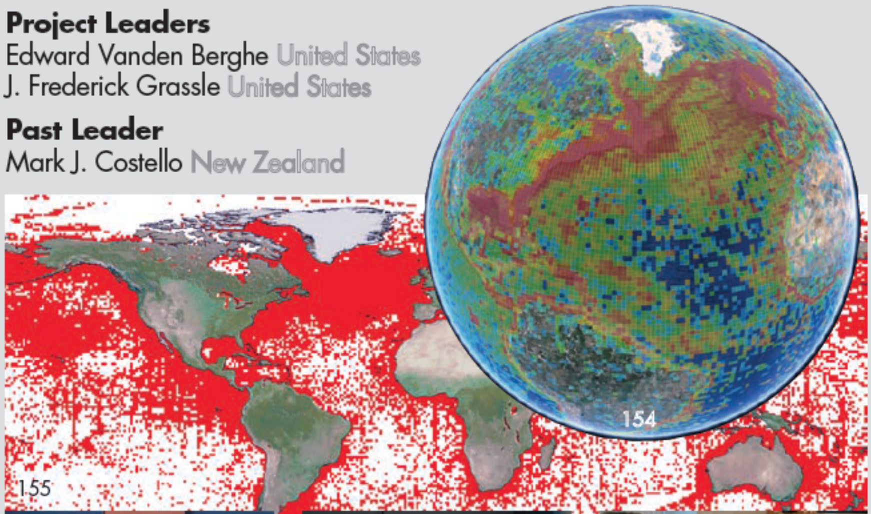
150. *Boris Worm*
151. *Future of Marine Animal Populations*
152. *Boris Worm*, et al.
153. *Alexandra Morton*

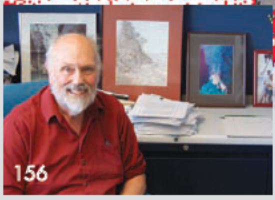
OBIS

The **Ocean Biogeographic Information System** (OBIS), built by the Census, forms the world's largest online repository of spatially referenced marine life data. Its present nearly 30 million records from more than 800 datasets locate species from *Aaptolasma americana* to *Zyzzyzus warreni* in all parts of the world's oceans in an evolving but permanent repository. It identifies diversity hot spots and broad patterns, tracks dispersion of species, and integrates species locations with temperature, salinity, and depth. Online, it instantaneously maps the distribution of specimens of a species.

Project Leaders
Edward Vanden Berghe United States
J. Frederick Grassle United States

Past Leader
Mark J. Costello New Zealand





154. Maps of all observations in the Census database show the known and unknown ocean. A map centered on the Atlantic displays the general state: Observations are most numerous near surface, near shore, and near or between rich nations. Wide expanses await exploration. *Image: Ocean Biogeographic Information System*

155. *Ocean Biogeographic Information System*
156–157. *Brook Herlach*
158. *Edward Vanden Berghe*
159. *Ocean Biogeographic Information System*
160. *Edward Vanden Berghe*

PHOTO CREDITS & IMAGE SOURCES

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7. Gary Cranitch, Queensland Museum, Brisbane

8. Jim Toomey, www.slagoon.com

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"Marine fish diversity: History of knowledge and discovery."
Zootaxa, 2525: 19–50, 2010

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Philippe Bouchet and Benoit Fontaine,
Muséum national d'Histoire naturelle, Paris

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20. Max K. Hoberg, Institute of Marine Science University of Alaska Fairbanks

21. Derek P. Tittensor, *et al.* Reprinted from Macmillan Publishers Ltd: *Nature,* 2010/07/28 online

22. From top: Russ Hopcroft, University of Alaska Fairbanks
Gary Cranitch, Queensland Museum, Brisbane
Colomban de Vargas © EPPO/SB Roscoff, France
Julian Finn, Museum Victoria, Melbourne
Gary Cranitch, Queensland Museum, Brisbane
Larry Madin, Woods Hole Oceanographic Institution
John Huisman, Murdoch University, Perth
Katrin Iken, University of Alaska Fairbanks
Bernard Picton, National Museums of Northern Ireland
Piotr Kuklinski, Institute of Oceanology, Polish Academy of Sciences, Sopot, Poland

23. Barcode: Mark Stoeckle, Rockefeller University, New York. Images: Cheryl Clarke-Hopcroft, Russ Hopcroft, Bodil Bluhm, and Katrin Iken, University of Alaska Fairbanks

24. Dirk Steinke, University of Guelph, Ontario

25. Bodil Bluhm, University of Alaska Fairbanks

26–27. Ocean Biogeographic Information System (source) Encyclopedia of Life (image)

28. Harte Research Institute, Texas A&M University Corpus Christi

29. Pacific Ocean Shelf Tracking

30. Southern Ocean Seals as Oceanographic Samplers, University of St. Andrews, Scotland (source), Daniel Costa (image)

31. Daniel Costa, Tagging of Pacific Predators

32. Image from "Habitat utilization of the Gulf of Mexico by bluefin and yellowfin tuna," Teo and Block, PLoS ONE, 2010

33. Salvador Jorgensen, *et al., Proceedings of the Royal Society B: Biological Sciences,* 277 (1682): 679

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35. Patterns and Processes of the Ecosystems of the Northern Mid-Atlantic project

36. Daniel Costa. Courtesy of the U.S. Antarctic Marine Living Resources Program, Southwest Fisheries Science Center, La Jolla, California

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41. Wil-Art Studio, courtesy of Monroe County Library, Key West, Florida

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48–49. Chih-Lin Wei and Gilbert T. Rowe, Texas A&M University at Galveston

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57. Anne Berg Edvardsen, www.anne-b-edvardsen.com

58. Megan Moews, NOAA Pacific Islands Fisheries Science Center, Honolulu, 2009

59. Nathalie Roland, www.headphonerecord.com/Nathalie_Roland/welcome.html

60. François Sarano, Galatée Films

61. Gary Cranitch, Queensland Museum, Brisbane

62. Census of Marine Life Mapping and Visualization Team

ArcOD

63. Ian MacDonald, Florida State University. Scientists and crew of the U.S. Coast Guard Cutter *Healy* stand on the ice in the Canada Basin of the Arctic Ocean.
64. Katrin Iken, University of Alaska Fairbanks. Diver photographs fauna below the ice of the central Arctic.
65. Rolf Gradinger, University of Alaska Fairbanks. Helicopter view of the *Healy*.
66. Katrin Iken, University of Alaska Fairbanks. Diver surfaces after a dive under Arctic sea ice.
67. Kevin Raskoff, Monterey Peninsula College, California

CAML

68. Australian Antarctic Division, © Commonwealth of Australia. Revealed by the powerful lights of a trawl-mounted camera, these elegant solitary sea squirts, or tunicates, stand half a meter high on the seabed, 200 meters below the surface of the sea off Terre Adélie. They were photographed during the Collaborative East Antarctic Marine Census (CEAMARC) voyage to the Southern Ocean in 2010. Solitary sea squirts are fast growing, early colonizers that take advantage of new habitat created by icebergs scouring the seabed.
69. National Institute of Water & Atmospheric Research (NIWA) New Zealand, 2007. Census researchers on R/V *Tangaroa* hold giant Macroptychaster sea stars.
70. Philippe Koubbi, Institut Paul Émile Victor and Centre national de la recherche scientifique. The Japanese research vessel R/V *Umitaku Maru* participated with two other vessels during the International Polar Year 2007/08 in the CEAMARC voyage to study life in the waters off East Antarctica.
71. Cédric d'Udekem d'Acoz, Flanders Marine Institute, Oostende, Belgium

MAR-ECO

72. Nicola King, Oceanlab, University of Aberdeen, Abyssal grenadiers, *Coryphaenoides armatus,* were photographed by one of MAR-ECO's ROBIO landers deployed on the Mid-Atlantic Ridge.
73. David Shale, www.deepseaimages.co.uk. A deepwater lizard fish. An ambush predator usually seen sitting motionless on the seafloor.
74. Thomas de Lange Wenneck, Institute of Marine Research, Norway. An orange roughy that is probably more than 100 years old is held by a scientist
75. David Shale, www.deepseaimages.co.uk
76. Klokkargaardens Film AB. Launching of the manned submersible *MIR* to dive to 4,200 meters in the Charlie-Gibbs Fracture Zone, 2003.
77. Thomas de Lange Wenneck, Institute of Marine Research, Norway. Researchers sort a deepwater bottom trawl sample.
78. David Shale, www.deepseaimages.co.uk. After two months aboard Norway's state-of-the-art R/V *G.O. Sars,* 60 scientists from 13 countries returned from the Mid-Atlantic Ridge with unprecedented quantity and quality of samples and data, impressive video footage captured by robotic submersibles, sonar data showing deep donuts of plankton 10 kilometers in diameter, and photographs of many probable new species among the more than 80,000 specimens collected.

ChEss

79. Craig Smith, University of Hawaii. A 30-ton grey whale was studied with respect to community succession over many years.
80. MARUM, University of Bremen, © 2006. Near a vent 3 kilometers beneath the equatorial Atlantic, Census researchers, using equipment attached to the remotely operated vehicle *Quest*, found shrimp and other life forms. They were found living near a hydrothermal vent billowing chemical-laden water at an unprecedented 407°C, a temperature that melts lead easily. It was the hottest marine temperature ever recorded.
81. Daichi Fujita, Japan
82. MARUM, University of Bremen, The remotely operated vehicle *Isis* withstands crushing pressures and extreme temperatures to study the geology, geochemistry, and biology of hydrothermal vents and cold seeps. Biogeography of Deep-Water Chemosynthetic Ecosystems project
83. Anders Warren, Swedish Museum of Natural History
84. Alexis Fifis, French Research Institute for Exploitation of the Sea

CeDAMar

85. Myriam Schueller, University of Bochum. R/V *Polarstern* in the Southern Ocean.
86. Wiebke Broekeland, Senckenberg Research Institute, Frankfurt. The Epibenthic Sledge coming back with benthic animals from the abyssal seafloor of the Weddell Sea.
87. Brigitte Ebbe, Senckenberg Research Institute, Frankfurt. Large benthic fauna caught with an Agassiz Trawl in the Southern Ocean is being separated from the deep-sea mud.
88. Brigitte Ebbe, Senckenberg Research Institute, Frankfurt. Scientists prepare a box corer for deployment.
89. Wiebke Broekeland, Senckenberg Research Institute, Frankfurt. Scientists process a collected sediment sample.
90. Jan Michels, Senckenberg Research Institute, Frankfurt

CenSeam

91. National Institute of Water and Atmospheric Research, New Zealand
92. Peter Marriott, National Institute of Water and Atmospheric Research, New Zealand, R/V *Tangaroa* about to set sail.
93. National Institute of Water and Atmospheric Research, New Zealand. Orange roughy swimming over a seamount.

94–95. National Institute of Water and Atmospheric Research, New Zealand. Towed cameras, such as the deep-towed imaging system (DTIS) have been used to collect video and photographs of seamount communities.

96. Global Census of Marine Life on Seamounts. The CenSeam Steering Committee, 2008
97. Global Census of Marine Life on Seamounts. In 2008 CenSeam-linked researchers sampled seamounts along the Macquarie Ridge.
98. Global Census of Marine Life on Seamounts. The CenSeam Steering Committee, 2007

COMARGE

99. Laurence P. Madin, Woods Hole Oceanographic Institution
100. Joe F. Siebenauller, Louisiana State University. After towing an otter trawl on the bottom of the Gulf of Mexico for two hours, LSU technician Sean Keenan and ship's crew prepare to remove the sample of deep-sea life onto a pitching deck.
101. Continental Margin Ecosystems on a Global Scale. Attendees at "Towards a Globalization of COMARGE" workshop at the Institut Océanographique, Paris, June 2006
102. Myriam Sibuet, French Research Institute for Exploitation of the Sea. On board the *l'Atlante,* Lenaick Menot handles African margin samples obtained with the ROV Victor 6000.
103. Matt Kupchik, Louisiana State University. Deep sampling proceeds around the clock. A beam trawl is recovered at 0300 from 2,200 meters in the Gulf of Mexico as graduate student Erin Becker and Dr. Bob Carney watch and wait to process the sample of deep-sea life.
104. Continental Margin Ecosystems on a Global Scale. COMARGE Steering Committee meeting, National Museum of Natural History, Smithsonian Institution, Washington, D.C., January 2007.
105. Robert S. Carney, Lousiana State University. Scientist and pilot wait expectedly in the acrylic shpere of the manned submersible Johnson *Sealink* suspended over the ocean while the ship manuvers for a precision launch to 800 meters on the margin of the Gulf of Mexico.

POST

106. Courtesy of Galatée Films. Sockeye salmon, Port Banks, Alaska, USA
107. Pacific Ocean Shelf Tracking project, 2006. A researcher displays a tagged salmon smolt.
108. Pacific Ocean Shelf Tracking project, 2006. Tagged salmon are released into the Pacific Ocean.
109. Melinda Jacobs, Pacific Ocean Shelf Tracking project/ Kintama Research Corporation. Acoustic receivers await final programming before deployment along the Pacific coast of North America.
110. Fraser River Sturgeon Conservation Society. A tagged sturgeon is released by researchers.

NaGISA

111. Brenda Konar, University of Alaska Fairbanks, 2004
112. Tohru Iseto, Kyoto University, 2009. Hua Thai Tuyen collects a sediment core from a seagrass bed in Vietnam.
113. Ana Karinna Carbonini, Universidad Simón Bolívar, Venezuela, 2010. The NaGISA sampling protocols have become teaching tools at several high schools and universities around the world, as students in Venezuela demonstrate.
114. Hyakubun Harada, Kyoto University, 2009. Coastal researchers study bivalve taxonomy at a workshop in Penang, Malaysia.
115. Susan Ryan, University of Southern Maine, 2007. The late Dr. Robin Rigby who was instrumental in integrating nearshore sampling in the Gulf of Maine, prepares quadrats for sampling.
116. Iacopo Bertocci, University of Pisa, 2006. Divers collect subtidal samples from the Mediterranean Sea along the Calafuria rocky coast near Livorno, Italy.

CReefs

117. Julian Finn, Museum Victoria, Melbourne, Australia
118. Russell Moffitt, National Oceanic and Atmospheric Administration (NOAA) Pacific Islands Fisheries Science Center (PIFSC), Papahanaumokuakea, Hawaii, 2008. A NOAA diver installs Autonomous Reef Monitoring Structures (ARMS) at Pearl and Hermes Atoll in the Northwestern Hawaiian Islands.
119. Megan Moews, NOAA PIFSC, Honolulu, Hawaii, 2008. CReef's PI's Nancy Knowlton, Rusty Brainard, and Julian Caley process test ARMS retreived off of the Island of Oahu, Hawaii, during the 2008 ARMS sampling, processing, and molecular development workshop.

120–121. Megan Moews, NOAA PIFSC, Honolulu, Hawaii, 2009. In 2009, Census scientists launched a "Hands-on-ARMS" outreach effort that targeted elementary and junior high school children, but has since reached over 6,000 people and with plans to make it worldwide.

122. Susan Middleton ©2006, courtesy of Northwestern Hawaiian Islands Marine National Monument. A spectacular anemone hermit crab captured in the French Frigate Shoals off the Northwestern Hawaiian Islands. The shiny gold on its claws is a phenomenon not seen before. Scientists believe it may serve as a form of communication. The crab also has its very own species of anemone attached to its shell (brown, fuzzy area below the shell), which is not known to attach to any other species of hermit crabs. This is but one example of how Census discoveries often pose more questions than they answer.

GoMA

123. Christina Kulfan, Suffolk University, Boston
124. Susan Ryan, University of Southern Maine, 2007. GoMA researchers collect samples along Maine's Cobscook Bay coastline.
125. Peter Stevick, Gulf of Maine Area Program, 2005. Two humpback whales, *Megaptera novaeangliae,* feed on red krill.
126. Jon Witman, Brown University, 2008. Divers retrieve a time-lapse camera from isolated Cashes Ledge.
127. Kelly Bentham, Bedford Institute of Oceanography, Canada, 2010 (with permission from Canadian Scientific Submersible Facility). Ship-board researchers direct a remotely operated vehicle in the Northeast Channel Coral Conservation area.

ICoMM

128. Linda Amaral-Zettler, Marine Biological Laboratory, Woods Hole
129. Carola Espinoza, Universidad de Concepción, Chile. Giant sulfur bacteria inhabit anoxic sediments in the eastern South Pacific.
130. Microbial Oceanography at the University of Vienna (MOVIE). Researchers collect dark ocean seawater for microbial DNA samples during a cruise in the Romanche Fracture Zone (19°W, 0°N) of the equtorial Atlantic.
131. Victor Gallardo, Universidad de Concepción, Chile. Bacterial mats that thrive mostly on hydrogen sulfide were found off the coast of Chile.

CMarZ

132. Laurence P. Madin, Woods Hole Oceanographic Institution
133. M.D. Allison, Woods Hole Oceanographic Institution, 2006. Researcher Russell R. Hopcroft (University of Alaska Fairbanks) aboard the R/V *Ronald H. Brown* photographs live zooplankton.
134. Nancy Copley, Woods Hole Oceanographic Institution, 2006. Zooplankton net heading to 5,000 meters depth, towed by the R/V *Ronald H. Brown* in the Sargasso Sea.
135. Laurence P. Madin, Woods Hole Oceanographic Institution. Bluewater divers silhouetted against the ocean surface. The safety diver (in the foreground) carries a short stick hanging down from his clip to push away curious sharks. The other diver swims with a collecting bag filled with jars to hold small animals. Another bag is clipped to the down-line below the trapeze. The lines on the right side of the photo are clipped to two other divers (not shown).
136. Bruce Cowden, bosun of the R/V *Ronald H. Brown,* 2006. Illustration of three-gilled angry bosunfish.
137. M.D. Allison, Woods Hole Oceanographic Institution 2006. Vials of copepods ready for DNA sequencing.

TOPP

138. Richard Hermann, Galatée Films
139. Josh Adams, Tagging of Pacific Predators. Darren Scott with tagged sooty shearwater.
140. Courtesy of Tagging of Pacific Predators. TOPP whale researcher Bruce Mate returns to the ship.
141. Courtesy of Tagging of Pacific Predators. The TOPP whale taggers returning to the dock.
142. Courtesy of Tagging of Pacific Predators. TOPP scientists at work tagging a bluefin tuna.
143. Courtesy of Tagging of Pacific Predators. A salmon shark is raised onto the boat for tagging.
144. Daniel Costa, University of California, Santa Cruz. A team tags a Northern Elephant Seal.

HMAP

145. Detail of a print by Nicholas De Larmessin.
146. Courtesy of History of Marine Animal Populations. Whaling logbook from November 1838.
147. Andrzej Antczak, Universidad Simón Bolívar, Caracas, Venezuela. Between 1200 and 1500 CE, more than 5 million conchs were harvested leaving this pre-Hispanic megamidden, or shell mound, of queen conch, *Strombus gigas,* on La Pelona Island, Los Roques Archipelago, Venezuela.
148. Pieter Bruegel, the Elder, drawing, Pieter van der Heyden, engraving, *Big Fish Eat Little Fish,* 1557

FMAP

149. © Bob Cranston
150. Boris Worm, Dalhousie University. FMAP researcher performs an underwater transect off the coast of Belize to study the effects of fishing on species richness.
151. Future of Marine Animal Populations. This animal movement diagram shows linking of multiple environmental and tracking datasets to explore animal movement, behavior, and habitat use.
152. Worm, *et al.,* 2005. *Science* 309: 1365–1369. Changes in tuna and billfish species richness over time (expected species per 50 individuals). These long-term declines correlated with increasing pressure.
153. Alexandra Morton. The late Ransom A. Myers near the Ahta River in British Columbia, 2007.

OBIS

154. Ocean Biogeographic Information System, Census of Marine Life Mapping and Visualization Team
155. Ocean Biogeographic Information System. Since 2000, the Ocean Biogeographic Information System has grown to nearly 28 million records of more than 120,000 species from more than 800 datasets. The red dots on the map show the global distribution of OBIS records.
156. Brook Herlach, Rutgers University, New Jersey. J. Frederick Grassle, former chair of the Census of Marine Life Scientific Steering Committee and project leader of OBIS at Rutgers University.
157. Brook Herlach, Rutgers University, New Jersey. William Stafford at work in Rutgers University Institute for Marine and Coastal Sciences, host institute to the international OBIS Secretariat.
158. Edward Vanden Berghe, Rutgers University, New Jersey. Brook Herlach at work in Rutgers University Institute for Marine and Coastal Sciences, host institute to the international OBIS Secretariat.
159. Courtesy of Ocean Biogeographic Information System. The OBIS Governing Board, which met regularly to ensure the integration of worldwide data.
160. Edward Vanden Berghe, Rutgers University, New Jer-sey. Fabio Lang da Silveira, Chair of OBIS' Managers Committee, and Daphne Fautin, head of the OBIS delegation to GBIF, at the eBiosphere conference in London, June 2009.

Mother and calf Weddell seal
Terre Adélie, Antarctica, 2007.
Image: Galatée Films

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2000•2001•2002•2003•2004•2005•2006•2007•2008•2009•2010

Census of Marine Life Projects

Arctic Ocean: **ArcOD**
Antarctic Ocean: **CAML**
Mid-Ocean Ridges: **MAR-ECO**
Vents and Seeps: **ChEss**
Abyssal Plains: **CeDAMar**
Seamounts: **CenSeam**
Continental Margins: **COMARGE**
Continental Shelves: **POST**
Near Shore: **NaGISA**
Coral Reefs: **CReefs**
Regional Ecosystems: **GoMA**
Microbes: **ICoMM**
Zooplankton: **CMarZ**
Top Predators: **TOPP**
Oceans Past: **HMAP**
Oceans Future: **FMAP**
Global Marine Life Database: **OBIS**

National and Regional Implementation Committees

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Australia
Canada
Caribbean
China
Europe
Indian Ocean
Indonesia
Japan
Republic of Korea
South America
Sub-Saharan Africa
United States of America

CENSUS
OF MARINE LIFE

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FIRST CENSUS OF MARINE LIFE 2010 **HIGHLIGHTS OF A DECADE OF DISCOVERY**

Forrest-028

No. 11846

MULTILATERAL

Convention establishing the World Intellectual Property Organization signed at Stockholm on 14 July 1967

Authentic texts: French, English, Spanish and Russian.

Registered by the Director General of the World Intellectual Property Organization, acting on behalf of the Parties, on 30 June 1972.

MULTILATÉRAL

Convention instituant l'Organisation mondiale de la propriété intellectuelle signée à Stockholm le 14 juillet 1967

Textes authentiques : français, anglais, espagnol et russe.

Enregistrée par le Directeur général de l'Organisation mondiale de la propriété intellectuelle, agissant au nom des parties, le 30 juin 1972.

CONVENTION[1] ESTABLISHING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION SIGNED AT STOCKHOLM ON JULY 14, 1967

The Contracting Parties,

Desiring to contribute to better understanding and cooperation among States for their mutual benefit on the basis of respect for their sovereignty and equality,

---

[1] Came into force on 26 April 1970 (see (1) below) in respect of the following States, i.e. three months after those States (ten of which being members of the Paris Union and seven members of the Berne Union(2) having fulfilled the conditions provided for in article 14 (2) (3)) had either signed it without reservation as to ratification, or deposited an instrument of ratification or accession with the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI), in accordance with article 15 (1):

State	*Date of definitive signature (s) or date of deposit of the instrument of ratification, or accession (a)*	
Ireland*	12 January	1968 *s*
German Democratic Republic**	20 June	1968 *a* (1)
Senegal**	19 September	1968
Union of Soviet Socialist Republics* (4)	4 December	1968
Ukrainian Soviet Socialist Republic (4)	12 February	1969
United Kingdom of Great Britain and Northern Ireland**	26 February	1969
Romania* (5)	28 February	1969
Byelorussian Soviet Socialist Republic (4) (5)	19 March	1969
Spain***	6 June	1969
Israel**	30 July	1969
Sweden**	12 August	1969
Hungary* (4)	18 December	1969
Denmark**	26 January	1970
Switzerland**	26 January	1970

* Member of the Paris Union.

** Member of the Paris Union and of the Berne Union.

*** Member of the Berne Union.

(1) The Governments of the following States have sent communications to the depositary to the effect that they objected to the instrument deposited by the German Democratic Republic: Argentina, Australia, Belgium, Canada, Denmark, Federal Republic of Germany, France, Gabon, Greece, Haiti, Holy See, Iceland, Iran, Ireland, Israel, Japan, Luxembourg, Madagascar, Niger, Portugal, South Africa, Spain, United Kingdom of Great Britain and Northern Ireland and United States of America.

In this connexion, it should be noted that the last action required by article 15 (1) for the purpose of entry into force of the Convention was effected on 26 January 1970 from both the points of view of the States which recognized the validity of the instrument and those which declared that they did not, since Denmark and Switzerland (the tenth and eleventh States members of the Paris Union to do so, taking into account accession by the German Democratic Republic, or the ninth and tenth such States, not taking that accession into account) both deposited their instrument of ratification on that date.

(2) The countries to which the Paris Convention for the Protection of Industrial Property of 20 March 1883 applies, in all texts still in force ("Paris Convention": see note 1, p. 9) form the Union for the Protection of Industrial Property ("Paris Union").

The countries to which the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 applies, in all texts still in force ("Berne Convention": see note 2, p. 9), form the Union for the Protection of Literary and Artistic Works ("Berne Union"). In accordance with article 15 (1), if a State is a member of both Unions, it will be counted in both groups.

(3) That is to say, having become a party to the Act of Stockholm of the Paris Convention in its totality or with the sole limitation provided for in article 20, 1, *b*, i, of the said Act, or having become

(continued on page 7)

(Footnote 1 continued from page 5)

a party to the Act of Stockholm of the Berne Convention in its totality or with the sole limitation provided for in article 28, 1, *b*, i of the said Act.

(⁴) With confirmation of the declaration made upon signature.

(⁵) For the texts of the declarations made upon ratification or accession, see p. 104 of this volume.

Subsequently, the Convention came into force in respect of each of the States listed below three months after the date on which they deposited their instrument of ratification or accession with the Director General of the World Intellectual Property Organization (WIPO) (the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI), before 22 September 1970), in accordance with article 15 (2):

State	*Date of deposit of the instrument of ratification, or accession (a)*	*Date of entry into force*
Australia	10 May 1972*a*	10 August 1972
Bulgaria (¹)	19 February 1970	19 May 1970
Canada	26 March 1970*a*	26 June 1970
Chad	26 June 1970*a*	26 September 1970
Czechoslovakia(²)	22 September 1970*a*	22 December 1970
Federal Republic of Germany (With a declaration to the effect that the ratification shall also apply to *Land Berlin*.) (³)	19 June 1970	19 September 1970
Finland	8 June 1970	8 September 1970
Fiji	11 December 1971*a*	11 March 1971
Jordan	12 April 1972*a*	12 July 1972
Kenya	5 July 1971	5 October 1971
Liechtenstein	21 February 1972	21 May 1972
Malawi	11 March 1970*a*	11 June 1970
Morocco	27 April 1971	27 July 1971
United States of America	25 May 1970	25 August 1970

(¹) With confirmation of the declaration made upon signature.

(²) For the texts of the declarations made upon ratification or accession, see p. 104 of this volume.

(³) Notifications from the States indicated hereafter, objecting to the declaration by the Federal Republic of Germany, were received by the Director General of the World Intellectual Property Organization: Bulgaria, Byelorussian Soviet Socialist Republic, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics.

Furthermore, the following States deposited with the Director General of the World Intellectual Property Organization (WIPO) (the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI), before 22 December 1970) in accordance with article 21, paragraph 2 (*a*), of the Convention, a notification to the effect that they desired to exercise the same rights as if they had become a party to the Convention, the said notification to take effect on the date of its receipt:

State	*Date of receipt of the notification*	*State*	*Date of receipt of the notification*
Algeria	24 September 1970	Malta	21 September 1970
Argentina	7 October 1970	Mexico	13 June 1972
Australia*	21 September 1971	Morocco**	14 September 1970
Belgium	20 May 1970	Netherlands	11 September 1970
Brazil	9 June 1970	Niger	24 September 1970
Cameroon	22 September 1970	Norway	22 July 1970
Cuba	15 January 1968	Poland	15 September 1970
Czechoslovakia*	4 August 1970	Portugal	25 August 1970
Dahomey	25 September 1970	South Africa	17 September 1970
France	24 April 1970	Syria	15 September 1970
Gabon	24 September 1970	Thailand	29 December 1970
Greece	21 September 1970	Tunisia	18 September 1970
Holy See	21 September 1970	Turkey	17 September 1970
Italy	29 April 1970	United Arab Republic	28 September 1970
Ivory Coast	6 August 1970	Upper Volta	18 August 1970
Japan	17 September 1970	Yugoslavia	6 August 1970
Luxembourg	20 March 1970		

* Instrument of accession subsequently deposited; see above.

** Instrument of ratification subsequently deposited; see above.

Desiring, in order to encourage creative activity, to promote the protection of intellectual property throughout the world,

Desiring to modernize and render more efficient the administration of the Unions established in the fields of the protection of industrial property and the protection of literary and artistic works, while fully respecting the independence of each of the Unions,

Agree as follows:

Article 1

ESTABLISHMENT OF THE ORGANIZATION

The World Intellectual Property Organization is hereby established.

Article 2

DEFINITIONS

For the purposes of this Convention:

(i) "Organization" shall mean the World Intellectual Property Organization (WIPO);

(ii) "International Bureau" shall mean the International Bureau of Intellectual Property;

(iii) "Paris Convention" shall mean the Convention for the Protection of Industrial Property signed on March 20, 1883, including any of its revisions;[1]

iv) "Berne Convention" shall mean the Convention for the Protection of Literary and Artistic Works signed on September 9, 1886, including any of its revisions;[2]

(v) "Paris Union" shall mean the International Union established by the Paris Convention;

(vi) "Berne Union" shall mean the International Union established by the Berne Convention;

(vii) "Unions" shall mean the Paris Union, the Special Unions and Agreements established in relation with that Union, the Berne Union, and any other international agreement designed to promote the pro-

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[1] *British and Foreign State Papers*, vol. 74, p. 44; vol. 92, p. 807, and vol. 104, p. 116; and League of Nations, *Treaty Series*, vol. LXXIV, p. 289, and vol. CXCII, p. 17.

[2] *British and Foreign State Papers*, vol. 77, p. 22, and vol. 88, p. 36; League of Nations, *Treaty Series*, vol. I, pp. 217 and 243, and vol. CXXIII, p. 233; and United Nations, *Treaty Series*, vol. 331, p. 217.

tection of intellectual property whose administration is assumed by the Organization according to Article 4 (iii);

(viii) "intellectual property" shall include the rights relating to:
- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Article 3

OBJECTIVES OF THE ORGANIZATION

The objectives of the Organization are:

(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,

(ii) to ensure administrative cooperation among the Unions.

Article 4

FUNCTIONS

In order to attain the objectives described in Article 3, the Organization, through its appropriate organs, and subject to the competence of each of the Unions:

(i) shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislations in this field;

(ii) shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union;

(iii) may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property;

(iv) shall encourage the conclusion of international agreements designed to promote the protection of intellectual property;

(v) shall offer its cooperation to States requesting legal-technical assistance in the field of intellectual property;

(vi) shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies;

(vii) shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations;

(viii). shall take all other appropriate action.

Article 5

MEMBERSHIP

(1) Membership in the Organization shall be open to any State which is a member of any of the Unions as defined in Article 2 (vii).

(2) Membership in the Organization shall be equally open to any State not a member of any of the Unions, provided that:

(i) it is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice, or

(ii) it is invited by the General Assembly to become a party to this Convention.

Article 6

GENERAL ASSEMBLY

(1) (*a*) These shall be a General Assembly consisting of the States party to this Convention which are members of any of the Unions.

(*b*) The Government of each State shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(*c*) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) The General Assembly shall:

(i) appoint the Director General upon nomination by the Coordination Committee;

(ii) review and approve reports of the Director General concerning the Organization and give him all necessary instructions;

(iii) review and approve the reports and activities of the Coordination Committee and give instructions to such Committee;

(iv) adopt the triennial budget of expenses common to the Unions;

(v) approve the measures proposed by the Director General concerning the administration of the international agreements referred to in Article 4 (iii);

(vi) adopt the financial regulations of the Organization;

(vii) determine the working languages of the Secretariat, taking into consideration the practice of the United Nations;

(viii) invite States referred to under Article 5 (2) (ii) to become party to this Convention;

(ix) determine which States not Members of the Organization and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) exercise such other functions as are appropriate under this Convention.

(3) (*a*) Each State, whether member of one or more Unions, shall have one vote in the General Assembly.

(*b*) One-half of the States members of the General Assembly shall constitute a quorum.

(*c*) Notwithstanding the provisions of subparagraph (*b*), if, in any session, the number of States represented is less than one-half but equal to or more than one-third of the States members of the General Assembly, the General Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the following conditions are fulfilled. The International Bureau shall communicate the said decisions to the States members of the General Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of States having thus expressed their vote or abstention attains the number of States which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(*d*) Subject to the provisions of subparagraphs (*e*) and (*f*), the General Assembly shall make its decisions by a majority of two-thirds of the votes cast.

(*e*) The approval of measures concerning the administration of international agreements referred to in Article 4 (iii) shall require a majority of three-fourths of the votes cast.

(*f*) The approval of an agreement with the United Nations under Articles 57 and 63 of the Charter of the United Nations shall require a majority of nine-tenths of the votes cast.

(*g*) For the appointment of the Director General (paragraph (2) (i)), the approval of measures proposed by the Director General concerning the administration of international agreements (paragraph (2) (v)), and the transfer of headquarters (Article 10), the required majority must be attained not only in the General Assembly but also in the Assembly of the Paris Union and the Assembly of the Berne Union.

(*h*) Abstentions shall not be considered as votes.

(*i*) A delegate may represent, and vote in the name of, one State only.

(4) (*a*) The General Assembly shall meet once in every third calendar year in ordinary session, upon convocation by the Director General.

(*b*) The General Assembly shall meet in extraordinary session upon convocation by the Director General either at the request of the Coordination Committee or at the request of one-fourth of the States members of the General Assembly.

(*c*) Meetings shall be held at the headquarters of the Organization.

(5) States party to this Convention which are not members of any of the Unions shall be admitted to the meetings of the General Assembly as observers.

(6) The General Assembly shall adopt its own rules of procedure.

Article 7

CONFERENCE

(1) (*a*) There shall be a Conference consisting of the States party to this Convention whether or not they are members of any of the Unions.

(*b*) The Government of each State shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(*c*) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) The Conference shall:

(i) discuss matters of general interest in the field of intellectual property and may adopt recommendations relating to such matters, having regard for the competence and autonomy of the Unions;

(ii) adopt the triennial budget of the Conference;

(iii) within the limits of the budget of the Conference, establish the triennial program of legal-technical assistance;

(iv) adopt amendments to this Convention as provided in Article 17;

(v) determine which States not Members of the Organization and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(vi) exercise such other functions as are appropriate under this Convention.

(3) (*a*) Each Member State shall have one vote in the Conference.

(*b*) One-third of the Member States shall constitute a quorum.

(*c*) Subject to the provisions of Article 17, the Conference shall make its decisions by a majority of two-thirds of the votes cast.

(*d*) The amounts of the contributions of States party to this Convention not members of any of the Unions shall be fixed by a vote in which only the delegates of such States shall have the right to vote.

(*e*) Abstentions shall not be considered as votes.

(*f*) A delegate may represent, and vote in the name of, one State only.

(4) (*a*) The Conference shall meet in ordinary session, upon convocation by the Director General, during the same period and at the same place as the General Assembly.

(*b*) The Conference shall meet in extraordinary session, upon convocation by the Director General, at the request of the majority of the Member States.

(5) The Conference shall adopt its own rules of procedure.

Article 8

COORDINATION COMMITTEE

(1) (*a*) There shall be a Coordination Committee consisting of the States party to this Convention which are members of the Executive Com-

mittee of the Paris Union, or the Executive Committee of the Berne Union, or both. However, if either of these Executive Committees is composed of more than one-fourth of the number of the countries members of the Assembly which elected it, then such Executive Committee shall designate from among its members the States which will be members of the Coordination Committee, in such a way that their number shall not exceed the one-fourth referred to above, it being understood that the country on the territory of which the Organization has its headquarters shall not be included in the computation of the said one-fourth.

(*b*) The Government of each State member of the Coordination Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(*c*) Whenever the Coordination Committee considers either matters of direct interest to the program or budget of the Conference and its agenda, or proposals for the amendment of this Convention which would affect the rights or obligations of States party to this Convention not members of any of the Unions, one-fourth of such States shall participate in the meetings of the Coordination Committee with the same rights as members of that Committee. The Conference shall, at each of its ordinary sessions, designate these States.

(*d*) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) If the other Unions administered by the Organization wish to be represented as such in the Coordination Committee, their representatives must be appointed from among the States members of the Coordination Committee.

(3) The Coordination Committee shall:

(i) give advice to the organs of the Unions, the General Assembly, the Conference, and the Director General, on all administrative, financial and other matters of common interest either to two or more of the Unions, or to one or more of the Unions and the Organization, and in particular on the budget of expenses common to the Unions;

(ii) prepare the draft agenda of the General Assembly;

(iii) prepare the draft agenda and the draft program and budget of the Conference;

(iv) on the basis of the triennial budget of expenses common to the Unions and the triennial budget of the Conference, as well as on the basis of the triennial program of legal technical assistance, establish the corresponding annual budgets and programs;

(v) when the term of office of the Director General is about to expire, or when there is a vacancy in the post of the Director General, nominate a candidate for appointment to such position by the General Assembly; if the General Assembly does not appoint its nominee, the Coordination Committee shall nominate another candidate; this procedure shall be repeated until the latest nominee is appointed by the General Assembly;

(vi) if the post of the Director General becomes vacant between two sessions of the General Assembly, appoint an Acting Director General for the term preceding the assuming of office by the new Director General;

(vii) perform such other functions as are allocated to it under this Convention.

(4) (*a*) The Coordination Committee shall meet once every year in ordinary session, upon convocation by the Director General. It shall normally meet at the headquarters of the Organization.

(*b*) The Coordination Committee shall meet in extraordinary session, upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(5) (*a*) Each State, whether a member of one or both of the Executive Committees referred to in paragraph (1) (*a*), shall have one vote in the Coordination Committee.

(*b*) One-half of the members of the Coordination Committee shall constitute a quorum.

(*c*) A delegate may represent, and vote in the name of, one State only.

(6) (*a*) The Coordination Committee shall express its opinions and make its decisions by a simple majority of the votes cast. Abstentions shall not be considered as votes.

(*b*) Even if a simple majority is obtained, any member of the Coordination Committee may, immediately after the vote, request that the votes be the subject of a special recount in the following manner: two separate lists shall be prepared, one containing the names of the States members of the Executive Committee of the Paris Union and the other the names of the States members of the Executive Committee of the Berne Union; the vote of each State shall be inscribed opposite its name in each list in which it appears. Should this special recount indicate that a simple majority has not been obtained in each of those lists, the proposal shall not be considered as carried.

(7) Any State Member of the Organization which is not a member of the Coordination Committee may be represented at the meetings of the Committee by observers having the right to take part in the debates but without the right to vote.

(8) The Coordination Committee shall establish its own rules of procedure.

Article 9

INTERNATIONAL BUREAU

(1) The International Bureau shall be the Secretariat of the Organization.

(2) The International Bureau shall be directed by the Director General, assisted by two or more Deputy Directors General.

(3) The Director General shall be appointed for a fixed term, which shall be not less than six years. He shall be eligible for reappointment for fixed terms. The periods of the initial appointment and possible subsequent appointments, as well as all other conditions of the appointment, shall be fixed by the General Assembly.

(4) (*a*) The Director General shall be the chief executive of the Organization.

(*b*) He shall represent the Organization.

(*c*) He shall report to, and conform to the instructions of, the General Assembly as to the internal and external affairs of the Organization.

(5) The Director General shall prepare the draft programs and budgets and periodical reports on activities. He shall transmit them to the Governments of the interested States and to the competent organs of the Unions and the Organization.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the General Assembly, the Conference, the Coordination Committee, and any other committee or working group. The Director General or a staff member designated by him shall be *ex officio* secretary of these bodies.

(7) The Director General shall appoint the staff necessary for the efficient performance of the tasks of the International Bureau. He shall appoint the Deputy Directors General after approval by the Coordination Committee. The conditions of employment shall be fixed by the staff regulations to be approved by the Coordination Committee on the proposal of the Director General. The paramount consideration in the employment of

the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

(8) The nature of the responsibilities of the Director General and of the staff shall be exclusively international. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each Member State undertakes to respect the exclusively international character of the responsibilities of the Director General and the staff, and not to seek to influence them in the discharge of their duties.

Article 10

HEADQUARTERS

(1) The headquarters of the Organization shall be at Geneva.

(2) Its transfer may be decided as provided for in Article 6 (3) (*d*) and (*g*).

Article 11

FINANCES

(1) The Organization shall have two separate budgets: the budget of expenses common to the Unions, and the budget of the Conference.

(2) (*a*) The budget of expenses common to the Unions shall include provision for expenses of interest to several Unions.

(*b*) This budget shall be financed from the following sources:

(i) contributions of the Unions, provided that the amount of the contribution of each Union shall be fixed by the Assembly of that Union, having regard to the interest the Union has in the common expenses;

(ii) charges due for services performed by the International Bureau not in direct relation with any of the Unions or not received for services rendered by the International Bureau in the field of legal-technical assistance;

(iii) sale of, or royalties on, the publications of the International Bureau not directly concerning any of the Unions;

(iv) gifts, bequests, and subventions, given to the Organization, except those referred to in paragraph (3) (*b*) (iv);

(v) rents, interests, and other miscellaneous income, of the Organization.

(3) (*a*) The budget of the Conference shall include provision for the expenses of holding sessions of the Conference and for the cost of the legal-technical assistance program.

(*b*) This budget shall be financed from the following sources:

(i) contributions of States party to this Convention not members of any of the Unions;

(ii) any sums made available to this budget by the Unions, provided that the amount of the sum made available by each Union shall be fixed by the Assembly of that Union and that each Union shall be free to abstain from contributing to the said budget;

(iii) sums received for services rendered by the International Bureau in the field of legal-technical assistance;

(iv) gifts, bequests, and subventions, given to the Organization for the purposes referred to in subparagraph (*a*).

(4) (*a*) For the purpose of establishing its contribution towards the budget of the Conference, each State party to this Convention not member of any of the Unions shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows:

Class A . . .	10
Class B . . .	3
Class C . . .	1

(*b*) Each such State shall, concurrently with taking action as provided in Article 14 (1), indicate the class to which it wishes to belong. Any such State may change class. If it chooses a lower class, the State must announce it to the Conference at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the session.

(*c*) The annual contribution of each such State shall be an amount in the same proportion to the total sum to be contributed to the budget of the Conference by all such States as the number of its units is to the total of the units of all the said States.

(*d*) Contributions shall become due on the first of January of each year.

(*e*) If the budget is not adopted before the beginning of a new financial period, the budget shall be at the same level as the budget of the previous year, in accordance with the financial regulations.

(5) Any State party to this Convention not member of any of the Unions which is in arrears in the payment of its financial contributions under the present Article, and any State party to this Convention member of any of the Unions which is in arrears in the payment of its contributions to any of the Unions, shall have no vote in any of the bodies of the Organization of which it is a member, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any of these bodies may allow such a State to continue to exercise its vote in that body if, and as long as, it is satisfied that the delay in payment arises from exceptional and unavoidable circumstances.

(6) The amount of the fees and charges due for services rendered by the International Bureau in the field of legal technical assistance shall be established, and shall be reported to the Coordination Committee, by the Director General.

(7) The Organization, with the approval of the Coordination Committee, may receive gifts, bequests, and subventions, directly from Governments, public or private institutions, associations or private persons.

(8) (*a*) The Organization shall have a working capital fund which shall be constituted by a single payment made by the Unions and by each State party to this Convention not member of any Union. If the fund becomes insufficient, it shall be increased.

(*b*) The amount of the single payment of each Union and its possible participation in any increase shall be decided by its Assembly.

(*c*) The amount of the single payment of each State party to this Convention not member of any Union and its part in any increase shall be a proportion of the contribution of that State for the year in which the fund is established or the increase decided. The proportion and the terms of payment shall be fixed by the Conference on the proposal of the Director General and after it has heard the advice of the Coordination Committee.

(9) (*a*) In the headquarters agreement concluded with the State on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such State shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such State and the Organization. As long as it remains under the obligation to grant advances, such State shall have an ex officio seat on the Coordination Committee.

(*b*) The State referred to in subparagraph (*a*) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(10) The auditing of the accounts shall be effected by one or more Member States, or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the General Assembly.

Article 12

LEGAL CAPACITY; PRIVILEGES AND IMMUNITIES

(1) The Organization shall enjoy on the territory of each Member State, in conformity with the laws of that State, such legal capacity as may be necessary for the fulfilment of the Organization's objectives and for the exercise of its functions.

(2) The Organization shall conclude a headquarters agreement with the Swiss Confederation and with any other State in which the headquarters may subsequently be located.

(3) The Organization may conclude bilateral or multilateral agreements with the other Member States with a view to the enjoyment by the Organization, its officials, and representatives of all Member States, of such privileges and immunities as may be necessary for the fulfilment of its objectives and for the exercise of its functions.

(4) The Director General may negotiate and, after approval by the Coordination Committee, shall conclude and sign on behalf of the Organization the agreements referred to in paragraphs (2) and (3).

Article 13

RELATIONS WITH OTHER ORGANIZATIONS

(1) The Organization shall, where appropriate, establish working relations and cooperate with other intergovernemental organizations. Any general agreement to such effect entered into with such organizations shall be concluded by the Director General after approval by the Coordination Committee.

(2) The Organization may, on matters within its competence, make suitable arrangements for consultation and cooperation with international non-governmental organizations and, with the consent of the Governments concerned, with national organizations, governmental or non-governmental. Such arrangements shall be made by the Director General after approval by the Coordination Committee.

Article 14

BECOMING PARTY TO THE CONVENTION

(1) States referred to in Article 5 may become party to this Convention and Member of the Organization by:

(i) signature without reservation as to ratification, or

(ii) signature subject to ratification followed by the deposit of an instrument of ratification, or

(iii) deposit of an instrument of accession.

(2) Notwithstanding any other provision of this Convention, a State party to the Paris Convention, the Berne Convention, or both Conventions, may become party to this Convention only if it concurrently ratifies or accedes to, or only after it has ratified or acceded to:

— either the Stockholm Act of the Paris Convention in its entirety or with only the limitation set forth in Article 20 (1) (*b*) (i) thereof,

— or the Stockholm Act of the Berne Convention in its entirety or with only the limitation set forth in Article 28 (1) (*b*) (i) thereof.

(3) Instruments of ratification or accession shall be deposited with the Director General.

Article 15

ENTRY INTO FORCE OF THE CONVENTION

(1) This Convention shall enter into force three months after ten States members of the Paris Union and seven States members of the Berne Union have taken action as provided in Article 14 (1), it being understood that, if a State is a member of both Unions, it will be counted in both groups. On that date, this Convention shall enter into force also in respect of States which, not being members of either of the two Unions, have taken action as provided in Article 14 (1) three months or more prior to that date.

(2) In respect to any other State, this Convention shall enter into force three months after the date on which such State takes action as provided in Article 14 (1).

Article 16

RESERVATIONS

No reservations to this Convention are permitted.

Article 17

AMENDMENTS

(1) Proposals for the amendment of this Convention may be initiated by any Member State, by the Coordination Committee, or by the Director General. Such proposals shall be communicated by the Director General to the Member States at least six months in advance of their consideration by the Conference.

(2) Amendments shall be adopted by the Conference. Whenever amendments would affect the rights and obligations of States party to this Convention not members of any of the Unions, such States shall also vote. On all other amendments proposed, only States party to this Convention members of any Union shall vote. Amendments shall be adopted by a simple majority of the votes cast, provided that the Conference shall vote only on such proposals for amendments as have previously been adopted by the Assembly of the Paris Union and the Assembly of the Berne Union according to the rules applicable in each of them regarding the adoption of amendments to the administrative provisions of their respective Conventions.

(3) Any amendment shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the States Members of the Organization, entitled to vote on the proposal for amendment pursuant to paragraph (2), at the time the Conference adopted the amendment. Any amendments thus accepted shall bind all the States which are Members of the Organization at the time the amendment enters into force or which become Members at a subsequent date, provided that any amendment increasing the financial obligations of Member States shall bind only those States which have notified their acceptance of such amendment.

Article 18

DENUNCIATION

(1) Any Member State may denounce this Convention by notification addressed to the Director General.

(2) Denunciation shall take effect six months after the day on which the Director General has received the notification.

Article 19

NOTIFICATIONS

The Director General shall notify the Governments of all Member States of:

(i) the date of entry into force of the Convention,

(ii) signatures and deposits of instruments of ratification or accession,

(iii) acceptances of an amendment to this Convention, and the date upon which the amendment enters into force,

(iv) denunciations of this Convention.

Article 20

FINAL PROVISIONS

(1) (*a*) This Convention shall be signed in a single copy in English, French, Russian and Spanish, all texts being equally authentic, and shall be deposited with the Government of Sweden.

(*b*) This Convention shall remain open for signature at Stockholm until January 13, 1968.

(2) Official texts shall be established by the Director General, after consultation with the interested Governments, in German, Italian and Portuguese, and such other languages as the Conference may designate.

(3) The Director General shall transmit two duly certified copies of this Convention and of each amendment adopted by the Conference to the Governments of the States members of the Paris or Berne Unions, to the Government of any other State when it accedes to this Convention, and, on request, to the Government of any other State. The copies of the signed text of the Convention transmitted to the Governments shall be certified by the Government of Sweden.

(4) The Director General shall register this Convention with the Secretariat of the United Nations.

Article 21

TRANSITIONAL PROVISIONS

(1) Until the first Director General assumes office, references in this Convention to the International Bureau or to the Director General shall be deemed to be references to the United International Bureaux for the Protec-

tion of Industrial, Literary and Artistic Property (also called the United International Bureaux for the Protection of Intellectual Property (BIRPI)), or its Director, respectively.

(2) (*a*) States which are members of any of the Unions but which have not become party to this Convention may, for five years from the date of entry into force of this Convention, exercise, if they so desire, the same rights as if they had become party to this Convention. Any State desiring to exercise such rights shall give written notification to this effect to the Director General; this notification shall be effective on the date of its receipt. Such States shall be deemed to be members of the General Assembly and the Conference until the expiration of the said period.

(*b*) Upon expiration of this five-year period, such States shall have no right to vote in the General Assembly, the Conference, and the Coordination Committee.

(*c*) Upon becoming party to this Convention, such States shall regain such right to vote.

(3) (*a*) As long as there are States members of the Paris or Berne Unions which have not become party to this Convention, the International Bureau and the Director General shall also function as the United International Bureaux for the Protection of Industrial, Literary and Artistic Property, and its Director, respectively.

(*b*) The staff in the employment of the said Bureaux on the date of entry into force of this Convention shall, during the transitional period referred to in subparagraph (a), be considered as also employed by the International Bureau.

(4) (*a*) Once all the States members of the Paris Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of that Union shall devolve on the International Bureau of the Organization.

(*b*) Once all the States members of the Berne Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of that Union shall devolve on the International Bureau of the Organization.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Stockholm, on July 14, 1967.

Pour l'Afghanistan :
For Afghanistan:
Por el Afganistán:
За Афганистан :

Pour l'Afrique du Sud :
For South Africa:
Por Sudáfrica:
За Южную Африку :

(Subject to ratification)[1]
T. SCHOEMAN

Pour l'Albanie :
For Albania:
Por Albania:
За Албанию :

Pour l'Algérie :
For Algeria:
Por Argelia:
За Алжир :

(Sous réserve de ratification)[2]
A. HACENE

Pour l'Arabie Saoudite :
For Saudi Arabia:
Por Arabia Saudita:
За Саудовскую Аравию :

Pour l'Argentine :
For Argentina:
Por la Argentina:
За Аргентину :

Pour l'Australie :
For Australia:
Por Australia:
За Австралию :

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[1] Sous réserve de ratification.
[2] Subject to ratification.

Pour l'Autriche :
For Austria:
Por Austria:
За Австрию :

(Sous réserve de ratification)[1]

GOTTFRIED H. THALER
DR. ROBERT DITTRICH

Pour la Barbade :
For Barbados:
Por Barbados:
За Барбадос :

Pour la Belgique :
For Belgium:
Por Bélgica:
За Бельгию :

(Sous réserve de ratification)[1]

B^on^ F. COGELS

Pour la Birmanie :
For Burma:
Por Birmania:
За Бирму :

Pour la Bolivie :
For Bolivia:
Por Bolivia:
За Боливию :

Pour le Botswana :
For Botswana:
Por Botswana:
За Ботсвану :

Pour le Brésil :
For Brazil:
Por el Brasil:
За Бразилию :

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[1] Subject to ratification.

Pour la Bulgarie[1] :
For Bulgaria:[1]
Por Bulgaria:
За Болгарию :

V. CHIVAROV
11.I.1968 g.

Sous réserve de ratification. La République populaire de Bulgarie fait une déclaration sur la rédaction de l'article 5 de la Convention exprimée dans la note verbale sub. n° 31 du 11 janvier de l'Ambassade de Bulgarie à Stockholm présentée au Ministère des affaires étrangères du Royaume de Suède[2].

Pour le Burundi :
For Burundi:
Por Burundi:
За Бурунди :

Pour le Cambodge :
For Cambodia:
Por Camboya:
За Камбоджу :

Pour le Cameroun :
For Cameroon:
Por Camerún:
За Камерун :

(Sous réserve de ratification)[3]

D. EKANI

Pour le Canada :
For Canada:
Por Canadá:
За Канаду :

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[1] For the text of the declarations made upon signature, see p. 100 of this volume.

[2] [TRANSLATION — TRADUCTION] "Subject to ratification. The People's Republic of Bulgaria makes a declaration concerning the wording of article 5 of the Convention in note verbale No. 31 of 11 January from the Bulgarian Embassy at Stockholm addressed to the Ministry of Foreign Affairs of the Kingdom of Sweden."

[3] Subject to ratification.

[1] Pour le texte des déclarations faites lors de la signature, voir p. 100 du présent volume.

Pour Ceylan :
For Ceylon:
Por Ceilán:
За Цейлон :

Pour le Chili :
For Chile:
Por Chile:
За Чили :

Pour Chypre :
For Cyprus:
Por Chipre:
За Кипр :

Pour la Colombie :
For Colombia:
Por Colombia:
За Колумбию :

Pour le Congo (Brazzaville) :
For the Congo (Brazzaville):
Por el Congo (Brazzaville):
За Конго (Браззавиль) :

Pour le Congo (République démocratique du) :
For the Congo (Democratic Republic of):
Por el Congo (República Democrática del):
За Демократическую Республику Конго :

(Sous réserve de ratification)[1]

G. MULENDA

Pour le Costa Rica :
For Costa Rica:
Por Costa Rica:
За Коста-Рику :

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[1] Subject to ratification.

Pour la Côte d'Ivoire :
For the Ivory Coast:
Por la Costa de Marfil:
За Берег Слоновой Кости :

(Sous réserve de ratification)[1]

BILE

Pour Cuba :
For Cuba:
Por Cuba:
За Кубу :

Pour le Dahomey :
For Dahomey:
Por el Dahomey:
За Дагомею :

Pour le Danemark :
For Denmark:
Por Dinamarca:
За Данию :

(Sous réserve de ratification)[1]

J. PALUDAN

Pour El Salvador :
For el Salvador:
Por El Salvador:
За Сальвадор :

Pour l'Équateur :
For Ecuador:
Por el Ecuador:
За Эквадор :

(Sujeto a ratificación)[2]

E. SÁNCHEZ

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[1] Subject to ratification.
[2] Subject to ratification — Sous réserve de ratification.

Pour l'Espagne :
For Spain:
Por España:
За Испанию :

(*Ad referendum*)
J. F. ALCOVER
ELECTO J. GARCÍA TEJEDOR

Pour les États-Unis d'Amérique :
For the United States of America:
Por los Estados Unidos de América:
За Соединенные Штаты Америки :

(Subject to ratification)[1]
EUGENE M. BRADERMAN

Pour l'Éthiopie :
For Ethiopia:
Por Etiopía:
За Эфиопию :

Pour la Finlande :
For Finland:
Por Finlandia:
За Финляндию :

(Subject to ratification)[1]
PAUL GUSTAFSSON

Pour la France :
For France:
Por Francia:
За Францию :

(Sous réserve de ratification)[2]
B. DE MENTHON

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[1] Sous réserve de ratification.
[2] Subject to ratification.

Pour le Gabon :
For Gabon:
Por el Gabón:
За Габон :

(Sous réserve de ratification)[1]
J. F. OYOUÉ

Pour la Gambie :
For Gambia:
Por Gambia:
За Гамбию :

Pour le Ghana :
For Ghana:
Por Ghana:
За Гану :

Pour la Grèce :
For Greece:
Por Grecia:
За Грецию :

(*Ad referendum*)
J. A. DRACOULIS

Pour le Guatemala :
For Guatemala:
Por Guatemala:
За Гватемалу :

Pour la Guinée :
For Guinea:
Por Guinea:
За Гвинею :

Pour la Guyane :
For Guyana:
Por Guyana:
За Гвиану :

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[1] Subject to ratification.

Pour Haïti :
For Haiti:
Por Haití:
За Гаити :

Pour la Haute-Volta :
For the Upper Volta:
Por el Alto Volta:
За Верхнюю Вольту :

Pour le Honduras :
For Honduras:
Por Honduras:
За Гондурас :

Pour la Hongrie[1] :
For Hungary:[1]
Por Hungría:
За Венгрию :

(Subject to ratification)[2]
ESZTERGÁLYOS
12/1/1968

Pour les îles Maldives :
For the Maldive Islands:
Por las Islas Maldivas:
За Мальдивские Острова :

Pour l'Inde :
For India:
Por la India:
За Индию :

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[1] For the text of the declarations made upon signature, see p. 100 of this volume.

[1] Pour le texte des déclarations faites lors de la signature, voir p. 100 du présent volume.
[2] Sous réserve de ratification.

Pour l'Indonésie :
For Indonesia:
Por Indonesia:
За Индонезию :

(Subject to ratification)[1]

IBRAHIM JASIN

12th January 1968

Pour l'Irak :
For Iraq:
Por el Irak:
За Ирак :

Pour l'Iran :
For Iran:
Por el Irán:
За Иран :

(Sous réserve de ratification)[2]

A. DARAÏ

Pour l'Irlande :
For Ireland:
Por Irlanda:
За Ирландию :

VALENTIN IREMONGER

12 January 1968

Pour l'Islande :
For Iceland:
Por Islandia:
За Исландию :

(Subject to ratification)[1]

ARNI TRYGGVASON

Pour Israël :
For Israel:
Por Israel:
За Израиль :

(Subject to ratification)[1]

G. GAVRIELI

Z. SHER

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[1] Sous réserve de ratification.

[2] Subject to ratification.

Pour l'Italie :
For Italy:
Por Italia:
За Италию :

(Sous réserve de ratification)[1]

CIPPICO

GIORGIO RANZI

Pour la Jamaïque :
For Jamaica:
Por Jamaica:
За Ямайку :

Pour le Japon :
For Japan:
Por el Japón:
За Японию :

(Subject to ratification)[2]

M. TAKAHASHI

C. KAWADE

K. ADACHI

Pour la Jordanie :
For Jordan:
Por Jordania:
За Иорданию :

Pour le Kenya :
For Kenya:
Por Kenia:
За Кению :

(Subject to ratification)[2]

M. K. MWENDWA

Pour le Koweït :
For Kuwait:
Por Kuwait:
За Кувейт :

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[1] Subject to ratification.

[2] Sous réserve de ratification.

Pour le Laos :
For Laos:
Por Laos:
За Лаос :

Pour le Lesotho :
For Lesotho:
Por Lesotho:
За Лесото :

Pour le Liban :
For Lebanon:
Por el Líbano:
За Ливан :

Pour le Libéria :
For Liberia:
Por Liberia:
За Либерию :

Pour la Libye :
For Libya:
Por Libia:
За Ливию :

Pour le Liechtenstein :
For Liechtenstein:
Por Liechtenstein:
За Лихтенштейн :

(Subject to ratification)[1]
MARIANNE MARXER

Pour le Luxembourg :
For Luxembourg:
Por Luxemburgo:
За Люксембург :

(Sous réserve de ratification)[2]
J. P. HOFFMANN

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[1] Sous réserve de ratification.
[2] Subject to ratification.

Pour Madagascar :
For Madagascar:
Por Madagascar:
За Мадагаскар :

(Sous réserve de ratification)[1]
RATOVONDRIAKA

Pour la Malaisie :
For Malaysia:
Por Malasia:
За Малайскую Федерацию :

Pour le Malawi :
For Malawi:
Por Malawi:
За Малави :

Pour le Mali :
For Mali:
Por Malí:
За Мали :

Pour Malte :
For Malta:
Por Malta:
За Мальту :

Pour le Maroc :
For Morocco:
Por Marruecos:
За Марокко :

(Sous réserve de ratification)[1]
H'SSAINE

Pour la Mauritanie :
For Mauritania:
Por Mauritania:
За Мавританию :

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[1] Subject to ratification.

Pour le Mexique :
For Mexico:
Por México:
За Мексику :

(Bajo reserva de ratificación)[1]
E. Rojas y Benavides

Pour Monaco :
For Monaco:
Por Mónaco:
За Монако :

(Sous réserve de ratification)[2]
J. M. Notari

Pour la Mongolie :
For Mongolia:
Por Mongolia:
За Монголию :

Pour le Népal :
For Nepal:
Por Nepal:
За Непал :

Pour le Nicaragua :
For Nicaragua:
Por Nicaragua:
За Никарагуа :

Pour le Niger :
For Niger:
Por el Níger:
За Нигер :

(Sous réserve de ratification)[2]
A. Wright

Pour le Nigéria :
For Nigeria:
Por Nigeria:
За Нигерию :

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[1] Subject to ratification — Sous réserve de ratification.
[2] Subject to ratification.

Pour la Norvège :
For Norway:
Por Noruega:
За Норвегию :

(Subject to ratification)[1]

JENS EVENSEN

B. STUEVOLD LASSEN

Pour la Nouvelle-Zélande :
For New Zealand:
Por Nueva Zelandia:
За Новую Зеландию :

Pour l'Ouganda :
For Uganda:
Por Uganda:
За Уганду :

Pour le Pakistan :
For Pakistan:
Por el Pakistán:
За Пакистан :

Pour le Panama :
For Panama:
Por Panamá:
За Панаму :

Pour le Paraguay :
For Paraguay:
Por el Paraguay:
За Парагвай :

Pour les Pays-Bas :
For the Netherlands:
Por los Países Bajos:
За Нидерланды :

(Sous réserve de ratification)[2]

GERBRANDY

W. G. BELINFANTE

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[1] Sous réserve de ratification.

[2] Subject to ratification.

Pour le Pérou :
For Peru:
Por el Perú:
За Перу :

(*Ad referendum*)
J. FERNÁNDEZ DÁVILA

Pour les Philippines :
For the Philippines:
Por Filipinas:
За Филиппины :

(Subject to ratification)[1]
LAURO BAJA

Pour la Pologne[2] :
For Poland:[3]
Por Polonia:
За Польшу :

(Sous réserve de ratification)[4]
M. KAJZER
10 janvier 1968

Sous réserve de ratification ultérieure et avec la déclaration faite dans la note du 10 janvier 1968 de l'Ambassade de la République populaire de Pologne à Stockholm[5].

Pour le Portugal :
For Portugal:
Por Portugal:
За Португалию :

(Sous réserve de ratification)[4]
ADRIANO DE CARVALHO
JOSÉ DE OLIVEIRA ASCENSÃO
RUY ÁLVARO COSTA DE MORAIS SERRÃO

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[1] Sous réserve de ratification.

[2] Pour le texte des déclarations faites lors de la signature, voir p. 100 du présent volume.

[3] For the text of the declarations made upon signature, see p. 100 of this volume.

[4] Subject to ratification.

[5] [TRANSLATION — TRADUCTION] "Subject to subsequent ratification and to the declaration contained in the note of 10 January 1968 from the Embassy of the Polish People's Republic at Stockholm."

Pour la République arabe unie :
For the United Arab Republic:
Por la República Arabe Unida:
За Объединенную Арабскую Республику :

Pour la République centrafricaine :
For the Central African Republic:
Por la República Centroafricana:
За Центральноафриканскую Республику :

(Sous réserve de ratification)[1]

L. P. GAMBA

Pour la République de Corée :
For the Republic of Korea:
Por la República de Corea:
За Корейскую Республику :

Pour la République Dominicaine :
For the Dominican Republic:
Por la República Dominicana:
За Доминиканскую Республику :

Pour la République fédérale d'Allemagne :
For the Federal Republic of Germany:
Por la República Federal de Alemania:
За Федеративную Республику Германии :

(Sous réserve de ratification)[1]

KURT HAERTEL
EUGEN ULMER

Pour la République socialiste soviétique de Biélorussie[2] :
For the Byelorussian Soviet Socialist Republic:[2]
Por la República Socialista Soviética de Bielorrusia:
За Белорусскую Советскую Социалистическую Республику :

Конвенция подлежит дальнейшей ратификации.
МАЛЬЦЕВ
16. XI. 1967 г.[3]

---

[1] Subject to ratification.

[2] For the text of the declarations made upon signature, see p. 100 of this volume.

[3] [TRANSLATION*—TRADUCTION**] The Convention is subject to subsequent ratification. V. Maltsev 16.XI.1967

* Translation supplied by the World Intellectual Property Organization.

** Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[2] Pour le texte des déclarations faites lors de la signature, voir p. 100 du présent volume.

[3] [TRADUCTION] La Convention est signée sous réserve de ratification ultérieure. V. Maltsev 16.XI.1967

Pour la République socialiste soviétique d'Ukraine[1] :
For the Ukrainian Soviet Socialist Republic:[1]
Por la República Socialista Soviética de Ucrania:
За Украинскую Советскую Социалистическую Республику :

Конвенция подлежит последующей ратификации Президиумом Верховного Совета Украинской Советской Социалистической Республики.
МАЛЬЦЕВ
16. XI. 1967 г.[2]

Pour la République unie de Tanzanie :
For the United Republic of Tanzania:
Por la República Unida de Tanzania:
За Объединенную Республику Танзания :

Pour la République du Viet-Nam :
For the Republic of Viet-Nam:
Por la República de Viet-Nam:
За Республику Вьетнам :

Pour la Roumanie :
For Romania:
Por Rumania:
За Румынию :

(Sous réserve de ratification)[3]
C. STANESCU
L. MARINETE
T. PREDA

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :
For the United Kingdom of Great Britain and Northern Ireland:
Por el Reino Unido de Gran Bretaña e Irlanda del Norte:
За Соединенное Королевство Великобритании и Северной Ирландии :

(Subject to ratification)[4]
GORDON GRANT
WILLIAM WALLACE

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[1] For the texts of the declarations made upon signature, see p. 100 of this volume.

[2] [TRANSLATION* — TRADUCTION**] The Convention is subject to subsequent ratification by the Presidium of the Supreme Council of the Ukrainian Soviet Socialist Republic. V. Maltsev 16.XI.1967

* Translation supplied by the World Intellectual Property Organization.

** Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[3] Subject to ratification.

[4] Sous réserve de ratification.

[1] Pour les textes des déclarations faites lors de la signature, voir p. 100 du présent volume.

[2] [TRADUCTION] La Convention est signée sous réserve de ratification ultérieure par le Présidium du Conseil suprême de la République socialiste soviétique d'Ukraine. V. Maltsev 16.XI.1967

Pour le Rwanda :
For Rwanda:
Por Rwanda:
За Руанду :

Pour Saint-Marin :
For San Marino:
Por San Marino:
За Сан-Марино :

Pour le Saint-Siège :
For the Holy See:
Por la Santa Sede:
За Ватикан :

(Sous réserve de ratification)[1]
GUNNAR STERNER

Pour le Samoa Occidental :
For Western Samoa:
Por Samoa Occidental:
За Западное Самоа :

Pour le Sénégal :
For Senegal:
Por Senegal:
За Сенегал :

(Sous réserve de ratification)[1]
A. SECK

Pour le Sierra Leone :
For Sierra Leone:
Por Sierra Leona:
За Сьерра-Леоне :

Pour Singapour :
For Singapore:
Por Singapur:
За Сингапур :

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[1] Subject to ratification.

Pour la Somalie :
For Somalia:
Por Somalia:
За Сомали :

Pour le Soudan :
For the Sudan:
Por el Sudán:
За Судан :

Pour la Suède :
For Sweden:
Por Suecia:
За Швецию :

(Sous réserve de ratification)[1]

HERMAN KLING

Pour la Suisse :
For Switzerland:
Por Suiza:
За Швейцарию :

(Sous réserve de ratification)[1]

HANS MORF

JOSEPH VOYAME

Pour la Syrie :
For Syria:
Por Siria:
За Сирию :

Pour le Tchad :
For Chad:
Por el Chad:
За Чад :

Pour la Tchécoslovaquie :
For Czechoslovakia:
Por Checoslovaquia:
За Чехословакию :

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[1] Subject to ratification.

Pour la Thaïlande :
For Thailand:
Por Tailandia:
За Таиланд :

Pour le Togo :
For Togo:
Por el Togo:
За Того :

Pour la Trinité-et-Tobago :
For Trinidad and Tobago:
Por Trinidad y Tabago:
За Тринидад и Тобаго :

Pour la Tunisie :
For Tunisia:
Por Túnez:
За Тунис :

(Sous réserve de ratification)[1]
M. KEDADI

Pour la Turquie :
For Turkey:
Por Turquía:
За Турцию :

Pour l'Union des Républiques socialistes soviétiques[2] :
For the Union of Soviet Socialist Republics:[2]
Por la Unión de Repúblicas socialistas soviéticas:
За Союз Советских Социалистических Республик :

Указанная Конвенция подлежит последующей ратификации Союзом Советских Социалистических Республик.
МАЛЬЦЕВ
12. X. 1967 г.[3]

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[1] Subject to ratification.

[2] For the text of the declarations made upon signature, see p. 100 of this volume.

[3] [TRANSLATION*—TRADUCTION**] The mentioned Convention is liable to be subsequently ratified by the Union of Soviet Socialist Republics. V. Maltsev 12.X.67

* Translation supplied by the World Intellectual Property Organization.

** Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[2] Pour le texte des déclarations faites lors de la signature, voir p. 100 du présent volume.

[3] [TRADUCTION* — TRANSLATION**] La Convention mentionnée est appelée à être ratifiée ultérieurement par l'Union des Républiques socialistes soviétiques. V. Maltsev 12.X.67

* Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

** Translation supplied by the World Intellectual Property Organization.

Pour l'Uruguay :
For Uruguay:
Por el Uruguay:
За Уругвай :

Pour le Venezuela :
For Venezuela:
Por Venezuela:
За Венесуэлу :

Pour la Yougoslavie :
For Yugoslavia:
Por Yugoslavia:
За Югославию :

(Sous réserve de ratification)[1]
A. JELIĆ

Pour la Zambie :
For Zambia:
Por Zambia:
За Замбию :

new page

DECLARATIONS MADE UPON SIGNATURE

BULGARIA

[TRANSLATION[2] — TRADUCTION[3]]

The People's Republic of Bulgaria considers it necessary to stress that the wording of article 5 of the Convention Establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967, is of a discriminatory nature because it bars a certain number of States from becoming party to that Convention. The article is clearly contrary to the nature of the World Intellectual Property Organization that is

DÉCLARATIONS FAITES LORS DE LA SIGNATURE

BULGARIE

« La République populaire de Bulgarie estime nécessaire de souligner que la rédaction de l'article 5 de la Convention instituant l'Organisation mondiale de la propriété intellectuelle signée à Stockholm le 14 juillet 1967 a un caractère discriminatoire car il exclut la possibilité, pour un certain nombre d'Etats, de devenir parties de cette Convention.

« Cet article est nettement contraire au caractère de l'Organisation mondiale

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[1] Subject to ratification.

[2] Translation supplied by the World Intellectual Property Organization.

[3] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

being established, the objective of which is to unite the efforts of all States for the purposes of protecting intellectual property and of regulating the questions in that field which are of concern to all countries.

The People's Republic of Bulgaria therefore feels that participation in conventions of this type should be open, without restriction, to all States, in conformity with the principles of the sovereign equality of States.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[ENGLISH TEXT][1]

Byelorussian Soviet Socialist Republic declares that the Convention on establishment of the Intellectual Property World Organization regulates questions, concerning the interests of all countries and must therefore be open for participation of all the States in correspondance with the principle of their sovereign equality.

HUNGARY

[TRANSLATION[2] — TRADUCTION[3]]

At the time of the signing of the Convention Establishing the World Intellectual Property Organization, the Government of the Hungarian People's Repub-

de la propriété intellectuelle qui est instituée et dont l'objectif est d'unir les efforts de tous les Etats en vue de la protection de la propriété intellectuelle et de réglementer les questions touchant les intérêts de tous les pays dans ce domaine.

« Aussi la République populaire de Bulgarie estime-t-elle que des conventions de ce genre devraient être ouvertes à la participation de tous les Etats sans restriction aucune, en conformité avec les principes de l'égalité souveraine des Etats. »

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[TRADUCTION — TRANSLATION][1]

La République socialiste soviétique de Biélorussie déclare que la Convention instituant l'Organisation mondiale de la propriété intellectuelle réglemente des questions qui ont trait aux intérêts de tous les pays; pour cette raison, la Convention devrait être ouverte à la participation de tous les Etats conformément au principe de leur souveraineté et de leur égalité.

HONGRIE

« Lors de la signature de la Convention instituant l'Organisation mondiale de la propriété intellectuelle, le Gouvernement de la République populaire hon-

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[1] The declaration was made orally in Russian upon signature and the English text handed to the Government of Sweden by the Soviet Ambassador in Stockholm. (Information provided by the Government of Sweden.)

[2] Translation supplied by the World Intellectual Property Organization.

[3] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[1] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle — Translation supplied by the World Intellectual Property Organization. La déclaration orale était prononcée en russe lors de la signature et le texte anglais transmis au Gouvernement suédois par l'Ambassadeur soviétique à Stockholm. (Renseignement fourni par le Gouvernement suédois.)

lic wishes to make the following declaration: Inasmuch as the Convention Establishing the World Intellectual Property Organization has the character of a universal international convention which concerns the interests of all States, any State has the right, on the basis of the principle of the sovereign equality of States, to become party to the Convention.

POLAND

[TRANSLATION[1] — TRADUCTION[2]]

When signing the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, the Polish People's Republic made the following declaration: In order that the World Intellectual Property Organization may become really universal and so that it may perform its duties as set out in the preamble of the Convention, it must be open to all States wishing to accede to it and to accept its provisions.

groise désire faire la déclaration suivante : la Convention instituant l'Organisation mondiale de la propriété intellectuelle ayant le caractère d'une convention internationale universelle qui concerne les intérêts de tous les Etats, tout Etat se trouve en droit, sur la base du principe de l'égalité souveraine des Etats, d'être partie à la Convention. »

POLOGNE

« En signant la Convention instituant l'Organisation mondiale de la propriété intellectuelle, signée à Stockholm, le 14 juillet 1967, la République populaire de Pologne fait la déclaration suivante : Afin que l'Organisation mondiale de la propriété intellectuelle devienne réellement universelle et qu'elle puisse remplir ses devoirs formulés dans le préambule de la Convention, elle doit être ouverte à tous les Etats qui désirent y adhérer et accepter ses dispositions. »

UKRAINIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[UKRAINIAN TEXT — TEXTE UKRAINIEN]

« Українська Радянська Соціалістична Республіка заявляє, що Конвенція, яка засновує Всесвітню організацію інтелектуальної власності, регулює питання, що торкаються інтересів усіх країн, і тому вона повинна бути відкрита для участі всіх держав у відповідності з принципом їх суверенної рівності».

[TRANSLATION — TRADUCTION][3]

Ukrainian Soviet Socialist Republic declares that the Convention on estab-

[TRADUCTION — TRANSLATION][1]

La République socialiste soviétique d'Ukraine déclare que la Convention

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[1] Translation supplied by the World Intellectual Property Organization.

[2] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[3] Translation supplied by the Government of the Union of Soviet Socialist Republics — Traduction fournie par le Gouvernement de l'Union des Républiques socialistes soviétiques.

[1] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle — Translation supplied by the World Intellectual Property Organization.

lishment of the Intellectual Property World Organization regulates questions, concerning the interests of all countries and must therefore be open for participation of all the states in correspondance with the principle of their sovereign equality.

instituant l'Organisation mondiale de la propriété intellectuelle réglemente des questions qui ont trait aux intérêts de tous les pays; pour cette raison, la Convention devrait être ouverte à la participation de tous les Etats conformément au principe de leur souveraineté et de leur égalité.

UNION OF SOVIET SOCIALIST REPUBLICS

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

Союз Советских Социалистических Республик заявляет, что Конвенция, учреждающая Всемирную организацию интеллектуальной собственности, регулирует вопросы, затрагивающие интересы всех стран, и поэтому она должна быть открыта для участия всех государств в соответствии с принципом их суверенного равенства.

[TRANSLATION — TRADUCTION][1]

The Union of Soviet Socialist Republics declares that the Convention, which establishes the World Intellectual Property Organization, regulates questions which concern the interests of all countries and for that reason it should be open for participation by all States in accordance with the principle of their sovereignty and equality.

[TRADUCTION — TRANSLATION][1]

L'Union des Républiques socialistes soviétiques déclare que la Convention instituant l'Organisation mondiale de la propriété intellectuelle réglemente des questions qui ont trait aux intérêts de tous les pays; pour cette raison, la Convention devrait être ouverte à la participation de tous les Etats conformément au principe de leur souveraineté et de leur égalité.

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[1] Translation supplied by the Government of the Union of Soviet Socialist Republics — Traduction fournie par le Gouvernement de l'Union des Républiques socialistes soviétiques.

[1] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle — Translation supplied by the World Intellectual Property Organization.

DECLARATIONS MADE UPON RATIFICATION OR ACCESSION

DÉCLARATIONS FAITES LORS DE LA RATIFICATION OU DE L'ADHÉSION

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[RUSSIAN TEXT — TEXTE RUSSE]

«Белорусская Советская Социалистическая Республика заявляет, что Конвенция, учреждающая Всемирную организацию интеллектуальной собственности, регулирует вопросы, затрагивающие интересы всех стран, и поэтому она должна быть открыта для участия всех государств в соответствии с принципом их суверенного равенства».

[TRANSLATION][1]

The Byelorussian Soviet Socialist Republic declares that the Convention Establishing the World Intellectual Property Organization regulates questions concerning the interests of all countries; and that is why it must be open to participation of all States, in accordance with the principle of their sovereign equality.

[TRADUCTION][2]

La République socialiste soviétique de Biélorussie déclare que la Convention instituant l'Organisation mondiale de la propriété intellectuelle règle les problèmes qui touchent les intérêts de tous les pays et, par conséquent, cette Convention doit être ouverte à la participation de tous les Etats conformément au principe de leur égalité souveraine.

CZECHOSLOVAKIA

"Contrary to the principle of sovereign equality of States and to the right of all States to participate in General multilateral treaties, article 5 concerning the membership in the organisation deprives certain States of their undeniable right to become parties to a Treaty of general character, concerning matters of legitimate interest of any State which should contribute to the development of friendly relations among nations irrespective of their differing constitutional and social systems."

TCHÉCOSLOVAQUIE

[TRADUCTION[2] — TRANSLATION[1]]

Contrairement au principe de l'égalité souveraine des Etats et au droit de tous les Etats à participer aux traités multilatéraux généraux, l'article 5, relatif à la qualité de membre de l'Organisation, prive certains Etats de leur droit indéniable de devenir parties à un traité de caractère général qui règle les questions présentant un intérêt légitime pour chaque Etat et qui devrait contribuer au développement des relations amicales entre les nations, indépendamment de leurs différences constitutionnelles et de leurs systèmes sociaux.

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[1] Translation supplied by the World Intellectual Property Organization.

[2] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

ROMANIA

[TRANSLATION[1] — TRADUCTION[2]]

The provisions of articles 5 and 14(1) of the Convention Establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967, are not in accordance with the principle of universality of treaties, by which all States have the right to become parties to multilateral treaties regulating questions of general interest.

ROUMANIE

« Les dispositions des articles 5 et 14.1 de la Convention instituant l'Organisation mondiale de la propriété intellectuelle, signée à Stockholm le 14 juillet 1967, ne sont pas en concordance avec le principe de l'universalité des traités, selon lequel tous les Etats ont le droit de devenir parties aux traités multilatéraux réglementant les questions d'intérêt général. »

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[1] Translation supplied by the World Intellectual Property Organization.

[2] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

Forrest-029

ANNEX 1C

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

PART I

GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[1] In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.[2] Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

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[1] When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

[2] In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[3] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

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[3] For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

Article 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II

STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: COPYRIGHT AND RELATED RIGHTS

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Article 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

SECTION 2: TRADEMARKS

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or

services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Article 17

Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 18

Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 21

Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

SECTION 3: GEOGRAPHICAL INDICATIONS

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

   (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

   (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.[4]

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

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[4] Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (*a*) for at least 10 years preceding 15 April 1994 or (*b*) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

SECTION 4: INDUSTRIAL DESIGNS

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least 10 years.

SECTION 5: PATENTS

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[5] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

   (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

   (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The

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[5] For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

    (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing[6] for these purposes that product;

    (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

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[6] This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use[7] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

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[7] "Other use" refers to use other than that allowed under Article 30.

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

  (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

  (ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

  (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article 32

Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

Article 33

Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.[8]

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

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[8] It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

(a) if the product obtained by the patented process is new;

(b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

SECTION 6: LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

Article 35

Relation to the IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder:[9] importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

Article 37

Acts Not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum

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[9] The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

Article 38

Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices[10] so long as such information:

   (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

   (b) has commercial value because it is secret; and

   (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against

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[10] For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

PART III

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 42

Fair and Equitable Procedures

Members shall make available to right holders[11] civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against

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[11] For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

   (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

   (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a

reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES[12]

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures[13] to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods[14] may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are

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[12] Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

[13] It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

[14] For the purposes of this Agreement:

(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52

Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

Article 55

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60

De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

PART IV

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED *INTER-PARTES* PROCEDURES

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

PART V

DISPUTE PREVENTION AND SETTLEMENT

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful.

The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

PART VI

TRANSITIONAL ARRANGEMENTS

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 66

Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Article 67

Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

PART VII

INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

Article 68

Council for Trade-Related Aspects of Intellectual Property Rights

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were

commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article 71

Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals

thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

Article 72

Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

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WIPO
WORLD INTELLECTUAL PROPERTY ORGANIZATION

Paris Convention for the Protection of Industrial Property

of March 20, 1883,
as revised at Brussels on December 14, 1900,
at Washington on June 2, 1911,
at The Hague on November 6, 1925,
at London on June 2, 1934,
at Lisbon on October 31, 1958,
and at Stockholm on July 14, 1967,
and as amended on September 28, 1979

TABLE OF CONTENTS[1]

Article 1
Establishment of the Union; Scope of Industrial Property[2]

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

Article 2
National Treatment for Nationals of Countries of the Union

(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

(2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.

Article 3
Same Treatment for Certain Categories of Persons as for Nationals of Countries of the Union

Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.

Article 4
A to I. Patents, Utility Models, Industrial Designs, Marks, Inventors’ Certificates: *Right of Priority*
G. Patents: *Division of the Application*

A.

(1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B. Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union

C.

(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks.

(2) These periods shall start from the date of filing of the first application; the day of filing shall not be included in the period.

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

(4) A subsequent application concerning the same subject as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union shall be considered as the first application, of which the filing date shall be the starting point of the period of priority, if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority. The previous application may not thereafter serve as a basis for claiming a right of priority.

D.

(1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation.

(4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.

(5) Subsequently, further proof may be required.

Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2), above.

E.

(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model, the period of priority shall be the same as that fixed for industrial designs.

(2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa.

F. No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple priorities, even if they originate in different countries, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed, provided that, in both cases, there is unity of invention within the meaning of the law of the country.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions.

G.

(1) If the examination reveals that an application for a patent contains more than one invention, the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any.

(2) The applicant may also, on his own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.

H. Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

I.

(1) Applications for inventors' certificates filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate shall give rise to the right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate.

Article 4*bis*
Patents: *Independence of Patents Obtained for the Same Invention in Different Countries*

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

(3) The provision shall apply to all patents existing at the time when it comes into effect.

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession.

(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority.

Article 4*ter*
Patents: *Mention of the Inventor in the Patent*

The inventor shall have the right to be mentioned as such in the patent.

Article 4*quater*
Patents: *Patentability in Case of Restrictions of Sale by Law*

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

Article 5

A. Patents: *Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses*
B. Industrial Designs: *Failure to Work; Importation of Articles*
C. Marks: *Failure to Use; Different Forms; Use by Co-proprietors*
D. Patents, Utility Models, Marks, Industrial Designs: *Marking*

A.

(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.

B. The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected.

C.

(1) If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.

(2) Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.

(3) Concurrent use of the same mark on identical or similar goods by industrial or commercial establishments considered as co-proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed shall not prevent registration or diminish in any way the protection granted to the said mark in any country of the Union, provided that such use does not result in misleading the public and is not contrary to the public interest.

D. No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.

Article 5*bis*

All Industrial Property Rights: *Period of Grace for the Payment of Fees for the Maintenance of Rights*;

Patents: *Restoration*

(1) A period of grace of not less than six months shall be allowed for the payment of the fees prescribed for the maintenance of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.

(2) The countries of the Union shall have the right to provide for the restoration of patents which have lapsed by reason of non-payment of fees.

Article 5*ter*

Patents: *Patented Devices Forming Part of Vessels, Aircraft, or Land Vehicles*

In any country of the Union the following shall not be considered as infringements of the rights of a patentee:

> (i) the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel;
>
> (ii) the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.

Article 5*quater*

Patents: *Importation of Products Manufactured by a Process Patented in the Importing Country*

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Article 5*quinquies*

Industrial Designs

Industrial designs shall be protected in all the countries of the Union.

Article 6

Marks: *Conditions of Registration; Independence of Protection of Same Mark in Different Countries*

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.

(2) However, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin.

(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

Article 6*bis*

Marks: *Well-Known Marks*

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

Article 6*ter*

Marks: *Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations*

(1)

(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph *(a)*, above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph *(b)*, above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph *(a)*, above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

(3)

(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. Nevertheless such communication is not obligatory in respect of flags of States.

(b) The provisions of subparagraph *(b)* of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6*quinquies*, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above.

Article 6*quater*
Marks: *Assignment of Marks*

(1) When, in accordance with the law of a country of the Union, the assignment of a mark is valid only if it takes place at the same time as the transfer of the business or goodwill to which the mark belongs, it shall suffice for the recognition of such validity that the portion of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the goods bearing the mark assigned.

(2) The foregoing provision does not impose upon the countries of the Union any obligation to regard as valid the assignment of any mark the use of which by the assignee would, in fact, be of such a nature as to mislead the public, particularly as regards the origin, nature, or essential qualities, of the goods to which the mark is applied.

Article 6*quinquies*
Marks: *Protection of Marks Registered in One Country of the Union in the Other Countries of the Union*

A.

(1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

(i) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;

(ii) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;

(iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10*bis*.

C.

(1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D. No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.

E. However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F. The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

Article 6*sexies*
Marks: *Service Marks*

The countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks.

Article 6*septies*
Marks: *Registration in the Name of the Agent or Representative of the Proprietor Without the Latter's Authorization*

(1) If the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favor of the said registration, unless such agent or representative justifies his action.

(2) The proprietor of the mark shall, subject to the provisions of paragraph (1), above, be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use.

(3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article.

Article 7
Marks: *Nature of the Goods to which the Mark is Applied*

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

Article 7*bis*
Marks: *Collective Marks*

(1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.

(2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.

(3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Article 8
Trade Names

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

Article 9
Marks, Trade Names: *Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name*

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10
False Indications: *Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer*

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10*bis*
Unfair Competition

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of

unfair competition.

(3) The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Article 10*ter*

Marks, Trade Names, False Indications, Unfair Competition: *Remedies, Right to Sue*

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*.

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10*bis*, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

Article 11

Inventions, Utility Models, Industrial Designs, Marks: *Temporary Protection at Certain International Exhibitions*

(1) The countries of the Union shall, in conformity with their domestic legislation, grant temporary protection to patentable inventions, utility models, industrial designs, and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them.

(2) Such temporary protection shall not extend the periods provided by Article 4. If, later, the right of priority is invoked, the authorities of any country may provide that the period shall start from the date of introduction of the goods into the exhibition.

(3) Each country may require, as proof of the identity of the article exhibited and of the date of its introduction, such documentary evidence as it considers necessary.

Article 12

Special National Industrial Property Services

(1) Each country of the Union undertakes to establish a special industrial property service and a central office for the communication to the public of patents, utility models, industrial designs, and trademarks.

(2) This service shall publish an official periodical journal. It shall publish regularly:

(a) the names of the proprietors of patents granted, with a brief designation of the inventions patented;

(b) the reproductions of registered trademarks.

Article 13
Assembly of the Union

(1)

(a) The Union shall have an Assembly consisting of those countries of the Union which are bound by Articles 13 to 17.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2)

(a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as “the International Bureau”) referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as “the Organization”), due account being taken of any comments made by those countries of the Union which are not hound by Articles 13 to 17;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the biennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii) establish such committees of experts and working groups as it deems appropriate to achieve the objectives of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international nongovernmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 13 to 17;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) perform such other functions as are appropriate under this Convention;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3)

(a) Subject to the provisions of subparagraph *(b)*, a delegate may represent one country only.

(b) Countries of the Union grouped under the terms of a special agreement in a common office possessing for each of them the character of a special national service of industrial property as referred to in Article 12 may be jointly represented during discussions by one of their number.

(4)

(a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph *(b)*, if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions, set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 17(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(5)

(a) Subject to the provisions of subparagraph *(b)*, a delegate may vote in the name of one country only.

(b) The countries of the Union referred to in paragraph (3)*(b)* shall, as a general rule, endeavor to send their own delegations to the sessions of the Assembly. If, however, for exceptional reasons, any such country cannot send its own delegation, it may give to the delegation of another such country the power to vote in its name, provided that each delegation may vote by proxy for one country only. Such power to vote shall be granted in a document signed by the Head of State or the competent Minister.

(6) Countries of the Union not members of the Assembly shall be admitted to the meetings of the latter as observers.

(7)

(a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(8) The Assembly shall adopt its own rules of procedure.

Article 14
Executive Committee

(1) The Assembly shall have an Executive Committee.

(2)

(a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 16(7)*(b)*, have an ex officio seat on the Committee.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements established in relation with the Union to be among the countries constituting the Executive Committee.

(5)

(a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected, but only up to a maximum of two-thirds of such members.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(6)

(a) The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly in respect of the draft program and biennial budget of the Union prepared by the Director General;

(iii) *[deleted]*

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) take all necessary measures to ensure the execution of the program of the Union by the Director General, in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(7)

(a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8)

(a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers.

(10) The Executive Committee shall adopt its own rules of procedure.

Article 15
International Bureau

(1)

(a) Administrative tasks concerning the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Literary and Artistic Works.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union.

(2) The International Bureau shall assemble and publish information concerning the protection of industrial property. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of industrial property. Furthermore, it shall furnish the International Bureau with all the publications of its industrial property service of direct concern to the protection of industrial property which the International Bureau may find useful in its work.

(3) The International Bureau shall publish a monthly periodical.

(4) The International Bureau shall, on request, furnish any country of the Union with information on matters concerning the protection of industrial property.

(5) The International Bureau shall conduct Studies, and shall provide services, designed to facilitate the protection of industrial property.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee, and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7)

(a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee, make the preparations for the conferences of revision of the provisions of the Convention other than Articles 13 to 17.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences.

(8) The International Bureau shall carry out any other tasks assigned to it.

Article 16
Finances

(1)

(a) The Union shall have a budget.

(b) The budget of the Union shall include the income and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Union shall be financed from the following sources:

(i) contributions of the countries of the Union;

(ii) fees and charges due for services rendered by the International Bureau in relation to the Union;

(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union;

(iv) gifts, bequests, and subventions;

(v) rents, interests, and other miscellaneous income.

(4)

(a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows[3]:

Class I 25

Class II 20

Class III 15

Class IV 10

Class V 5

Class VI 3

Class VII 1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce such change to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the said session.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions may not exercise its right to vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its right to vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, as provided in the financial regulations.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General.

(6)

(a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, the Assembly shall decide to increase it.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the decision to increase it is made.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7)

(a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee.

(b) The country referred to in subparagraph *(a)* and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

Article 17
Amendment of Articles 13 to 17

(1) Proposals for the amendment of Articles 13, 14, 15, 16, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment to Article 13, and to the present paragraph, shall require four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment.

Article 18
Revision of Articles 1 to 12 and 18 to 30

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

(2) For that purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.

(3) Amendments to Articles 13 to 17 are governed by the provisions of Article 17.

Article 19
Special Agreements

It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.

Article 20
Ratification or Accession by Countries of the Union; Entry Into Force

(1)

(a) Any country of the Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it. Instruments of ratification and accession shall be deposited with the Director General.

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply:

(i) to Articles 1 to 12, or

(ii) to Articles 13 to 17.

(c) Any country of the Union which, in accordance with subparagraph *(b)*, has excluded from the effects of its ratification or accession one of the two groups of Articles referred to in that subparagraph may at any later time declare that it extends the effects of its ratification or accession to that group of Articles. Such declaration shall be deposited with the Director General.

(2)

(a) Articles 1 to 12 shall enter into force, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)*(b)*(i), three months after the deposit of the tenth such instrument of ratification or accession.

(b) Articles 13 to 17 shall enter into force, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)*(b)*(ii), three months after the deposit of the tenth such instrument of ratification or accession.

(c) Subject to the initial entry into force, pursuant to the provisions of subparagraphs *(a)* and *(b)*, of each of the two groups of Articles referred to in paragraph (1)*(b)*(i) and (ii), and subject to the provisions of paragraph (1)*(b)*, Articles 1 to 17 shall, with respect to any country of the Union, other than those referred to in subparagraphs *(a)* and *(b)*, which deposits an instrument of ratification or accession or any country of the Union which deposits a declaration pursuant to paragraph (1)*(c)*, enter into force three months after the date of notification by the Director General of such deposit, unless a subsequent date has been indicated in the instrument or declaration deposited. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country of the Union which deposits an instrument of ratification or accession, Articles 18 to 30 shall enter into force on the earlier of the dates on which any of the groups of Articles referred to in paragraph (1)*(b)* enters into force with respect to that country pursuant to paragraph (2)*(a)*, *(b)*, or *(c)*.

Article 21
Accession by Countries Outside the Union; Entry Into Force

(1) Any country outside the Union may accede to this Act and thereby become a member of the Union. Instruments of accession shall be deposited with the Director General.

(2)

(a) With respect to any country outside the Union which deposits its instrument of accession one month or more before the date of entry into force of any provisions of the present Act, this Act shall enter into force, unless a subsequent date has been indicated in the instrument of accession, on the date upon which provisions first enter into force pursuant to Article 20(2)*(a)* or *(b)*; provided that:

(i) if Articles 1 to 12 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 1 to 12 of the Lisbon Act,

(ii) if Articles 13 to 17 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 13 and 14 (3), (4), and (5), of the Lisbon Act.

If a country indicates a subsequent date in its instrument of accession, this Act shall enter into force with respect to that country on the date thus indicated.

(b) With respect to any country outside the Union which deposits its instrument of accession on a date which is subsequent to, or precedes by less than one month, the entry into force of one group of Articles of the present Act, this Act shall, subject to the proviso of subparagraph *(a)*, enter into force three months after the date on

which its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country outside the Union which deposits its instrument Of accession after the date of entry into force of the present Act in its entirety, or less than one month before such date, this Act shall enter into force three months after the date on which its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

Article 22
Consequences of Ratification or Accession

Subject to the possibilities of exceptions provided for in Articles 20(1)*(b)* and 28(2), ratification or accession shall automatically entail acceptance of all the clauses and admission to all the advantages of this Act.

Article 23
Accession to Earlier Acts

After the entry into force of this Act in its entirety, a country may not accede to earlier Acts of this Convention.

Article 24
Territories

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification any time thereafter, that this Convention shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories.

(3)

(a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in the instrument of which it was included, and any notification given under such paragraph shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

Article 25
Implementation of the Convention on the Domestic Level

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Article 26
Denunciation

(1) This Convention shall remain in force without limitation as to time.

(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of all earlier Acts and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union.

Article 27
Application of Earlier Acts

(1) The present Act shall, as regards the relations between the countries to which it applies, and to the extent that it applies, replace the Convention of Paris of March 20, 1883 and the subsequent Acts of revision.

(2)

> *(a)* As regards the countries to which the present Act does not apply, or does not apply in its entirety, but to which the Lisbon Act of October 31, 1958, applies, the latter shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).
>
> *(b)* Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act applies, the London Act of June 2, 1934, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).
>
> *(c)* Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act, nor the London Act applies, the Hague Act of November 6, 1925, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(3) Countries outside the Union which become party to this Act shall apply it with respect to any country of the Union not party to this Act or which, although party to this Act, has made a declaration pursuant to Article 20(1)*(b)*(i). Such countries recognize that the said country of the Union may apply, in its relations with them, the provisions of the most recent Act to which it is party.

Article 28
Disputes

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

Article 29
Signature, Languages, Depositary Functions

(1)

(a) This Act shall be signed in a single copy in the French language and shall be deposited with the Government of Sweden.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the English, German, Italian, Portuguese, Russian and Spanish languages, and such other languages as the Assembly may designate.

(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.

(2) This Act shall remain open for signature at Stockholm until January 13, 1968.

(3) The Director General shall transmit two copies, certified by the Government of Sweden, of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country.

(4) The Director General shall register this Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Article 20(1)*(c)*, entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Article 24.

Article 30
Transitional Provisions

(1) Until the first Director General assumes office, references in this Act to the International Bureau of the Organization or to the Director General shall be deemed to be references to the Bureau of the Union or its Director, respectively.

(2) Countries of the Union not bound by Articles 13 to 17 may, until five years after the entry into force of the Convention establishing the Organization, exercise, if they so desire, the rights provided under Articles 13 to 17 of this Act as if they were bound by those Articles. Any country desiring to exercise such rights shall give written notification to that effect to the Director General; such notification shall be effective from the date of its receipt. Such countries shall be deemed to be members of the Assembly until the expiration of the said period.

(3) As long as all the countries of the Union have not become Members of the Organization, the International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau.

(4) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization.

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[1] This Table of Contents is added for the convenience of the reader. It does not appear in the signed text of the Convention.

[2] Articles have been given titles to facilitate their identification. There are no titles in the signed (French) text.

[3] The Governing Bodies of WIPO and the Unions administered by WIPO adopted with effect from January 1, 1994, a new contribution system that replaces the contribution system set forth in Article 16(4)*(a), (b)* and *(c)* of the Paris Convention. Details concerning that system may be obtained from the International Bureau of WIPO *(Editor's note)*.

Forrest-031

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WIPO

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DATE: March 30, 2009

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

Twenty-First Session
Geneva, June 22 to 26, 2009

PROPOSAL BY JAMAICA

Document prepared by the Secretariat

1. In a communication dated March 30, 2009, the Secretariat received a proposal from Jamaica relating to the Amendment of Article 6*ter* of the Paris Convention for the Protection of Industrial Property for consideration by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), at its twenty-first session to be held in Geneva from June 22 to 26, 2009.

2. The said proposal is annexed to this document.

[Annex follows]

ANNEX

Proposal by Jamaica
to the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

Article 6*ter*

(1)

(a) **The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.**

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

1. The SCT will recall that during the 1980s, proposals were made to review the Paris Convention in order to broaden the scope of Article 6*ter* to include the protection of country names. The last proposal, regarding a full review of Article 6*ter* for the purpose of possible amendments, was made at a diplomatic conference held in February 1980. At that conference, under the heading of "alternative B", a proposal was placed on the table which recommended that the term "as well as the official names of the countries of the Union" should be included under the category of areas that are to be refused for validation as registered trade marks. This would effectively lead to the expansion of Article 6*ter*(1)(a) to include the protection of country names.

2. Unfortunately, attempts to review Article 6*ter* of the Paris Convention, at the Diplomatic Conference were unsuccessful, due to the rejection of the proposal for the protection of country names by a few States.

3. The rejection of such an inclusion in Article 6*ter*, however, took place against the backdrop of a very different political and socioeconomic reality. Emphasis must be given to the fact that past rejection of the argument to include country names under the protection of Article 6*ter*(1)(a), such as was the case in 1980 (almost 30 years ago), took place under a starkly different international economic order and global trade regime. The widening and deepening of linkages amongst and between countries, as a result of globalization and trade liberalization has facilitated an increase in the trade in goods which carry unauthorized country names.

4. Jamaica is, therefore, proposing to open discussions in the forum of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) for the provision of Article 6*ter* of the Paris Convention to be amended to reflect the protection of these country names, in addition to the other categories of protection already in existence. For this purpose, therefore, Jamaica wishes to revisit elements of the previous proposal made in 1980.

5. Jamaica also wishes to propose the granting of additional protection to a State's identity by way of a further amendment of Article 6*ter* to allow for the protection of country names of the Union to include homonymous sounds of these country names. An example of this would be the official country name "Jamaica" also being protected as "Jah-mey-ka."

6. It should be noted that a discussion concerning the widening of the categories of protection under Article 6*ter* of the Paris Convention to include the protection of country names, must be approached from a holistic point of view having regard to the political, socioeconomic and legal implications of such an amendment, as well as its direct impact on a country's sustainable development and economic survival. In terms to the implications, it is evident that where country names are not protected then the danger of these names becoming generic exists. This has implications not only for the value of private trade marks but on a country's ability to properly protect their Intellectual Property generally, particularly in third countries. Countries like Jamaica that are heavily reliant on their name as a means of marketing suffer greatly when such widespread use of the name without authorization goes unchecked.

7. Based on the foregoing, Jamaica hereby formally requests that the protection of country names be added to the categories under Article 6*ter*(1)(a) of the Paris Convention, and that this matter be included as an agenda item for discussion at the twenty-first session of the Standing Committee on the Law of Trade Marks, Industrial Designs and Geographical Indications, scheduled to be held from June 22 to 26, 2009.

[End of Annex and of document]

Forrest-032

THE RECOGNITION OF RIGHTS AND THE USE OF NAMES IN THE INTERNET DOMAIN NAME SYSTEM

Report
of the
Second WIPO Internet Domain Name Process
http://wipo2.wipo.int

September 3, 2001

The World Intellectual Property Organization (WIPO) is an international intergovernmental organization, which has 177 States as members. The Member States established the Organization as the vehicle for promoting the protection of intellectual property throughout the world.

The Organization provides services both to its Member States and to the individuals and enterprises that are constituents of those States.

The services provided by WIPO to its Member States include the provision of a forum for the development and implementation of intellectual property policies internationally through treaties and other policy instruments.

The services provided to the private sector by WIPO include the administration of procedures for the settlement of intellectual property disputes through the WIPO Arbitration and Mediation Center, and the administration of systems that make it possible to obtain protection for patents, trademarks, industrial designs and geographical indications in different countries through a single international procedure.

The operations of WIPO are financed as to 90 per cent by fees generated by the Organization for the services it renders to the private sector, and as to the remaining 10 per cent by contributions made by the Member States.

World Intellectual Property Organization (WIPO)
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SUMMARY OF CONTENTS

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EXECUTIVE SUMMARY

The Second WIPO Internet Domain Name Process was initiated at the request of the Member States of WIPO. It follows the first such WIPO Process, which investigated the interface between trademarks and Internet domain names, and recommended the establishment of a uniform dispute-resolution procedure to deal with disputes concerning the bad faith registration and use of trademarks as domain names, or "cybersquatting." The Uniform Domain Name Dispute Resolution Policy (UDRP), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) as a consequence of the first WIPO Process, has proven to be an efficient and cost-effective international mechanism, responsive to the particular circumstances of the domain name system (DNS) as a global addressing system. The WIPO Arbitration and Mediation Center, as a leading provider of services under the UDRP, has received, at the date of publication of this Report, over 3000 complaints under it, of which well over 80% have been resolved.

The Second WIPO Process concerns a range of identifiers other than trademarks and is directed at examining the bad faith and misleading registration and use of those identifiers as domain names. These other identifiers, which form the basis of naming systems used in the real or physical world, are:

- International Nonproprietary Names (INNs) for pharmaceutical substances, a consensus-based naming system used in the health sector to establish generic names for pharmaceutical substances that are free from private rights of property

The international legal framework for the protection of these other identifiers is not as developed as it is for the protection of trademarks. In some cases, for example, geographical indications and trade names, elements of international protection exist, but they do not constitute a complete system that is uniformly applied throughout the world. In other cases, for example, personal names and the names of geographical localities, such as cities, used outside the context of trade in goods, there are no clear elements of an international framework.

The Report finds that there is considerable evidence of the registration and use of the identifiers examined in the Report as domain names by persons who might be considered not to be properly entitled to use the identifiers in question. Moreover, it is clear from the comments received by WIPO in the process leading to the Report that the registration of these identifiers as domain names by such persons offends many sensitivities. For example, many commentators considered that the registration as domain names of the names of eminent political, scientific or religious persons, or the names of countries, cities or indigenous peoples, by parties without any association with the persons, places or peoples concerned, was unacceptable.

The possibility of registering these identifiers as domain names is a consequence of the first-come, first-served, highly automated and efficient nature of the system used for domain name registration, which does not involve any screening of domain name applications. That same system has also allowed the tremendous growth that has taken place in the use of the Internet, while acting as the means of preserving universal connectivity on the Internet.

respect to domain name registries, registrars and registrants, and the more traditional instrument of the treaty. These instruments are not exclusive, but can be used in combination. Thus, the UDRP represents a deployment, through the contractual relations that make up the ICANN system, of established rules relating to trademark protection that have been developed in widely accepted treaties. It will be for the international community to choose not only whether it wishes to make new rules to deal with any of the identifiers examined in this Report, but also how it may wish to develop such rules and implement them.

The specific findings and recommendations made with respect to the various identifiers examined in this Report are:

(i) For *INNs*, which are examined in Chapter Three of the Report, it is recommended that a simple mechanism be established which would protect INNs against identical domain name registrations. The mechanism would allow any interested party to notify WIPO that a domain name registration is identical to an INN, whereupon WIPO would, in conjunction with the World Health Organization (WHO), verify the exact similarity between the domain name and the INN and notify this to ICANN, which would, in turn, notify the registrar with which the registration was made that the domain name registration should be cancelled.

(ii) For the *names and acronyms of IGOs*, which are examined in Chapter Four of the Report, it is recommended that States, as the constituents of IGOs, should work towards the establishment of an administrative dispute-resolution procedure, akin to the UDRP, where an

The sensitivities offended by the registration of personal names as domain names by parties unconnected with the persons in question is recognized, and it is suggested that the international community needs to decide whether it wishes to work towards some means of protection of personal names against their abusive registration as domain names.

(iv) For *geographical identifiers*, which are dealt with in Chapter Six, it is recognized that certain norms exist at the international level which prohibit false and deceptive indications of geographical source on goods and which protect geographical indications, or the names of geographical localities with which goods having particular characteristics derived from that locality are associated. However, these rules apply to trade in goods and may require some adaptation to deal with the perceived range of problems with the misuse of geographical indications in the DNS. Furthermore, the lack of an international agreed list of geographical indications would pose significant problems for the application of the UDRP in this area because of the need to make difficult choices of applicable law. It is suggested that the international framework in this area needs to be further advanced before an adequate solution is available to the misuse of geographical indications in the DNS. As far as other geographical terms are concerned, the Report produces considerable evidence of the widespread registration of the names of countries, places within countries and indigenous peoples as domain names by persons unassociated with the countries, places or peoples. However, these areas are not covered by existing international laws and a decision needs to be taken as to whether such laws ought to be developed.

(v) For *trade names*, which are the subject of Chapter Seven, the situation is similar

1. THE MANDATE AND ITS CONTEXT

1. On June 28, 2000, the Director General of WIPO received a request from 19 of WIPO's Member States to develop, through a consultative process, recommendations on means of dealing with the "bad faith, abusive, misleading or unfair use," within the Internet domain name system (DNS), of identifiers that form the basis of certain naming systems used in the real or non-virtual world.[1] The identifiers specified were:

- — personal names;
- — International Nonproprietary Names (INNs) for pharmaceutical substances;
- — the names of international intergovernmental organizations;
- — geographical indications, geographical terms, or indications of source; and
- — trade names.

The Request was subsequently endorsed by the WIPO General Assembly, the constituent organ of the Member States of WIPO.[2]

2. The Request established three process criteria for WIPO's work:

(i) first, it was specified that "this activity should take full advantage of WIPO's prior work";

(ii) secondly, the activity should "build on existing and ongoing discussions"; and

Paper called for the creation of a new, private, not-for-profit corporation which would be responsible for coordinating certain DNS functions for the benefit of the Internet as a whole. Following the publication of the White Paper, a process occurred which resulted in the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit corporation established under the laws of the State of California of the United States of America. The by-laws of ICANN and documentation on the various meetings that it has organized and activities that it has carried out are available on ICANN's web site, *www.icann.org*.

4. In response to growing publicity and concern over the interface between domain names and trademarks, and the lack of definition of the relation between these two species of identifiers, the White Paper also addressed certain intellectual property questions. In particular, the White Paper stated that the United States Government would "seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders," to develop recommendations on certain aspects of the interface between domain names and trademarks, including "a uniform approach to resolving trademark/domain name disputes involving cyberpiracy."

5. Following the publication of the White Paper, and with the subsequent approval of its Member States,[4] WIPO carried out between July 1998 and April 1999 an extensive and intensive process of consultations directed at developing recommendations on the issues

72 non-governmental organizations representing professional, industry and other special interests, 181 corporations and law firms and 182 individuals.

7. The Report of the WIPO Internet Domain Name Process, *The Management of Internet Names and Addresses: Intellectual Property Issues*,[5] was published on April 30, 1999. The Report contained a series of recommendations. Chief amongst those recommendations was the establishment of a uniform dispute-resolution policy and procedure for resolving disputes over the alleged bad faith and deliberate misuse of trademarks through the registration of domain names in the generic top-level domains (gTLDs) .com, .net and .org.

The Uniform Domain Name Dispute Resolution Policy for gTLDs

8. Following the publication of the Report of the WIPO Internet Domain Name Process and certain consultation procedures in conformity with the by-laws of ICANN, ICANN adopted, in August 1999, a Uniform Domain Name Dispute Resolution Policy (UDRP), which entered into force for the gTLDs .com, .net and .org on December 1, 1999, and January 1, 2000 (the policy was phased-in for registrars over the two dates).

9. The UDRP establishes a dispute-resolution procedure under which a complainant can seek the transfer or cancellation of a domain name registration in .com, .net or .org on the basis that (i) the domain name is identical or confusingly similar to a trademark in which the complainant has rights; (ii) the domain name holder has no rights or legitimate interests in respect of the domain name; and (iii) the domain name has been registered and is being used

11. Between the date of commencement of the UDRP on December 1, 1999, and the end of July 2001, some 4,155 cases had been initiated under the UDRP. Of these, 2821 were filed with the WIPO Arbitration and Mediation Center.

12. The UDRP has proven itself to be an efficient and cost-effective means of resolving disputes over the bad faith and deliberate misuse of trademarks through the registration and use of domain names in the gTLDs. Of the 2821 cases filed the WIPO Arbitration and Mediation Center since the commencement of the UDRP, 88% have been resolved. Filing a case with the WIPO Center costs US$1500 and a decision is normally given within 50 days of the commencement of the procedure.[6] The procedure has attracted widespread international participation, with cases being filed with the WIPO Center by parties from 85 countries.

EXISTING AND ONGOING DISCUSSIONS

13. There are several "existing and ongoing discussions" or developments which may have an impact, directly or indirectly, on the UDRP and on the various issues that WIPO has been requested to address in respect of the interface between domain names and certain identifiers other than trademarks.

UDRP Review

15. The Domain Name Supporting Organization (DNSO) has the responsibility of advising the Board "with respect to policy issues relating to the Domain Name System" (Article VI-B, Section 1 (a)). The scope of such policy issues is presumably not open, but is circumscribed by the Articles of Incorporation of ICANN,[8] which set out the purposes and functions of ICANN (thus, for example, the policy issues would not include taxation or criminal law). The DNSO has two organs, a Names Council, consisting of representatives of various "constituencies," and a General Assembly, consisting of "all interested individuals and entities" (Article VI-B, Section 1(b)).

16. The constituencies of the DNSO Names Council "self-organize" and "determine [their] own criteria for participation" (Article VI-B, Section 3(a)). There are seven constituencies of the DNSO Names Council, namely ccTLD registries; commercial and business entities; gTLD registries; ISP and connectivity providers; non-commercial domain name holders; registrars; and trademark, other intellectual property and anti-counterfeiting interests (Article VI-B, Section 3(b)).

17. The Business Plan for the DNSO Names Council 2001-2002[9] includes two items concerning the UDRP amongst its proposed objectives for the Names Council 2001-2002:

> "*UDRP.*
>
> *a. Review and evaluate the Uniform Dispute Resolution Policy and propose changes for consideration by the ICANN Board.*

ccTLDs

18. In parallel to the Request to WIPO, referred in paragraph 1, above, which led to the publication of this present WIPO Report, WIPO also received from the same 19 Member States a Request "to develop, for the assistance of the administrators in ccTLDs, voluntary guidelines for the development of practices and policies to curb abusive and bad faith registration of protected names, and to resolve related disputes."[10] This second Request was also endorsed by the WIPO General Assembly.[11]

19. The ccTLDs are those top-level domains which bear two letter codes essentially derived from the International Organization for Standardization's (ISO) Standard 3166. In accordance with the second Request addressed to it, WIPO initiated a ccTLD program, which included consultations and an international conference held in Geneva on February 20, 2001. The program led to the publication of the *WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes*.[12]

20. Twenty-two ccTLDs have now adopted the UDRP within their domains. Those 22 ccTLDs are: .AC (Ascension Island), .AG (Antigua and Barbuda), .AS (American Samoa), .BS (Bahamas), .BZ (Belize), .CY (Cyprus), .EC (Ecuador), .FJ (Fiji), .GT (Guatemala), .LA (Lao People's Democratic Republic), .MX (Mexico), .NA (Namibia), .NU (Nuie), .PA (Panama), .PH (Philippines), .PN (Pitcairn Island), .RO (Romania), .SH (Saint-Helena), .TT (Trinidad and Tobago), .TV (Tuvalu), .VE (Venezuela), and .WS (Western Samoa). To date, 46 cases relating to domain name registrations in the abovementioned

"Internationalized" Domain Names

22. Various efforts are under way in the Internet community to make domain names available in non-Roman or non-ASCII scripts, such as Arabic, Chinese, Cyrillic, Japanese or Korean.

23. The Internet Engineering Task Force (IETF) has established an Internationalized Domain Name (IDN) Working Group, whose goal is "to specify the requirements for internationalized access to domain names and to specify a standards track protocol based on the requirements."[13] According to the charter of the Working Group, a "fundamental requirement in this work is to not disturb the current use and operation of the domain name system, and for the DNS to continue to allow any system anywhere to resolve any domain names." The Working Group has not yet completed its work.

24. VeriSign Global Registry Services (VeriSign GRS), a leading provider of domain name registry services and DNS support to the Internet, has introduced an Internationalized Domain Name Testbed.[14] According to the VeriSign GRS "General Information Paper on Internationalized Domain Name Resolution,"[15] the "VeriSign GRS approach in implementing its testbed is to insure adherence to the Internet Architecture Board (IAB) principle of a single DNS route and continued compliance with the evolving standards under development by the Internationalized Domain Name (IDN) Working Group of the Internet Engineering Task Force (IETF)." The VeriSign GRS Internationalized Domain Name Testbed has commenced the phase of resolution of non-Roman script registrations that have been made under the

group "to identify the various internationalization efforts and the issues they raise, to engage in dialogue with technical experts and other participants in these efforts, and to make appropriate recommendations to the Board."[17] The ICANN IDN Internal Working Group has not completed its work.

26. The UDRP applies to all domain name registrations in the gTLDs .com, .net and .org. If those registrations are effected in non-Roman or non-ASCII script, the UDRP thus applies. The WIPO Arbitration and Mediation Center has already received 15 cases under the UDRP concerning internationalized domain name registrations effected under the VeriSign GRS Internationalized Domain Name Testbed. The cases concerned internationalized domain names in Chinese, Japanese, Norwegian (æ), German (ö) and French (é). Decisions have been given in 7 of the 15 cases filed.

27. The internationalization of domain names is manifestly an immensely important development in the DNS and one which will, inevitably, have intellectual property implications. The problem of conflicting trademarks across different languages and different language scripts is a problem that is already well known to the trademark community, which has a long experience with trademark registrations being effected in the various languages and language scripts used around the world. It may be expected, however, that the introduction of internationalized domain names will introduce certain dimensions to the problem of conflicting identifiers across different languages and language scripts which are additional to those already experienced in respect of conflicting trademark registrations. Those new dimensions are likely to include the evaluation of the importance of phonetic similarity in the

The selection followed a process conducted by ICANN which included the publication of criteria for assessing new TLD proposals, a call for applications, the publication of the non-confidential portions of the 47 applications received, a public comment period and the publication of a report evaluating the applications received.

29. The seven new gTLDs fall into two categories: (i) "unsponsored" TLDs, which are intended to be relatively large and to operate under policies established by "the global Internet Community directly through the ICANN process,"[19] and (ii) "sponsored" TLDs, each of which is intended to be "a specialized TLD that has a sponsoring organization representing the narrower community that is most affected by the TLD."[20] The following table gives details of the name, nature, intended purpose and registry operator of each of the seven new gTLDs.

Table 1

New gTLDs

TLD	Nature	Intended Purpose	Registry Operator
.aero	Sponsored	Air-transport industry	Société internationale de télécommunications aéronautiques, SC (SITA)
.biz	Unsponsored	Businesses	NeuLevel, Inc.
.coop	Sponsored	Cooperatives	National Cooperative

30. The unsponsored TLDs will operate under "Registry Agreements" with ICANN. A common form of basic agreement has been negotiated with each of the four selected unsponsored TLD registry operators. Negotiations for agreements with sponsoring organizations for the three sponsored TLDs are in process.

31. The timetable for the introduction of the new gTLDs has not yet been completed. Two of the new gTLDs have announced dates for the commencement of operations open to the public, namely .info, which will commence on September 19, 2001,[21] and .biz, which will commence on October 1, 2001.[22] The dates for the commencement of operations of the other new gTLDs will be announced in due course. WIPO has been working with the Registries of the new gTLDs to provide advice and assistance concerning appropriate dispute-resolution policies.[23]

32. *Intellectual Property Considerations.* One of the terms of reference of the first WIPO Internet Domain Name Process was to evaluate the effects of adding new gTLDs and related dispute-resolution procedures on trademark and intellectual property holders.[24] The Report of that process concluded that, subject to the implementation of recommendations made in the Report, new gTLDs could be introduced "provided that they are introduced in a slow and controlled manner which takes account of the efficacy of the proposed new practices and procedures in reducing existing problems."[25]

33. All four new unsponsored gTLDs are expected to apply the UDRP. In addition, three of

34. In addition to the UDRP and other dispute-resolution policies that will govern open registry operations, the first two new gTLDs to come online have established procedures aimed at minimizing bad faith abuse of trademark rights during the initial start-up phase of registry operations. .info is implementing a "sunrise" period (from July 25, 2001 to August 28, 2001) during which trademark holders may register their exact trademarks as domain names in .info. The sunrise period will be followed by a period during which a Sunrise Challenge Policy will apply under which a person may challenge a registration made during the sunrise period on the ground that the registration does not conform to the requirements for registration during the sunrise period (for example, the domain name is not identical to the trademark claimed in support of it).[26] Afilias, the Registry operator of .info, has also announced that it will itself initiate challenges in respect of manifestly false registrations of names during the sunrise period.[27] In the case of .biz, the Registry operator, Neulevel, is implementing a procedure whereby a trademark owner may register a claim with respect to the trademarks that it owns. If a domain name registration is made by a third party in respect of the trademarks claimed, the trademark owner which has registered the claim will be notified of the registration. The trademark owner will then have the opportunity to initiate a challenge in respect of the domain name on the ground that the domain name has been registered or is used in bad faith.

35. It is too early in the process of the introduction of the new gTLDs to assess what impact, if any, they will have on intellectual property. The introduction of the new gTLDs will be closely monitored by all and, in particular, from the perspective of intellectual property, with respect to the following issues:

(iii) the response to greater differentiation in the DNS on the part of Internet users, search engines and directory services; and

(iv) the design and inter-relationship between WHOIS services across an extended DNS.

A Unique, Authoritative Root

36. The DNS relies upon a single authoritative root to ensure reliable universal connectivity on the Internet. As stated by the Internet Architecture Board (IAB):

> "*To remain a global network, the Internet requires the existence of a globally unique public name space. The DNS name space is a hierarchical name space derived from a single, globally unique root. This is a technical constraint inherent in the design of the DNS. Therefore it is not technically feasible for there to be more than one root in the public DNS. That one root must be supported by a set of coordinated root servers administered by a unique naming authority.*"[28]

37. Various attempts have been made by operators to establish alternate roots. Certain of these attempts are considered to be benign insofar as they are either purely private, and thus insulated from the public DNS, or experimental and intended not to interfere with the operation of the DNS. Others have been commercially established to support top-level domains to compete with the single root managed by ICANN and may be considered to pose potential threats to the stability and reliability of the DNS.

39. From the intellectual property perspective, alternate roots present the possibility of a loss of cohesion in the application of the UDRP. As described in paragraphs 9 and 10 above, and in Chapter 2 below, the UDRP represents a contractually based system for the implementation of intellectual property policy in the DNS. Intellectual property policy, as expressed in the UDRP, is implemented through registrar accreditation agreements with ICANN and through the contract between the applicant for a domain name registration and the registrar under which the holder of the domain name registration agrees to submit to the uniform dispute-resolution procedure if challenged by a third party. Insofar as alternate roots lie outside the contractual system established by ICANN, the application of the UDRP by operators of alternate roots is not ensured and depends upon their voluntary adoption of the UDRP or a similar policy.[31]

Internet Keywords

40. Internet keywords offer a natural language Web addressing system or a navigational system based on the use of words, without technical prefixes, such as *http://* or *www.*, and without top-level domain suffixes, such as .com, .net or .org. Keywords resolve to URLs and, in some cases, e-mail addresses, usually through the use of the keyword in the browser location bar. While being navigational tools, keywords can also be regarded as virtual identifiers and, as such, have intellectual property implications.

41. Keywords do not constitute a competing rooting system to the DNS, but rather an application layer super-imposed upon the DNS.

44. As keywords systems become increasingly used in web browsers and search engines, the possibility of conflicts between keywords and intellectual property rights is likely to increase. Depending on their evolution, user uptake and the effectiveness of voluntary dispute-resolution procedures applied by providers, the intellectual property dimensions of keywords and other addressing systems super-imposed on the DNS could warrant further study.

THE PROCESS OF CONSULTATIONS IN THE SECOND WIPO INTERNET DOMAIN NAME PROCESS

45. As mentioned in paragraph 2, above, the Request addressed to WIPO, which initiated the process leading to the present Report, called for "a process of consultation with WIPO Members and all interested stakeholders."

46. In order to undertake the requested process of consultation, WIPO adopted procedures modeled on those followed in the first WIPO Internet Domain Name Process. The Second Process thus also comprises three stages and was conducted in English, French and Spanish.

47. The first stage sought greater definition in the issues that were to be addressed in the course of the process, the procedures that were to be used and the timetable that would be followed. To this end, a Request for Comments (WIPO2 RFC-1) was issued on July 10, 2000, with a deadline for receipt of comments by August 15, 2000.

50. Each of the above-mentioned Requests for Comments was published on the web site established for the Second WIPO Internet Domain Name Process (*http://wipo2.wipo.int/process2/index.html*), as well as in paper form. The paper version was also sent to the governments and industrial property offices of each of the 177 Member States of WIPO, and to intergovernmental organizations and non-governmental organizations accredited with observer status at WIPO.

51. In addition to the Internet-based and written consultations, WIPO also organized, throughout the latter part of 2000 and the first of part of 2001, physical meetings in 10 cities throughout the world. Details of the location of those meetings and participation in the meetings are given in Table 2, below.

Table 2

Consultation Meetings Organized

Location	Date(s)	Participation (approx.)
São Paulo, Brazil	August 2 and 3, 2000	41
Chiang Mai, Thailand	August 3 and 4, 2000	58
Amman, Jordan	September 18 to 20, 2000	100
Krakow, Poland	October 25	63

52. In all, throughout this Second WIPO Internet Domain Name Process, written comments on the three Requests for Comments and physical participation at the meetings held were engaged from 51 government agencies of 28 countries, 18 intergovernmental organizations and agencies, 44 non-governmental organizations, 201 corporations and professional firms and 184 individuals. Details of the names of these entities and persons and of their participation in the various stages of the process are set out in Annex I to this Report.

THE SUBMISSION OF THE PRESENT REPORT

53. The Request initiating the Second WIPO Internet Domain Name Process indicated that the "findings and the recommendations [of the Process] should be submitted to the Members of WIPO and for consideration by the Internet Community (including the Internet Corporation for Assigned Names and Numbers)."[37] Accordingly, the present Report will be submitted to the Assemblies of Member States of WIPO at their meeting from September 24 to October 3, 2001, and will be submitted to the Board of ICANN. In addition, the Report will be published on the WIPO web site and distributed widely in paper form.

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[1] The Request was contained in a letter from the Minister for Communications, Information Technology and the Arts of the Government of Australia transmitted with the endorsement of Argentina, Australia, Canada, Denmark, France, United States of America and the European Union. A copy of the letter is available at *http://wipo2.wipo.int/process2/rfc/letter.html*.

[Endnote continued from previous page]

[12] Available at *http://ecommerce.wipo.int/domains/cctlds/bestpractices/index.html*, or in bound paper form, upon request, from WIPO.

[13] See the IETF IDN Working Group Web Site at *http://www.i-d-n.net*.

[14] See *http://www.verisign-grs.com/idn/index.html*.

[15] See *http://www.verisign-grs.com/idn/Gen_Info_Paper.pdf*.

[16] See *http://www.icann.org/minutes/minutes-25sep00.htm*.

[17] See *http://www.icann.org/committees/idn/*.

[18] See *http://www.icann.org/minutes/prelim-report-16nov00.htm#Second Annual Meeting*.

[19] See ICANN, "New TLD Program" at *http://www.icann.org/tlds/*.

[20] *Ibid*.

[21] See *http://www.afilias.info*.

[22] See *http://www.neulevel.biz*.

[23] For detailed information, see *http://arbiter.wipo.int/domains/gtld/newgtld.html*.

[24] See WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues*, Chapter 5, *http://wipo2.wipo.int/process1/report/finalreport.html*.

[25] *Ibid*, paragraph 343.

[26] See, for details, *http://www.afilias.info/faq/sunrise.html* and *http://www.afilias.info/faq/sunrise-challenge-policy.html*.

[27] See *http://www.icann.org/announcements/icann-pr14aug01.htm*.

[28] See RFC 2826 "IAB Technical Comment on the Unique DNS Root," *http://www.rfc-editor.org/rfc/rfc2826.txt*.

[29] See *http://www.icann.org/stockholm/unique-root-draft.htm*.

[30] See *http://www.icann.org/icp/icp-3.htm*.

[31] For example, new.net which operates 20 gTLDs outside the ICANN system applies a Model Domain Name Dispute Policy which largely corresponds to the UDRP.

[32] See *http://www.commonname.com*.

[33] See *http://home.netscape.com/escapes/keywords/faq.html*.

[34] See *http://web.realnames.com/Virtual.asp?page=Eng_Corporate_Product_Faq*.

[35] See *http://www.commonname.com/English/master .asp?asp=/English/LegalDocs/CommonNameDisputeResolutionPolicy.html* and *http://web.realnames.com/Virtual.asp?page=Eng_Policy_DisputeResolution*.

[36] See *http://wipo2.wipo.int/process2/rfc/rfc3/index.html*.

[37] See *http://wipo2.wipo.int/process2/rfc/letter2.html*.

2. POLICY OPTIONS FOR A GLOBAL MEDIUM

54. The Domain Name System (DNS) has presented a set of problems for intellectual property policy, as well as a set of opportunities, that are perhaps unique in the historical development of the intellectual property system. The problems arise from the spontaneous adaptation of a technical addressing system to functions and purposes beyond those for which it was originally designed. In addition to providing a human friendly, reliable and stable rooting system, the DNS has given rise to identifiers that are used for commercial, cultural, governmental, political and social purposes, both on the Internet itself and in similar contexts beyond the Internet. The opportunities arise from the hierarchical design of the DNS and the set of contractual relations that bind ICANN, registries, registrars and domain name holders in various relationships, thereby providing a means for implementing common terms of policy in those relationships.

55. The Uniform Domain Name Dispute Resolution Policy (UDRP) can be seen as a largely successful use of the opportunities provided by the hierarchical design of the DNS, although it is not without critics. The Second WIPO Internet Domain Name Process involves a series of far-reaching questions, which ultimately relate to the interface between the virtual identifiers that domain names are and identifiers that have a basis in naming systems that have been deployed historically throughout the real or non-virtual world. Some of those naming systems are circumscribed by legal rules and principles (for example, geographical indications or trade names), and some operate within social, cultural and spiritual contexts that contain their own,

development and implementation that are available to the international community should it choose to take action in respect of any possible solutions.

57. In examining the available options for policy development and implementation, it is useful to commence by recalling first, the special features of the environment in which intellectual property policy with respect to domain names applies, and, secondly, the distinction between the application of existing policy and the creation of new policy.

SPECIAL FEATURES OF THE ENVIRONMENT

58. It is widely recognized that the Internet presents special challenges for policy development and implementation. There are four features that are particularly pertinent in the present context.

A Global Medium

59. The Internet is global in several senses. It is accessible from any place in which the appropriate telecommunication facilities exist, with the consequence that the users of the Internet reflect, or potentially reflect, the diversity of the world's population. A domain name registration, whether in a gTLD or a ccTLD, gives a global presence which makes the corresponding online address accessible from anywhere. There are advantages for all in this universal connectivity, which allows the Internet to be a medium for international commerce,

the activity emanates, the location of the server, the location of the computer on which the activity is perceived, the locality of the target audience, the locality of the accidental audience that may perceive or be able to perceive the activity, the territory over which messages travel, and so forth. Sorting out the territorial connections to activity on the Internet is, however, a difficult exercise and the reality is that activity on the Internet is not susceptible to territorial localization in the way in which activity in the non-virtual world is. The absence of territorial localization in this way stands in contrast to the historical basis of political and legal systems in which policy is formulated by governments and parliaments for the territory over which they exercise authority and the ensuing legal rights are limited to, and enforced within, the same territories. Who has authority to make policy for a global space and who has authority to enforce that policy are complicated questions to which there are no easy answers.

Speed of Penetration and of Change

61. The Internet has been characterized by extremely rapid acceptance and adoption. Estimates indicate that the number of users of the Internet has risen from several thousand in August 1981 to 460 million in 2001.[1] This rate of adoption is much quicker than the rate of adoption of the telephone or television.[2]

62. Not only has the rate of adoption of the Internet been exceptionally quick, but also the technologies that it deploys and policies governing the DNS have been in rapid evolution, as Chapter 1 indicates. The distinction between gTLDs and ccTLDs is not as clear as the descriptions of those categories of top-level domains suggest. Language within the DNS is in

Multifunctionality

64. As noted above, the Internet is used by a diverse range of people for a diverse range of purposes. Every adjective that can be used to describe a branch of human activity finds its corresponding noun in activity on the Internet: research, science, technology, commerce, culture, entertainment, leisure, communication, religion, politics, pornography, lunacy and so forth. Making policy for one area so as not to damage the legitimate interests of another area is also a complicated issue.

CREATING -V- APPLYING LAW

65. It is not inappropriate to recall some old distinctions in political and legal theory. In particular, there is a well accepted distinction in theory, even if not always so easily applied in practice, between creating law, a legislative activity, and applying it, an executive activity. Legislation, at least in liberal democracies, is the activity of elected representatives of the constituency to which the legislation applies. The executive function is performed by duly appointed or constituted agencies.

66. The recommendation in the first WIPO Internet Domain Name Process to establish a uniform domain name dispute resolution procedure (UDRP) was essentially an exercise in finding a means to express, in an economically rational and effective way, principles that were widely accepted in national and international laws. There has been history of nearly

legislation than about the efficient application of existing law in a multijurisdictional and cross-territorial space.

67. The Second WIPO Internet Domain Name Process involves more difficult questions where it is as well to remember the distinction between positive law, or what the law is, and normative law, or what the law should be according to opinion gauged to be more or less widespread. From the point of view of positive law, as will be seen in the ensuing chapters, the questions to be addressed in the present Report fall into three categories:

(i) questions on which there is a clear international norm requiring protection of a certain subject matter, but under-developed modalities for the international recognition of the subject matter that is to be protected (with the consequence, that the appreciation of the subject matter to be respected often is left to national law). Into this category fall geographical indications and trade names.

(ii) questions where there are elements of an international framework for the protection of the subject matter, but those elements are incomplete or insufficiently precise. Into this category fall the names and acronyms of international intergovernmental organizations and International Non-proprietary Names (INNs) for pharmaceutical substances.

(iii) questions in respect of which there are no existing international norms, however unjust the absence of such norms might be. Into this category fall personal names, advantage of the positive features of each, as well as to take into account their limitations. If the international community should wish to establish rules with respect to the questions examined in the ensuing chapters of this Report, it would need also to decide on the optimal way in which those rules can be developed and implemented.

Self-Regulation

69. The first model for adopting and implementing intellectual property policy is the self-regulatory model, under which, in the context of the DNS, registries, in cooperation with any supervisory body that may exercise authority over them, develop and adopt rules governing intellectual property protection within the domains for which they are responsible. Those policies can then be implemented through terms in the contractual relationships that govern registrations made in the domains in question. Naturally, the rules in question must conform to applicable law.

70. To a certain extent, self-regulation is already practiced in certain areas of the interface between domain names and intellectual property. The administrators of ccTLDs are not obligated to apply the UDRP. As indicated above (paragraphs 18 to 21), 22 ccTLDs have voluntarily adopted the UDRP. A number of others have, however, chosen to develop their own dispute-resolution mechanisms and charters with respect to the bad faith and deliberate violation of intellectual property rights through domain name registrations, for example, .uk.[3] While the policy that they may adopt may bear a great similarity to the UDRP, it constitutes a self-contained system, which does not permit consolidation of cases concerning similar

71. The *advantages* of self-regulation are relatively swift development and implementation of rules, as well as relatively flexible procedures for modification of rules, where necessary, a particularly desirable feature in the context of a rapidly evolving medium. In addition, rules backed by a dispute-resolution procedure have the great benefit of rapid and effective enforcement through the registry adopting the rules. In the case of ccTLDs, there is also the advantage of greater possibility of adopting specific rules to accommodate local circumstances.

72. The *disadvantages* of self-regulation are the risks of incoherence in policy across a global medium and a global space, with the resultant possibility of conflicting rules, increased compliance costs for users, who may have to conform to a variety of differing rules and systems, and an increased possibility of confusion on the part of users in knowing what is and what is not permissible. Self-regulation also depends for its effect on legislative discipline to restrain the possibility of an increasing number and diversity of national laws applying to regulate various facets of the interface between domain names and intellectual property rights. Legislation relating to aspects of domain names and intellectual property rights exists in the United States of America,[5] is under consideration within the European Union in the form of a proposed Regulation of the European Parliament and of the Council with respect to the proposed top-level domain .eu[6] and has been considered in a number of countries, including Belgium[7] and Italy.[8]

The ICANN Contractual Model

approval of standard terms for contracts between registrars and domain name applicants, the system has the beauty of rapid and effective enforcement (since remedies under the UDRP are limited to what may be technically achieved in the DNS, such as the transfer or cancellation of registration). The model has also the advantage of ensuring coherence in policy application across the generic top-level domain name space. In addition, it makes use of ICANN's specialist expertise in the management of the technical functioning of the DNS, as well as its decision-making processes and instances which have been designed to encourage participation on the part of all interested stakeholders.

75. The *disadvantages* of this model are that ICANN's mandate and focus of activity are the technical coordination, technical management and operational stability of the Internet. ICANN's Articles of Incorporation state, in Article 3, that it shall pursue "the charitable and public purposes of lessening burdens of government and 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 top-level domains are added to the DNS root server system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance items (i) through (iv)." In view of these functions and focus, ICANN may see the development of new rules of intellectual property policy, as opposed to the use of the contractual basis of the ICANN

The Treaty

77. The third model is the instrument traditionally used by the international community to create binding rules that limit the inconsistent exercise of national legislative competence, namely the treaty. The treaty is the international equivalent of a national law and the process leading to its adoption is the international equivalent to the national legislative process.

78. The *advantages* of the treaty are the representative nature of the process leading to the treaty's conclusion, which typically includes consultations on the part of national delegations with interested circles in formulating national positions, extensive international negotiations by duly authorized representatives, adoption of the treaty by duly empowered representatives specialized in the subject matter of the treaty and accession to or ratification of the treaty through national consultative and parliamentary or congressional processes. The treaty also has, of course, binding force amongst contracting parties and remains the instrument used by the international community for achieving the uniform application of the rules.

79. The *disadvantages* of the treaty are the length and slowness of the multilateral process for the negotiation of the instrument, which typically requires a number of years that is often incompatible with the speed of response required by the Internet, and the length of time required for the subsequent ratification of the treaty in order to bring it into force across a geographically effective and pertinent area. In addition, once concluded, a treaty is often a relatively inflexible instrument for dealing with areas subject to rapid and radical change, since amendment usually requires time-consuming procedures of consultation and negotiation

congresses of their sovereign rights to consent to the content of an instrument which may become binding on their constituents.

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[1] See Nielsen/Net Ratings' Global Internet Trends Report, released August 28, 2001, at *http://www.nielsen-netratings.com/hot_of_the_net_i.htm*.

[2] See Report of the International Telecommunication Union (ITU), *Challenges to the Network: Internet for Development (1999)* available at *http://www.itu.int/itu-d/ict/publications/inet/1999/index.html*.

[3] See *http://www.nic.uk/ref/drs.html*.

[4] Of all cases filed with the WIPO Arbitration and Mediation Center that concern more than one domain name, over 50% cover two or more different top-level domains.

[5] Anticybersquatting Consumer Protection Act, see *http://www.gigalaw.com/library/anticybersquattingact-1999-11-29-p1.html*.

[6] See *http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&PUBREF=-//EP//TEXT+REPORT+A5-2001-0226+0+NOT+SGML+V0//EN&LEVEL=2*.

[7] See *http://www.lachambre.be/documents/1069/1.pdf*.

[8] See *http://www.interlex.it/nomiadom/testo.htm*.

3. INTERNATIONAL NONPROPRIETARY NAMES FOR PHARMACEUTICAL SUBSTANCES (INNs)

81. In common with other areas, the health sector has been affected in a variety of new and fundamental ways by the Internet. Vast amounts of health-related information and products are available through the Internet to a global audience which can retrieve and use them with unprecedented ease and efficiency.[1] The accuracy, reliability and safety of the information and products retrieved are matters of primary interest to public health and safety.

82. Identifiers play an important role with respect to health products, services and information, both on the Internet and in the physical world. In particular, identifiers:

(i) enable health-related information to be located online;
(ii) signal the source of products, services and information; and
(iii) connect producers or suppliers, on the one hand, and consumers, on the other hand, enabling consumers to associate certain consistent characteristics of products or information with the identifiers.

83. The pharmaceutical industry, the medical profession and associated suppliers of medical equipment and services use a variety of identifiers, including trademarks for branded pharmaceutical products, service marks for suppliers of medical services, personal names for physicians and surgeons, traditional names for tradition-based products and remedies and trade names for enterprises providing products and services or for associations grouping

that, in the interests of public safety, a class of identifiers would be established that would be free from appropriation through private rights and available for public use. This system, developed and managed by the World Health Organization (WHO), attributed such public status to a class of identifiers known as "International Nonproprietary Names (INNs)." The system operates on the basis of consensus on the part of public authorities and the private sector.

85. With the arrival of the Internet and DNS, a new opportunity arose for tainting the public status of INNs. By registering an INN as a domain name, the functional capacity of the INN to serve as an address locator and identifier on the Internet could be appropriated and controlled by the domain name holder. No screening system exists to prevent anyone from doing this.

86. The registration of INNs as domain names came to light in the course of the first WIPO Process. The Report of that Process recognized that the issue was outside the scope of the mandate of the first Process, but recommended that serious consideration be given in future to the protection of INNs against registration in the open top-level domains (gTLDs).[2] This recommendation led to the request to WIPO to explore, in the Second WIPO Process, the issues raised in the DNS by the bad faith, abusive, misleading or unfair use of INNs. In addressing this request, the present Chapter describes the operation and policy of the INN system, analyses the comments received in the course of the Second WIPO Process and evaluates the evidence of current problems experienced in the DNS relating to the registration of INNs. It explores policy options for protecting INNs within the DNS and recommends

chloroquine and retinol.[3] INNs are selected by WHO, in coordination with national authorities worldwide, and maintained on a Cumulative List of recommended INNs, now numbering more than 8,000, to which between 120 and 150 new names are added each year.[4]

88. WHO is a specialized agency of the United Nations with 191 Member States and a constitutional responsibility to "develop, establish and promote international standards with respect to biological, pharmaceutical and similar products."[5] WHO has the international mandate to offer recommendations to its Member States on any matter within its competence, including setting norms and standards for pharmaceutical products in international commerce.

89. The INN system was established by a World Health Assembly resolution in 1950,[6] which also provided for the development of a selection procedure for recommended INNs. The procedure for selection of INNs begins with a request, often by a national nomenclature authority or a pharmaceutical company, which is submitted for examination and name selection by the WHO Expert Panel on the International Pharmacopoeia and Pharmaceutical Preparations ('WHO Expert Panel'), made up of representatives of the major national nomenclature committees. The proposed INN is published in *WHO Drug Information* for comment or objection by any interested person over a four-month period. If no objection is raised during that period, the name is published as a recommended INN.

90. To qualify for selection, INNs must be succinct, distinctive in sound and spelling, so as to avoid confusion with other commonly used names, and must be in the public domain and therefore freely available for the sole purpose of identifying the pharmaceutical substance in

92. As a result, there now exists an international consensus among relevant public and private circles on the public policy against the acquisition of proprietary rights in INNs. The policy extends to trademarks and calls for restraints on the part of private health enterprises and public trademark registration authorities not to allow trademark rights to be acquired over INNs. The exact INN itself and the stem of the INN may not be registered as a trademark. In line with the intended status of INNs as generic or common names, manufacturers of pharmaceutical substances are encouraged to use their corporate names together with INNs in marketing products. Thus the use of "[INN] [name of manufacturer]" in the promotion and marketing of products is not considered to offend the policy against acquisition of proprietary rights in INNs.

THE POLICIES UNDERLYING THE INN SYSTEM

93. The prohibition of the acquisition of proprietary rights in INNs is intended to implement three main policy objectives:[7]

(i) The establishment of INNs as unique, globally available, generic names which are free of proprietary rights and, thus, available for use by all for the purpose of identifying pharmaceutical substances. The public status of such names is intended to ensure that no confusion can arise about drugs or their pharmacological activity and properties in international dispensing practice and in communication and exchange of information among health professionals and scientists worldwide.

EVIDENCE OF REGISTRATIONS OF INNs IN THE DNS

94. The registration of an INN as a domain name creates a monopoly of association with that unique address in the domain concerned. While a domain name is not a legal title which confers upon its holder the right to exclude others from using it in other contexts, it is a unique address. As a result, anyone who registers an INN as a domain name occupies a unique space and acquires a singular advantage in associating the website that is accessed through the domain name with the INN. Without any external control over the veracity and reliability of the information relating to the INN, there are risks of confusion posed to health professionals and consumers.[8] As one commentator remarked: "Any use or registration of INNs which would lead the public to confusion as to a pharmaceutical substance or active pharmaceutical ingredient should be restricted."[9]

95. In response to the call for evidence of abusive registrations of domain names, WHO and the European Federation of Pharmaceutical Industries and Associations (EFPIA) have submitted studies of INNs that have been registered as domain names by individuals or pharmaceutical businesses. The studies, set out at Annex V, demonstrate that numerous INNs have already been appropriated in the DNS (e.g., sildenafenil.com, also known as 'viagra', also ampicillin.com, amoxicillin.com, tagamet.com, tetracycline.com, diclofenac.com, diazepam.com and lorazepam.com). These domain names are used for various purposes:s some merely provide information about the pharmaceutical substance, but the majority are proprietary sites registered and used to advertise or sell pharmaceuticals.[10] The WHO comments that such purposes are antithetical to the policy of the INN system, which reserves

ANALYSIS OF COMMENTS AND VIEWS EXPRESSED IN RESPONSE TO THE INTERIM REPORT

96. The Interim Report posed the question whether INNs should be protected in the DNS. A significant majority of commentators to the Second WIPO Process were in favor, or strongly in favor, of the protection of INNs in the DNS.[13] It was largely agreed, in principle, that the integrity of the INN system and the preservation of its underlying policies require that INNs be protected against registration as domain names. Some commentators, however, opposed such protection of INNs on the grounds of free speech, competition policy, health and consumer protection.[14] Certain argued that, for generic words such as INNs, the only fair means of apportionment may be first-come, first-served.[15] A minority of commentators referred to the insufficient evidence of abuse to conclude that INNs did not require protection at this stage.[16] It was also noted that abuse, and consequent risk to patient safety, is most critical in the bad faith use of the domain name and not its registration *per se*.[17] However, these comments do not recognize the damage which is occasioned to the integrity of the INN system, which depends upon consensus compliance, as a consequence of the registration of INNs as domain names. It was for these reasons that the majority of commentators to the Second WIPO Process favored the implementation of some means to protect INNs in the DNS.

97. The Interim Report put forward five issues that required consideration in giving expression to any protection of INNs in the DNS. Each issue is discussed below, with reference to the comments received.

system, the use of an INN is permitted together with the name of a manufacturer of the INN. This possibility was also favored as enabling consumers to locate INNs via their manufacturer.[19] Against this proposal, it was argued that allowing an exception only for the use of the INN together with the name of the manufacturer would enable large pharmaceutical companies to monopolize the flow of information and trade on those drugs.[20] In this respect, however, it is noted that there remain many alternate possibilities for exchange of information and sale of pharmaceuticals online and off, including through use of the INN on a web site itself, that are not precluded by restriction of the registration of an INN as a domain name, with or without the name of the manufacturer.

99. On the issue whether it should be permitted to register INNs together with additional words, such as 'info' or 'usergroup', comments were divided. Several commentators, emphasizing the need for free speech and public information, favored permitting registration of composite names for these purposes.[21] By contrast, WHO remains firmly opposed to permitting the registration of domain names derived from an INN, including the registration of an INN plus any other word, if such registration is misleading or otherwise in 'bad faith', defined by WHO to mean any registration not strictly limited to providing information relating to the pharmaceutical substance, but used for advertising or promotional purposes.[22] This view was supported by other commentators, who identified the potential risk to consumers of confusion caused by such registrations,[23] prompting the European Commission to comment that if composite names including INNs were permitted, then the website should be required to display a standard disclaimer, informing the public that the information on the site was not approved by WHO.[24]

names that are misleadingly similar to trademarks.[25] It should be noted that the policies underlying INNs and trademarks are different: in the case of INNs, the objective of the system is to ensure that the INN can be used freely by all, as well as to preserve a clear identification mechanism for the global health system, whereas in the case of trademarks, the objective of the system is to restrict the use in commerce of the trademark, on similar goods and services, to the single person or entity that owns the trademark. Nevertheless, misleadingly similar variations of either identifier can, in each case and in different ways, interfere with the underlying policy objectives and create confusion as to the nature of the identifier or its source.

101. As discussed above, and in relation to this issue, WHO was firmly opposed to a system of protection that would allow the registration of misleadingly similar, or otherwise bad faith, versions of INNs.[26] It is apparent that such registrations could be effected precisely in order to mislead and confuse consumers and users, or to circumvent any restriction on registration of exact INNs, in contravention of the policies underlying the INN system. A comment, from Mexico, noted that protection of INNs against misleadingly similar domain name registrations was consistent with their national legal system, which prohibits the registration as trademarks of words within a three-letter difference to an INN so as to avoid consumer confusion.[27]

102. A number of commentators opposed the restriction of domain names similar to INNs, noting that there was no evidence to date of deliberate attempts by domain name registrants to mislead consumers.[28] Most of the opposition to any wider protection (beyond protection of the exact INN as a domain name) stemmed from some commentators' apprehension at the

103. The majority of commentators were in favor of extending any protection to INNs in the DNS to cover all the different languages and scripts that are used in the DNS.[30] As noted by WHO, the Cumulative List of INNs is published in seven official languages: Arabic, Chinese, English, French, Latin, Russian and Spanish. A number of commentators remarked that, as the policy objectives of the INN system apply irrespective of language or script, protection should extend beyond such languages, particularly at a ccTLD level, so as to protect INNs in all languages.[31]

- ♣ Fourthly, whether protection should address existing registrations of INNs.

104. This question relates to the treatment of existing registrations of INNs in the event that protection for INNs is introduced in the DNS. The retrospective application of any protective mechanism for INNs raised concerns among some commentators, who questioned whether domain names acquired in good faith could simply be cancelled. Under United States law at least, it was argued that this could amount to a regulatory action requiring reimbursement in accordance with national law.[32] Other commentators noted that cancellation of a registration contract entered into in good faith could amount to a breach of contract that could create problems between registrars and registrants.[33]

105. On the other hand, numerous commentators were in favor of the application of protection for INNs against past, as well as future, domain name registrations.[34] One commentator supported such retrospectivity, provided that protection applied only against bad faith registrations of INNs in the DNS, and did not prejudice rights acquired in good faith.[35]

any grandfather clauses for existing registrations would undermine the integrity of the INN system.

- Fifthly, whether protection for INNs in the DNS should apply to all gTLDs and whether it could appropriately be adopted by the administrators of ccTLDs.

106. The final question relates to the coverage of protection for INNs within the top-level domains. The majority of commentators were in favor of protection of INNs in gTLDs, including those that are open and restricted, existing and future.[36] Although the risk of abusive registrations in restricted gTLDs (.int, .mil., .edu and .gov) is very low, the extension of protection to these domains does not seem to be problematic. With respect to new gTLDs, as noted in paragraph 28 to 31, above, ICANN has approved the introduction of seven new generic top-level domains, four of which (.biz, .info, .name and .pro) are "unsponsored," meaning that they are intended to operate under policies established by "the global Internet Community directly through the ICANN process," and three of which (.aero, .coop and .museum) are "sponsored," meaning that they are each intended to be "a specialized TLD that has a sponsoring organization representing the narrower community that is most affected by the TLD." In respect of the unsponsored new gTLDs, at least two of these will be opened to a large and essentially undifferentiated public. For these, any decision to protect INNs against registrations of domain names should clearly apply. For the other new gTLDs, it may well be that restrictions on persons who may register domain names within them may preclude the registration of INNs as domain names. In that case, there should not be any difficulty in the acceptance by such gTLDs of the extension to them of any decision to protect INNs against

as British Approved Names (BAN), Dénominations communes françaises (DCF), Japanese Adopted Names (JAN) and United States Accepted Names (USAN). Such national name systems are, for the most part, harmonized with the INN Cumulative List. Nevertheless, it is recommended that, in considering the application of the protection of INNs, the ccTLD administrator do so in consultation with the national health authorities in order to ensure appropriate implementation of the policy.

ANALYSIS OF VIEWS EXPRESSED ON MEANS OF IMPLEMENTING PROTECTION

108. The Interim Report proposed for comment three alternate means to give expression to the protection of INNs within the DNS:

(i) an exclusion or blocking mechanism;
(ii) a modified Uniform Dispute Resolution Procedure (UDRP); and
(iii) a notice and take-down procedure.

Exclusion Mechanism

109. The Interim Report proposed consideration of an exclusion mechanism to cancel registrations in all open gTLDs of domain names that exactly matched the INNs on the WHO Cumulative List, and to block any future registrations of such INNs. The exclusion mechanism gained the support of numerous commentators to the Second WIPO Process,

exclusion mechanism could operate through reference to WHO's existing MEDNET service – a publicly available, free, searchable database that allows access and queries to the INN database.[42] The MEDNET database lists INNs with recommended, proposed and alternative medicinal names that, it was suggested, could be utilized by the domain name registration authorities administering an exclusion mechanism.[43]

111. However, despite a general opinion in favor of protection of INNs, the concept of an exclusion met with significant opposition from numerous commentators, suggesting that it could not feasibly be implemented with the consensus of the Internet community. An exclusion mechanism was criticized by one commentator as over-inclusive, because it cancels names that do not threaten public health and safety, and under-inclusive because it does not purge the Web of misinformation about pharmaceuticals.[44] The blunt method of an exclusion mechanism was also criticized as being inconsistent with the policy underlying generic drug names, in that it would result in limitation of free speech and open discussion concerning INNs both in the physical world and online. It was also noted that cancellation of existing domain names through an exclusion process would result in loss without due process for domain name holders.[45] These views reflect a widely prevalent attitude among the Internet community against the implementation of blocking mechanisms within the DNS with respect to any identifiers. Commentators urged WIPO to recommend an alternate means of expressing the protection of INNs in the DNS.

Modified UDRP

commentators who supported the UDRP option for protection of INNs primarily supported the administrative nature of the process, as opposed to an exclusion mechanism. Others, while supporting the principle of protection for INNs, opposed both the UDRP and the exclusion mechanism: "While INNs should be protected against commercial use by one party, this should be effected through some means other than the UDRP, whether it be by treaty process or direct intervention on the part of ICANN."[50]

Notice and Take-down Procedure

113. As noted above, the majority of comments to the Second WIPO Process were strongly in favor of some means to protect INNs in the DNS. Commentators favored a system that would efficiently prevent INNs from being registered as domain names in the gTLDs, if those registrations would have the effect of undermining the INN system and potentially confusing users and health professionals. Any mechanism for protection should not overburden domain name registration authorities, nor require an international intergovernmental organization (WHO) to be unduly subject to a costly dispute-resolution procedure to protect such identifiers in the public interest.

114. Under the proposed notice and take-down procedure, it was suggested that upon notification to WIPO by any interested party, (including, *inter alia*, individuals, consumer groups, manufacturers, medical associations, international organizations and governments), WIPO would verify that the domain name registration matches an entry on the Cumulative List of INNs in any official language, and notify ICANN of this fact. ICANN would then

RECOMMENDATION

116. A clear majority of commentators were in favor of the protection of INNs in the DNS. There were, however, differing views about the means of implementing that protection and, especially, about the extent of protection.

117. In these circumstances, we consider it to be appropriate to recommend the implementation, at this stage, of a very simple mechanism of protection that requires no judgements of similarity or good or bad faith use, but mere clerical verification. We recommend that there should be a prohibition against the registration of exact INNs in any of the official languages of the Cumulative List in the gTLDs, and that any exact INN registered in violation of this prohibition should be subject to cancellation, upon notification by any interested party to WIPO, verification by WIPO, in conjunction with WHO, of the exact similarity of the domain name registration and the INN, notice to ICANN by WIPO, and certification by ICANN to the registrar concerned (with notification to the domain name holder). Consideration could be given to allowing a reasonable transition period for the holder of the registration that is subject to cancellation to migrate to another domain name registration.

118. The world health community, through consensus among relevant public authorities and private circles, have considered it to be appropriate to establish the INN system for the protection of public safety and the promotion of a reliable system of identifiers that can be

119. It is accordingly recommended that:

(i) ICANN's agreements with registries for gTLDs should require the prohibition of the registration of exact INNs in any of the official languages of the Cumulative List as domain names;

(ii) a similar prohibition should be reflected in registration agreements for domain names in the gTLDs;

(iii) any interested party should have the right to serve notice that a domain name registration in a gTLD is identical to an INN and that, upon verification of the exact similarity between the domain name registration and the corresponding INN by WIPO, in conjunction with WHO, notice to ICANN, and certification by ICANN to the registrar concerned, the domain name registration should be cancelled.

121. It is further recommended that administrators of ccTLDs adopt a corresponding policy, in conjunction with their national health authorities.

122. In making the abovementioned recommendations, it is pointed out that the INN system is not supported by an international treaty, but by a resolution of the competent treaty organ of the World Health Organization and by consensus between public authorities and private industry. The effect of our recommendation is, therefore, to encourage ICANN to join the consensus established by the competent public and private authorities whose concern it is to promote public health and safety.

123. We do not recommend, at this stage, any further protection for INNs in the DNS, and, in particular, do not recommend an administrative dispute-resolution procedure in respect of misleading variations of INNs, for the following reasons:

(i) We believe that it is appropriate to commence with the certain and to review the application of the policy in the light of experience.

(ii) There is no convincing evidence of the damaging misuse of INNs through the registration of misleading variations of INNs as domain names. Since the existing policy of the INN system allows the use of the name of a manufacturer with an INN, difficult judgements might be involved in determining what is and what is not misleading in variations of INNs. Reliance upon the content of a web site addressed through a domain name may similarly involve difficult judgements, since content changes constantly.

ICANN of the value of the naming system that has already been established by competent authorities in the health sector. Insofar as the Domain Name Supporting Organization (DNSO) has a responsibility of advising the Board of ICANN "with respect to policy issues relating to the Domain Name System" (see paragraph 15, above), those policy issues presumably are circumscribed by the definition of functions of ICANN set out in its Articles of Incorporation (see paragraph 75, above), which relate to the technical functioning and stability of the DNS. The Names Council of the DNSO has no constituency representing health interests.

124. In recommending that no further measures than the prohibition against the registration of exact INNs as domain names be taken at this stage, the possibility is left open to re-visit the question of such further measures at a later stage in the light of the experience gained with respect to the recommendation made (assuming that it is adopted) and of further evidence to suggest that the integrity of the INN system is damaged through the registration of misleading variations of INNs.

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[1] Google search engine lists more than 46 million health-related sites, and Yahoo! Shopping offers more than 50,000 listings for sales and purchase of health products. The proposal submitted by the World Health Organization (WHO) for a .health gTLD noted the existence of more than 10,000 health-related sites.

[2] WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues* (April 30, 1999) at paras. 295-303.

[3] See "The use of common stems in the selection of International Nonproprietary Names (INN) for pharmaceutical substances," April 2000, Programme on International Nonproprietary Names, Quality Assurance and Safety: Medicines, Essential Drugs and Medicines Policy, WHO, Geneva (WHO/EDM/QSM/99.6). See also Daniel L. Boring "The Regulation and

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relationship by using a common stem or suffix. For a description of the use of stems and a list of common stems in the INNs system, see “Guidelines on the Use of International Nonproprietary Names (INNs) for Pharmaceutical Substances”, 1997, Report of the Programme on International Nonproprietary Names (INN), Division of Drug Management & Policies, WHO, Geneva (WHO/PHARM S/NOM 1570) at Section 3 and Annex 3.

[7] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001).

[8] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001).

[9] See Comment of Asóciacion Interamericana de la Propiedad Industrial (RFC-2 – December 26, 2000).

[10] For example: amoxicillin.com resolves to a web page offering a basic description of the drug and its applications, as well as two advertisements linking to pharmaceutical companies offering commercial services; phentermine.com resolves to a web page offering an entire lifestyle option for those interested in the diet-related drug.

[11] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001).

[12] One commentator stated that, to its knowledge, there was no reported case of a domain name containing an INN that had threatened patient safety. See Comment of Anakena.com (RFC-2 – December 28, 2000). See also Comment of United States of America, Office of Advocacy, U.S. Small Business Administration (RFC-3 – June 15, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of NIC Chile (RFC-3 – May 10, 2001), Comment of Anakena.com (RFC-3 – June 15, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001), Comment of Pharma Consulting International (RFC-3 – June 14, 2001).

[13] See Comment of Canada (RFC-3 – July 5, 2001), Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001), Comment of Mexico, National Institute of Copyright (RFC-3 – May 30, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of European Brands Association (AIM) (RFC-3 – May 16, 2001), Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001), Comment of UAEnic (RFC-3 – June 6, 2001), Comment of Martin Cibula (RFC-3 – June 15, 2001).

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[17] It was noted that INNs may be registered as domain names by pharmaceutical companies or individuals related to the healthcare industry and used in good faith to provide information to users (e.g. tamoxifencitrate.com – registered by Barr Laboratires to provide information about a generic medication used in breast cancer treatment). See Comment of Anakena.com (RFC-3 – June 15, 2001), Comment of Pharma Consulting International (RFC-3 – June 14, 2001).

[18] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001). See also Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000).

[19] See Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001). One commentator added that, in this event, some means of protection would be needed to ensure that other intellectual property rights were not violated in the use of the manufacturers' names. See Comment of European Commission (RFC-3 – June 25, 2001).

[20] See Comment of Pharma Consulting International (RFC-3 – June 14, 2001), Comment of Anakena.com (RFC-2 – December 28, 2000).

[21] See Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001).

[22] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001).

[23] See Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001).

[24] See Comment of European Commission (RFC-3 – June 25, 2001).

[25] Uniform Domain Name Dispute Resolution Policy, Paragraph 4(a)(i).

[26] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001).

[27] See Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001).

[28] See Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Pharma Consulting International (RFC-3 – June 14, 2001).

[29] See Comment of Nominet UK (RFC-3 – June 14, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001), Comment of Daniel R. Tobias (RFC-3 – April 15, 2001).

[30] One commentator, for example, referred to the global availability and use of INNs to suggest that protection should not be limited to the list of INNs maintained by WHO, but should extend to cover translations of the names identifying each pharmaceutical substance or ingredient, to

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[34] See Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001), Comment of UAEnic (RFC-3 – June 6, 2001).

[35] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001).

[36] See Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[37] See Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of European Federation of Pharmaceutical Industries and Associations (EFPIA) (RFC-3 – June 5, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[38] See Comments of World Health Organization (WHO) (RFC-3 – June 7, 2001) and (RFC-2 – December 21, 2000).

[39] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Republic of Korea, Korean Intellectual Property Office (KIPO) (RFC-3 – June 7, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of International Chamber of Commerce (ICC) (RFC-3 – June 18, 2001), Comment of Martin Cibula (RFC-3 – June 15, 2001). See also Comment of the European Commission (RFC-2 – January 16, 2001), Comment of Asóciacion Interamericana de la Propiedad Industrial (RFC-2 – December 26, 2000). One commentator noted that "[i]n contrast to personal names, these are names that should be protected to the greatest extent possible, since confusion could cause immense damage. These names should be incorporated into a register and completely excluded from all TLDs and ccTLDs." See Comment of MARQUES, Association of European Trade Mark Owners (RFC-2 – December 22, 2000).

[40] See Comment of European Federation of Pharmaceutical Industries Associations (EFPIA) (RFC-2 – December 15, 2000), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000).

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system and applications are refused on the basis of descriptiveness, if a mark is identical or closely similar with a recommended INN.

[42] See *http://mednet.who.int.*

[43] Currently, the MEDNET is available only to WHO 'INN partners', with authorization given through an automated administration process, that ensures privacy using password and authentication systems. However, it is envisaged that different layers of access will be provided in future to authorized users.

[44] See Comment of United States of America, Office of Advocacy, U.S. Small Business Administration (RFC-3 – June 15, 2001). The opposition to an exclusion mechanism was confirmed by numerous other commentators: see Comment of Japan Network Information Centre (JPNIC) (RFC-3 – June 8, 2001), Comment of Pharma Consulting International (RFC-3 – June 14, 2001), Comment of Luis de Barros (RFC-3- June 14, 2001), Comment of Chris Brand (RFC-3 – April 16, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001), Comment of Jason Presley (RFC-3 – April 18, 2001), Comment of George Reese (RFC-3 – April 15, 2001).

[45] It was noted that scientific, regulatory, and consumer communities use the generic names to discuss pharmaceuticals' benefits, side effects, testing and regulatory review and progress. (e.g., consumers understand that NutraSweet® is a trademark but 'aspartame' is open for all use). See Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 – June 15, 2001).

[46] See Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001), Comment of Pharma Consulting International (RFC-3 – June 14, 2001). See also Comment of Fédération internationale des conseils en propriété industrielle (FICPI) (RFC-2 – December 29, 2000), Comment of United States Council for International Business (USCIB) (RFC-2 – December 29, 2000), Comment of Verizon Communications (RFC-2 – December 26, 2000).

[47] The case of *Boehringer Ingelheim Corporation* v. *Kumar Bhatt*, involved the domain names micardis.com, telmisartan.com and meloxicam.com, of which the first reflects a registered trademark of the Complainant pharmaceutical company, and the latter are recommended INNs used by the Complainant to market pharmaceutical products in which they are active ingredients. The Administrative Panel transferred all three names to the Complainant on the basis of its status as trademark owner, as well as patentee and exclusive licensee of products marketed under the INNs. The Respondent, a physician and Internet consultant, argued that his registration of the names was to assist patients and the general public by providing centralized reference sites for medical information, and that 'telmisartan' and 'meloxicam' were generic

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[Endnote continued from previous page]

intergovernmental organizations. They provide that such entities shall have the capacity to, *inter alia*, institute legal proceedings (Article I and Article II respectively) but shall enjoy immunity from every form of legal process, except insofar as the organization expressly waives such immunity (Article II and Article III respectively).

[50] See Comment of Fédération internationale des conseils en propriété industrielle (FICPI) (RFC-3 – June 14, 2001).

[51] See Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001). An alternative remedy that was favored by some commentators was the transfer of any domain name replicating an INN to WHO, while costs of registration maintenance could be minimized by agreement between the registrars and ICANN. One commentator also suggested that WHO could maintain informational sites at the INN domains; see Comment of Christian Mogensen (RFC-3 – April 16, 2001).

4. NAMES OF INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

125. One of the consequences of increased personal mobility, the networked society, open trading and financial systems and the power of technology has been that issues requiring public sector intervention are increasingly international in character. As a result, international intergovernmental organizations (IGOs) – such as the United Nations Organization (UNO), the Food and Agricultural Organization (FAO), the International Labour Organization (ILO), the International Monetary Fund (IMF), the International Telecommunications Union (ITU), the World Health Organization (WHO), the World Meteorological Organization (WMO) and the World Trade Organization (WTO) – are called upon to play a progressively more important role in multilateral affairs among States and their citizens. The ability of these IGOs to fulfil their respective missions depends on effective communication and dissemination of information about their activities and services.

126. The Internet provides a powerful means for IGOs to present information about and encourage participation in their programs. At the same time, however, the Internet poses a risk that individuals and entities might attempt to capitalize, through unauthorized association, imitation, deception or fraudulent activity, on the standing of these organizations. If an IGO's name or acronym is used on the Internet by unauthorized parties, it may lose its distinctive power of identification, while the public, by virtue of the false associations, may be misled as to the information or products or services offered by the unauthorized party.

127. The Request addressed to WIPO to initiate the Second WIPO Process sought

EXISTING INTERNATIONAL PROTECTION

128. The existing international legal framework contains clearly expressed and widely accepted (through applicable constitutional processes) principles prohibiting the unauthorized commercial use, as trademarks, of the names and acronyms[1] of IGOs.

129. Article 6*ter* of the Paris Convention for the Protection of Industrial Property (the Paris Convention), to which 162 States are party, provides, *inter alia*:

> "(1)(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.
>
> "(b) The provisions of subparagraph (a), above, shall apply equally to . . . abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of . . . abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection."[2]

130. Article 6*ter* was introduced into the Paris Convention by the Revision Conference of

131. The Paris Convention, (Article 6*ter* (1)(b)), accordingly prohibits the registration and use of, *inter alia*, the names or abbreviations of IGOs as trademarks or elements of trademarks. The Trademark Law Treaty of 1994 (Article 16) extends the same protection against registration and use with respect to service marks.[4]

132. The entitlement of an IGO to receive protection under these treaties is not automatic. Any name or abbreviation for which an IGO wishes to obtain protection must be communicated to the International Bureau (Secretariat) of WIPO, which will then transmit the communication to the States party to the Paris Convention.[5] The protection available to IGOs under the Paris Convention thus depends entirely upon their submission of a request for communication to WIPO.[6] WIPO maintains a notification list and performs the functions of determining the admissibility of such requests for communication under Article 6*ter* and of forwarding the admissible communications to the States party to the Paris Convention.

133. To date, a total of 91 IGOs have requested protection under Article 6*ter*. Each organization has not requested protection of all of the possible signs or emblems enumerated under Article 6*ter* (e.g., armorial bearings or flags). As a general rule, however, most IGOs that have requested protection have notified their name and abbreviation (in several languages), as well as their principal emblem.[7]

134. In 1992, the Paris Union Assembly (the competent treaty organ of the Paris Convention) adopted a set of "Guidelines for the Interpretation of Article 6*ter*(1)(b) and (3)(b) of the Paris Convention"[8] designed to clarify which IGOs may qualify for protection under the Paris

135. The Guidelines define a "permanent entity" as one that has been established "for an indefinite period of time."[9] The "specified aims" and "rights and obligations" of such a permanent entity are defined by reference, respectively, to subject matters, rights and obligations "which are clearly defined in [the permanent entity's] enabling statutes or charter or in the resolutions or decisions by which it has been established."[10]

136. The Paris Convention foresees that the use of IGOs' insignia may be authorized,[11] and permits States the choice whether to apply a further non-mandatory exception to its prohibitions against trademark registration and use, specifically in respect of the names, abbreviations and other emblems of IGOs. States are not required to apply such prohibitions when the registration or use of the trademark in question:

> (i) "is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the . . . abbreviations, and names," or
>
> (ii) "is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization."[12]

Many, but not all, States party to the Convention have enacted the exception in national legislation and, to this extent, there is divergence at the national level in the scope of protection granted to IGOs.[13]

137. The Agreement on Trade-Related Aspects of Intellectual Property Rights

> "The procedures relating to communication of emblems and transmittal of objections under the TRIPS Agreement shall be administered by the International Bureau [of WIPO] in accordance with the procedures applicable under Article 6*ter* of the Paris Convention (1967)."[15]

SCOPE OF EXISTING INTERNATIONAL PROTECTION

138. The scope of existing international protection established by the treaty provisions discussed above may be summarized as follows:

(i) The *registration* and *use*, as trademarks, service marks or elements thereof, of the names and abbreviations of IGOs is prohibited, except where such registration and use is authorized or falls within a permitted exception. Contracting Parties agree to refuse or invalidate any such registration of the names or acronyms of IGOs, and to prohibit their use by appropriate measures.[16] The clear purpose is to ensure that these names and abbreviations remain free of the private proprietary rights. These provisions reflect the public status of IGOs, and seek to avoid any potential for confusion or deception that would interfere with that public status.

(ii) The protection afforded by the treaties is directed against the registration and use of the names and abbreviations of IGOs as *trademarks* or *service marks*. It follows that, to the extent that a domain is the same as the name or acronym of an IGO and *is used as a* acronyms notified accordingly. As noted above, only 91 such organizations received such protection since 1958, when this system was established.

(iv) The protection granted to IGOs under the international treaties is subject to exception, when the registration or use of an IGO's name or abbreviation as a trademark or service mark is not of such a nature to suggest to the public that a connection exists with the organization concerned, or is "probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization."[17] By analogy, the registration and use by third parties of the names or acronyms of IGOs as domain names might, in countries that recognize this exception, be considered permissible, if the registration and use of the domain name is unlikely to suggest to, or to mislead, the public that a connection with the IGO exists. One commentator noted, for example, that existing domain name registrants should be given the opportunity to defend their registration through the UDRP, on the same grounds set forth in Article 6*ter* (1)(c).[18]

THE *.INT* TOP-LEVEL DOMAIN

139. The .int - for "international" - top-level domain was among the seven initial generic domains established by the Internet Assigned Numbers Authority (IANA), and its use remains restricted to "organizations established by international treaties, or international databases."[19] IANA states that .int is reserved for "organizations established by international treaties between or among national governments" and, in particular, that:

140. It is notable that, from the beginning, special status was accorded within the DNS to international organizations. The restricted .int gTLD serves the dual purposes of (i) designating a space in the DNS for the registration of IGOs' chosen identifiers, and (ii) providing a measure of protection through registration requirements which restrict that space only to those international organizations that qualify (i.e., those that are established by treaty).

141. The .int top-level domain provides some measure of assistance to IGOs within the DNS. Because of the restricted nature of this top-level domain, no individuals, companies or other entities can obtain a domain name registration in .int, let alone register the name or abbreviation of an IGO in that domain. As long as the registration procedures of .int are properly enforced, the .int top-level domain provides a space where Internet users can have confidence that registrations in the domain are genuinely connected with the corresponding organizations. This restricted domain for IGOs has the added advantage of having already been established, and the assistance it offers to IGOs in protecting the authenticity of their virtual identities cannot interfere with any existing rights or interests of domain name registrants in other TLDs. For these reasons, the question was raised in the Second WIPO Process whether adequate protection may already exist in the DNS for international organizations by virtue of the restricted .int gTLD.[22]

142. Commentators throughout the Second WIPO Process revealed a lack of confidence that the existence of the .int domain, of itself, can provide sufficient protection to IGOs against the abuse of their names and acronyms in the DNS, and prevent any consequent deception of

such as .org.[24] The potential for abuse in these open gTLDs is illustrated by the fact that the United Nations Organization has registered 'un.org', whereas 'unitednations.org' has been registered by a private California-based company. As an alternative solution, the World Health Organization has its official site at 'who.int', and users visiting 'who.org' are automatically forwarded to the .int site. It is clear that many users are unaware of the existence or purpose of the .int domain, and considerable promotional work is needed to enhance its recognition. Nevertheless, most commentators strongly supported the enhancement of the visibility and profile of .int, and favored its use consistently and universally by all IGOs.[25]

144. Critically, the protection provided to the names and acronyms of IGOs in the .int top-level domain has a serious deficiency. While restrictions apply to it, they do not apply to other gTLDs. The lack of restrictions in these other domains undermines the efficacy of .int.[26] It is the risk of predatory and parasitical practices in these domains (as well as in the ccTLDs), which raises most concern for IGOs and Internet users in general.[27] The .int domain space assists in determining when a domain name registration is legitimate, but it does not assist in determining when other registrations in the broader gTLD space are fraudulent. For this reason, at this stage, it is recommended that reliance alone upon the .int domain is insufficient. The question thus remains, in the context of the global DNS, how the names and abbreviations of IGOs can most effectively be protected.

ANALYSIS OF COMMENTS AND VIEWS EXPRESSED IN RESPONSE TO THE INTERIM REPORT

including the United Nations (UN), World Health Organization (WHO), World Trade Organization (WTO), Organization for the Prohibition of Chemical Weapons (OPCW) and International Labour Office (ILO), each voiced an unequivocal need for protection in the DNS, and gave evidence of having been "plagued by such infringing or abusive registrations."[29] The IGOs noted that such protection would benefit not just the organizations themselves, but advance the global public interest by protecting Internet users and consumers from deceptive conduct.[30] Some IGOs stated that their names and abbreviations should not be available for registration as domain names by unauthorized third parties, even if the domain name registration is not in bad faith, as such registrations can nevertheless be confusing and misleading to the public, raising questions of authenticity and accuracy as to the source of information provided, and giving rise to the perception that an IGO endorses or approves of the information, service or product being offered through an unrelated web site.[31]

147. The organizations which should qualify for protection was also the subject of comments. Many commentators suggested, in this regard, that at least the names or acronyms of those IGOs that have followed the treaty procedures under the Paris Convention and TRIPS Agreement - and notified accordingly - should be considered for protection in the DNS.[32] These commentators expressed the view that the scope of legal protection which already exists in the physical world for the names and abbreviations of IGOs should be reflected in the DNS. The United Nations (UN) put forward the view that protection should also be extended to the names and acronyms of subsidiary bodies of the UN organizations, such as peacekeeping missions, that are an integral and significant part of the Organization, although they do not qualify as 'permanent entities' in accordance with the Guidelines adopted for the

abuse in the registration of their names or acronyms that had resulted in deception or confusion to the public, and that required constant and resource-wasting vigilance.[35] These organizations expressed concern that unofficial web sites using a domain name that is identical or similar to their name or acronym may contain misleading, inaccurate or prejudicial information about the IGO, while leading the viewer to believe that he or she is visiting the organization's official web site. The UN stated that, in dealing with such instances of abusive registrations, it has been required to constantly monitor the DNS and confront offending registrants one by one, committing substantial time and resources from various sectors of the Organization. The UN described the added complication in resolving these cases through available legal or administrative processes, because these procedures would inappropriately require the waiver of the privileges and immunities that are accorded to IGOs under international law.[36] In this respect, a number of commentators noted the importance of taking into account the customary immunity from legal process and execution that is accorded to IGOs, when implementing any system of protection for identifiers in the DNS.[37]

149. A small minority of commentators felt that the existing protection granted to IGOs through the UDRP procedures, insofar as their names and acronyms may function as trademarks, is adequate.[38] It is notable, however, that no intergovernmental organization has yet filed a claim under the UDRP in respect of its name and acronym, nor can such a procedure accommodate the organizations' privileges and immunities.

150. With regard to the scope of protection to be granted to the names and acronyms of

ANALYSIS OF VIEWS EXPRESSED ON MEANS OF IMPLEMENTING PROTECTION

151. Commentators were most concerned with discussion of the means of implementation of protection. The Interim Report put forward three options in this regard:

(i) Maintenance of the status quo, and reliance on the existing top-level domain, .int, reserved for treaty organizations;
(ii) Establishment of an exclusion mechanism in some or all of the gTLDs for the names only, or for the names and acronyms, of IGOs; and
(iii) Modification of the UDRP to extend to the names and acronyms of IGOs.

In relation to the first option, as discussed above, commentators did not favor maintaining the status quo, as the .int domain, while useful, is not considered sufficient to provide the necessary protection for IGOs in the DNS, nor to reflect the existing protection accorded by international law. Comments were divided on the remaining two options.

Exclusion Mechanism

152. The exclusion mechanism has proven a contentious option with respect to the protection of any identifier in the DNS, including the names and acronyms of IGOs. As discussed in relation to the protection of INNs, the Internet community has strong reservations about the efficacy and desirability of blocking or exclusion mechanisms, and the overreaching effect they may have on users' rights. Some commentators were opposed to any protection by way

Nations Organization, but is also 'one' in Italian, a Fiat car model and a Swiss card game. 'ICC' is both the International Chamber of Commerce and the International Computing Centre. The 'WHO' refers to the World Health Organization, a rock group, and the science fiction character Dr. Who. WIPO itself is registered as a United States trademark in respect of tissues for personal and industrial use.[44] Across the differentiated domain name space, these different entities may coexist: 'SBA' is shared by the United States Small Business Association at 'sba.gov', the Southern Bakers Association at 'sba.org' and the American law firm Smith, Bucklin and Associates at 'sba.com'.[45] There exists a German medical company at 'ilo.com', as well as a Canadian Internet company at 'ilos.net'.[46] An exclusion mechanism that automatically blocked both the names and acronyms of IGOs could jeopardize the existing rights of numerous other users. In this context, it should be noted that the international law protecting the names and acronyms of IGOs is aimed at preventing the registration or use of such identifiers as trademarks, especially in any circumstance where such use could mislead the public as to the source or connection of the user with the IGO. An analogy could usefully be drawn to the DNS, where the objective is not necessarily to deny all uses of acronyms that correspond to IGOs, but to ensure the prohibition of any use that is likely to mislead or otherwise confuse the public.

154. Despite the apparent shortcomings of an exclusion mechanism, many commentators, including IGOs, were in favor of this form of protection, as seemingly the most effective way to recognize the existing legal protection for IGOs in the DNS, without requiring these entities to submit to inappropriate dispute-resolution proceedings.[47] Some commented that such an exclusion should apply to all gTLDs, while others suggested it should be considered

or in addition to an exclusion mechanism.[51] Extending the UDRP to protect the identifiers of IGOs would not require the creation of new law, but merely the reflection in the DNS of existing international legal principles for their protection. The key benefit perceived in the UDRP is that it can be used to target only those names and acronyms of IGOs that are used in bad faith, so as to mislead or confuse the public.[52] Even those commentators in favor of protection for IGOs' names and acronyms noted that, in considering any new measures of protection, adequate consideration needed to be given to the rights of existing, legitimate domain name registrants.[53] A minority of comments were in favor of broader protection for IGOs, such that any unauthorized registration and use of the name or acronym of an IGO should be presumed to be misleading and in bad faith.[54] One commentator proposed a detailed definition of 'bad faith', specifying that the registration of the name or acronym, in whole or in part, must have been unauthorized and intentional, and must be (i) likely to create an impression that the domain name is that of the IGO concerned, or (ii) in relation to a site that contains material or information prejudicial to the interests of the IGO.[55]

156. In opposition to any modification of the UDRP in this context, some commentators stated that the UDRP should apply only to the extent that such names or acronyms of IGOs function as trademarks or service marks.[56] Others opposed any broadening in the scope of disputes that could be decided under the UDRP, arguing that the UDRP is a relatively new process that should be allowed to develop and stabilize before addressing new categories of disputes.[57] Still other commentators raised free speech concerns and contended that the names or acronyms of IGOs should be allowed to be registered as domain names if there is no confusing similarity or misleading content on the site.[58] Finally, there was expressed a

consider submission to the UDRP as an inappropriate compromise of their privileges and immunities.[60] In fact, the UN has stated that it will not submit to a dispute resolution process such as the UDRP, which would subject the Organization to the jurisdiction of national courts.[61] It is recalled, in this respect, that the UDRP as it currently applies to trademarks contains a mutual jurisdiction clause that requires complainants to submit to the compulsory jurisdiction of a designated court of law for the purpose of any challenge to the decision of the administrative decision-maker.[62] Any administrative process to which the IGOs could agree would need to omit such a reference.

RECOMMENDATION

158. The clear majority of commentators favors some form of protection of the names and acronyms of IGOs within the DNS.

159. There is also abundant evidence that abuses of the names and acronyms of IGOs through domain name registrations exist that constitute harmful practices.

160. The protection of the *names* of IGOs raises less complicated and more straightforward questions than the protection of the *acronyms* of IGOs, where necessarily there is far greater scope for the concurrent, good faith use of the same letters as the acronyms of some IGOs in various different contexts and in various different naming systems.

numerous public policies established by the international community and conducive to undermining the credibility and reliability of the DNS.

162. The existing situation with respect to the names and acronyms of IGOs in the DNS is unbalanced. Any person, without any qualification whatsoever, may register the name or acronym of an IGO in an unrestricted gTLD. Furthermore, they can do so immediately and at an insignificant cost. In contrast, the potential damage that can be inflicted with the use of such a registration is of a different order. The pursuit of protection against such harm not only is distractful to the central missions of IGOs and wasteful of their limited resources, but also may involve questionably unnecessary deviation from the standard principle of immunity of IGOs from jurisdiction.

163. We recommend that the current unsatisfactory situation be redressed through balanced action on the part of the international community. The choices of instruments for implementing such action are limited and consist principally of the following:

(i) A system of notification by any interested party of the registration as a domain name of the name or acronym of an IGO benefiting from protection under Article 6*ter* of the Paris Convention, the verification of the exact similarity between the name or acronym of the IGO and the domain name by WIPO (as custodian of the authorized list of notifications under Article 6*ter* of the Paris Convention), notification to ICANN or, directly, to the registrar concerned, and the cancellation of the domain name registration. Such a procedure would, however, appear to be unsatisfactory because (a) its automacity may result in the cancellation

(iii) A modification of the existing UDRP, specifically designed for the bad faith misuse of the names or acronyms of IGOs through domain name registrations. This option, however, is unacceptable because (a) insofar as ICANN, acting on the basis of recommendations from the Domain Name Supporting Organization (DNSO) or the DNSO Names Council, might be considered to be responsible for the introduction of modifications to the UDRP, it and its subsidiary bodies do not have any constituency pertinent to international intergovernmental organizations; and (b) the UDRP contains within its design an unacceptable deviation from the established principle of immunity of IGOs from the jurisdiction of national courts.

(iv) An administrative procedure, similar to the UDRP, but independently developed and managed within the framework of international administrative tribunals. Such an administrative procedure could be available to any IGO to file a complaint that a domain name registration is the same as or misleadingly similar to the name or acronym of the IGO concerned, has been registered in bad faith without legal justification, and is likely to mislead users into believing that there is an association between the holder of the domain name registration and the IGO in question. Like the UDRP, the remedies that might be awarded by a panel under the special administrative procedure should be limited to cancellation or transfer of the domain name registration and should be implemented through the ICANN system (or ccTLD administrators) within the DNS.

164. It is recommended that the names and acronyms of IGOs benefiting from protection *qualifying IGOs to file a complaint that a domain name registration is the same as, or misleadingly similar to, the name or acronym of the IGO, that the registration has been made without legal justification, and that the registration is likely to mislead users into believing that there is an association between the holder of the domain name registration and the IGO in question.*

166. It is recommended that remedies under the special administrative procedure be limited to the cancellation or transfer of the domain name registration and that the results of the procedure be enforced within the DNS through the ICANN system.

167. It is recommended that the special administrative procedure should apply to domain name registrations in all gTLDs and in all ccTLDs. It is recognized that the enforcement of the results of such a procedure within the ccTLDs would require the

the form of a resolution of a competent treaty organ, a memorandum of understanding duly accepted by national authorities or a treaty.

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[1] The terms “abbreviation” and “acronym” are used interchangeably in this Chapter. An acronym is defined as “a word formed from the initial letters of other words,” such as “WIPO” for the World Intellectual Property Organization. See Concise Oxford Dictionary (10th ed. 1999). An “abbreviation,” the term used in Article 6*ter* of the Paris Convention, is a more inclusive term, which can refer to an acronym or any other means of abridging a word or series of words, such as “int” for international.

[2] The protection under Article 6*ter* does not extend to names, abbreviations and other emblems of intergovernmental organizations that are already the subject of international agreements intended to ensure their protection, such as the Geneva Convention (1949) for the amelioration of the condition of the wounded and sick in armed forces, Article 44 of which protects the emblems of the Red Cross, the words “Red Cross” or “Geneva Cross, and analogous emblems.” The object of this exception is to avoid possible overlap with provisions in other conventions that regulate on this subject. See Stephen P. Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, vol. II, at 1244 (1975); Prof. J.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property*, Article 6*ter*, paragraphs (1) and (2), at 97-98 (BIRPI, 1969).

[3] See Stephen P. Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, vol. II, at 1244 (1975).

[4] Article 16 of the Trademark Law Treaty (TLT) provides: “Any contracting party shall register service marks and apply to such marks the provisions of the Paris Convention which concern trademarks.”

[5] Article 6*ter* (3)(b). Each State is obligated under Article 6*ter* (1)(3)(a) to “make available to the public the lists so communicated” by WIPO. Any State receiving the communication of a name, emblem or other official sign of an IGO may, within a period of 12 months from the receipt of that communication, transmit its objections, if any, through the intermediary of the International Bureau of WIPO, to the IGO at the request of which the communication was made. (Article 6*ter* (4)).

[6] Article 6*ter* (3)(b) provides:

> “The provisions of subparagraph (b) of paragraph (1) of this Article *shall apply only* to such … abbreviations, and names of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International

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[11] By implication, Article 6*ter* (1)(a) refers to "use, without authorization by the competent authorities."

[12] Article 6*ter* (1)(b).

[13] The European Patent Office noted that the national legal provisions enacting Article 6*ter* of the Paris Convention "are sometimes highly divergent in the scope of protection." See Comment of European Patent Office (EPO) (RFC-2 – December 28, 2000).

[14] TRIPS Agreement, Article 63 (2).

[15] WIPO-WTO Agreement, Article 3.

[16] Paris Convention, Article 6*ter* (1)(a).

[17] Paris Convention, Article 6*ter* (1)(c).

[18] See Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 - December 26, 2000).

[19] See J. Postel, Request for Comments (RFC) 1591, Network Working Group (March 1994). The six other generic domains are .com, .net, .org, which are unrestricted domains, and .edu, .gov and .mil, which restrict registrations to certain entities, as with .int.

[20] See "The .int Domain: Current Registration Policies," at *http//www.iana.org/int-dom/int.htm* (page last updated April 16, 2000).

[21] The IANA site further indicates that "discussions are underway with a number of organizations regarding the future of the .int domain, including a plan of the International Telecommunications Union (ITU) to assume management of the .int domain. *Id.*, referencing the ITU's plan to assume management of the .int domain, at *http://www.itu.int/net/int.*

[22] See Comment of Alexander Svensson (RFC-2 - December 21, 2000). See also Comment of Matthias Haeuptli (RFC-1 – September 15, 2000), Comment of J.R. Stogrin (RFC-1 – September 14, 2000), Comment of Christopher Zaborsky (RFC-1 – August 11, 2000).

[23] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001), Comment of International Civil Aviation Organization (ICAO) (RFC-3 – June 12, 2001), Comment of United Nations, Office of Legal Affairs, (RFC-3 – June 15, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[24] IGOs registering in .org include the United Nations Organization, Food and Agriculture Organization, International Civil Aviation Organization, International Maritime Organization, United Nations Economic Social and Cultural Organization, United Nations Development

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Comment of Michael Froomkin (RFC-3 – June 4, 2001), Comment of Christian Mogensen (RFC-3 – April 16, 2001), Comment of Daniel R. Tobias (RFC-3 – April 15, 2001).

[26] The top-level domain, .org, is a domain space that might especially be prone to risks of misleading domain name registrations corresponding to the names or abbreviations of IGOs, since "org" is intended to be the abbreviation for "organization."

[27] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Mexico, National Institute of Copyright (RFC-3 – May 30, 2001), Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of United Nations, Office of Legal Affairs, (RFC-3 – June 15, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of European Brands Association (AIM) (RFC-3 – May 16, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001), Comment of UAEnic (RFC-3 – June 6, 2001). See also Comment of the Brazil Association of Intellectual Property (ABPI) (RFC-2 – January 4, 2001).

[28] See, for example, Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001), Comment of International Civil Aviation Organization (ICAO) (RFC-3 – June 12, 2001), Comment of United Nations, Office of Legal Affairs (RFC-3 – June 15, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[29] See Comment of United Nations, Office of Legal Affairs (RFC-3 – June 15, 2001). See also Comment of European Commission (RFC-3 – June 25, 2001), Comment of International Civil Aviation Organization (ICAO) (RFC-3 – June 12, 2001), Comment of International Labour Office (ILO) (RFC-3 – June 8, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of European Patent Office (EPO) (RFC-2 – December 28, 2000), Comment of International Organization for Migration (IOM) (RFC-2 – February 1, 2001), Comment of International Monetary Fund (IMF) (RFC-2 – December 28, 2001), Comment of Organization for the Prohibition of Chemical Weapons (OPCW) (RFC-2 – January 17, 2001), Comment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – January 17, 2001), Comment of United Nations Framework Convention on Climate Change (UNFCCC) (RFC-2 – January 17, 2001), Comment of World Trade Organization (WTO) (RFC-2 – January 17, 2001).

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Property Protection of the Republic of Moldova (RFC-2 - December 29, 2000), Comment of the European Patent Office (EPO) (RFC-2 - December 28, 2000), Comment of International Maritime Organization (IMO) (RFC-2 – December 13, 2000), Comment of United Nations Framework Convention on Climate Change (UNFCCC) (RFC-2 - December 7, 2000), Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000), Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 - December 26, 2000), Comment of The Association of European Trade Mark Owners (MARQUES) (RFC-2 - December 22, 2000), Comment of European Brands Association (AIM) (RFC-2 - December 20, 2000), indicating for IGOs that the "level of protection on the Internet should be NO LESS than the Paris Convention/TRIPS protection today." (Emphasis in original), Comment of The Law Society of Scotland (RFC-2 – January 4, 2001). See also Comment of Organization for the Prohibition of Chemical Weapons (OPCW) (RFC-2 – December 28, 2000), Comment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – December 22, 2000), Comment of World Trade Organization (WTO) (RFC-2 – December 6, 2000).

[33] See Comment of United Nations, Office of Legal Affairs (RFC-3 – June 15, 2001). See also Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001).

[34] See Comment of World Trade Organization (WTO) (RFC-2 – January 19, 2001).

[35] The International Labour Office described the abusive registration by an individual of internationallabour.org, internationallabour.com and internationallabour.net. See Comment of International Labour Office (ILO) (RFC-3 – June 8, 2001). Similarly, the International Monetary Fund indicated that its name and acronym had been registered by third parties in a manner that is misleading fraudulent and abusive. See Comment of International Monetary Fund (IMF) (RFC-2 - December 28, 2000). See also Comment of Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – December 22, 2000), Comment of United Nations Framework Convention on Climate Change (UNFCC) (RFC-2 - December 7, 2000), Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000), Comment of World Trade Organization (WTO) (RFC-2 – December 6, 2000).

[36] The Convention on the Privileges and Immunities of the United Nations (adopted by the General Assembly of the United Nations on 13 February 1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (adopted by resolution of the General Assembly on 21 November 1947) provide for the special legal status of the IGOs. They provide that such entities shall have the capacity to, *inter alia*, institute legal proceedings (Article I and Article II respectively) but shall enjoy immunity from every form of legal process, except

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Affairs (RFC-3 – June 15, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[40] See Comment of European Commission (RFC-3 – June 25, 2001).

[41] See Comment of International Maritime Organization (IMO) (RFC-2 – December 13, 2000), Comment of Organization for the Prohibition of Chemical Weapons (OPCW) (RFC-2 – December 28, 2000), Comment of Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – December 22, 2000), Comment of the United Nations Framework Convention on Climate Change (UNFCC) (RFC-2 – December 7, 2000), Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000), Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 – December 26, 2000), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of Elzaburu (Luis H. De Larramendi) (RFC-1 – September 19, 2000).

[42] See Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001), Comment of Elzaburu (Luis H. De Larramendi) (RFC-3 – June 14, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001).

[43] See also Comment of the American Intellectual Property Law Association (AIPLA) (RFC-2 - December 29, 2000).

[44] U.S. Trademark Registration #2209103.

[45] See Comment of United States of America, Office of Advocacy, U.S. Small Business Administration (Washington consultation – May 29, 2001), Comment of World Health Organization (WHO) (RFC-3 – June 7, 2001), Comment of Argentine Chamber of Databases and On Line Services (CABASE) (RFC-3 – June 6, 2001), Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 – June 15, 2001), Comment of European Brands Association (AIM) (RFC-3 – May 16, 2001), Comment of *Fédération internationale des conseils en propriété industrielle* (FICPI) (RFC-3 – June 14, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Japan Network Information Centre (JPNIC) (RFC-3 – June 8, 2001), Comment of Christian Mogensen (RFC-3 – April 16, 2001).

[46] See Comment of International Labour Office (ILO) (RFC-3 – June 8, 2001).

[47] See Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Comment of Republic of Korea, Korean Intellectual Property Office (KIPO) (RFC-3 – June 7, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of International Civil Aviation Organization (ICAO) (RFC-3 – June 12, 2001), Comment of

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(WHO) (RFC-2 – December 21, 2000), Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 - December 26, 2000), Comment of The Association of European Trade Mark Owners (MARQUES) (RFC-2 - December 22, 2000); *cf.* Comment of International Maritime Organization (IMO) (RFC-2 – December 13, 2000), Comment of J. R. Stogrum (RFC-1 – September 14, 2000).

[49] See Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 - December 26, 2000).

[50] See Comment of International Labour Office (ILO) (RFC-3 – June 8, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001).

[51] See Comment of the European Commission (RFC-2 – January 16, 2001), Comment of Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – December 22, 2000), Comment of the United Nations Framework Convention on Climate Change (UNFCC) (RFC-2 – December 7, 2000), Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000), Comment of the Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 - December 26, 2000), Comment of European Brands Association (AIM) (RFC-2 - December 20, 2000), Comment of British Telecommunications, Plc. (RFC-2 - December 19, 2000), Comment of Elzaburu (Luis H. De Larramendi) (RFC-1 – September 19, 2000).

[52] See Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001).

[53] See Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001). See also Comment of International Maritime Organization (IMO) (RFC-2 – December 13, 2000), Comment of Organization for the Prohibition of Chemical Weapons (OPCW) (RFC-2 – December 28, 2000).

[54] See Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 – December 26, 2000), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of British Telecommunications, Plc. (RFC-2 – December 19, 2000).

[55] See Comment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (RFC-2 – December 22, 2000). See also Comment of World Health Organization (WHO) (RFC-2 – December 21, 2000), providing that the challenge should be allowed if the acronym of the IGO was in use *before* the domain name registration and there is a risk of confusion as to the identity of the domain name holder or the registration or use is otherwise in bad faith.

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VerandaGlobal.com, Inc. (William Blackwood) (RFC-1 – August 15, 2000), Comment of Solid State Design, Inc. (Charles Linart) (RFC-1 – August 15, 2000), Comment of harrycanada (RFC-1 – August 14, 2000), Comment of Garry Anderson (RFC-1 – August 12, 2000), Comment of Mark Moshkowitz (RFC-1 – August 12, 2000), Comment of Daniel Deephanphongs (RFC-1 – August 12, 2000).

[60] See, for example, Comment of International Civil Aviation Organization (ICAO) (RFC-3 – June 12, 2001), Comment of International Labour Office (ILO) (RFC-3 – June 8, 2001), Comment of United Nations, Office of Legal Affairs (RFC-3 – June 15, 2001), Comment of Organization for the Prohibition of Chemical Weapons (OPCW) (RFC-2 – December 28, 2000).

[61] See Comment of United Nations, Office of Legal Affairs (RFC-3 – June 15, 2001).

[62] The UDRP Rules, paragraph 3 (xiii), provide that the complaint shall:
"State that Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction."
See *http://www.icann.org/udrp/udrp-rules-24oct99.htm#3bxiii*

5. PERSONAL NAMES

169. Identity is a fundamental attribute of "the inherent dignity of the human person."[1] Many things are important in constituting a person's identity. The personal name is foremost amongst them and assists in creating distinctiveness or individuality, as well as serves as a succinct symbol pregnant with the associations that others have with that person. The importance of personal names to dignity is evident from the dark days of totalitarianism and nazism, when names were only numbers.

170. It has been often pointed out that the power and ubiquity of the technologies of communication and telecommunication have created greater opportunity for invasion of personal space and the use of attributes of personal identity in ways which are not approved by the person concerned. At the same time, these technologies have, in enhancing the visibility of public figures and leading business, sports and entertainment personalities, established the celebrity as a mundane feature of society.

171. The personal name is a difficult subject to treat. There is considerable diversity around the world in the way in which it is formulated and presented. These formulations and presentations (for example, which name, family or given, comes first, or whether the name consists of these two elements at all) are usually the result of the historical and cultural traditions of particular societies. Many sensitivities, including religious, political, historical, cultural and psychological, are touched by the subject of personal names.

173. Because of the diversity of interests affected by the treatment of personal names, the legal principles and policies that can be deployed to protect personal names are similarly diverse and vary, as might be expected, from country to country. These legal principles and policies include the right to publicity or the right to control the commercial use of one's identity, recognized in many States of the United States of America; the tort of unfair competition; the tort of passing-off (conceptually treated, in many cases, as part of the law of unfair competition), recognized generally in common-law countries; and the right to privacy.

174. It has not been possible to review in detail all the legal principles and policies that can be used for the protection of personal names in all of the countries of the world. Nevertheless, it is possible to identify two main interests that underlie particular approaches adopted in a number of countries to the protection of personal names against misuse:

(i) A commonly expressed public policy for the protection of personal names against misuse is economic. This economic policy, in turn, has two bases. The first of those bases is the prevention of unjust enrichment through the unauthorized commercial use of another's identity. As stated by Kalven and quoted by the Supreme Court of the United States of America, "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[2] The second basis of the economic interest underlying the protection of personal names against misuse is the prevention of deception and confusion on the part of consumers.

an injunction to restrain the continuation of this assumption, and can in addition claim damages if the act is proved to be wrongful, and moral compensation if this is justified by the nature of the wrong suffered." And in Spain, Section 7.6 of the Law of May 5, 1982,[3] provides that the unpermitted use of one's name, voice or likeness for *advertising or trade* purposes is an invasion of one's *personal* life.

175. The notoriety that attaches to certain persons can, in some countries, establish a basis for protection which is not available to ordinary persons.[4] In other instances, notoriety can be a factor which can influence the extent of damages granted as a result of the wrongful use of the person's name, rather than a ground for establishing a separate form of protection from that available to non-famous persons.

176. In commerce, the protection that is recognized for personal names and other attributes of the personality is usually exploited through the vehicle of contract. Thus, by permitting, under contract (or license), another to use a person's name in association with products or services, the personal name becomes an asset.

177. The status of the personal name as a potential asset may be secured through the registration of a trademark (or service mark). Most national laws, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement),[5] explicitly recognize that personal names are eligible for registration as trademarks. While personal names are eligible for registration as trademarks, however, like any sign for which trademark registration is sought, they must be distinctive in order to be valid trademarks.

PROTECTION OF PERSONAL NAMES UNDER THE UDRP

179. As mentioned above, personal names may, in appropriate circumstances, be registered as trademarks and, in practice, many are. The protection of personal names as trademarks has provided a basis for the application of the Uniform Domain Name Dispute Resolution Policy (UDRP) to the protection of personal names against deliberate, bad faith registration as domain names in the gTLDs. While a few oppose this application of the UDRP,[6] the clear weight of authority of many decisions is in favor of the application of the UDRP to the protection of personal names when they constitute trademarks. The present section of this Chapter outlines the main trends in this authority. Annex VI to this Report contains an indicative list of UDRP cases involving personal names that have been filed with the WIPO Arbitration and Mediation Center.

180. It is recalled that the UDRP provides that three conditions must be satisfied in order to establish that a domain name registration is abusive and that the complainant is entitled to relief:

(i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

(ii) the registrant of the domain name has no rights or legitimate interests in respect of the domain name; and

(iii) the domain name has been registered and is being used in bad faith.[7]

Trademark or Service Mark Rights

181. The first condition requires that in each case the complainant must demonstrate that the personal name in question is protected as a trademark or service mark, in which that complainant has rights.

182. There have been a number of cases in which a complainant has demonstrated that it meets this requirement by submitting evidence that the personal name in question is registered as a trademark.[8] The UDRP, however, does not require that a complainant must hold rights specifically in a *registered* trademark or service mark. Instead, it provides only that there must be "a trademark or service mark in which the complainant has *rights*," without specifying how these rights are acquired.[9] With this distinction in mind, many decisions under the UDRP have therefore determined that common law or unregistered trademark rights may be asserted by a complainant and will satisfy the first condition of the UDRP.[10] In relation to personal names, in particular, numerous UDRP decisions have relied upon a complainant's demonstration that it holds such common law rights in the disputed name.[11] In making these decisions, panels have given attention to a number of factors, including: (i) the distinctive character or notoriety of the name and the requirement that the domain name must be "identical or confusingly similar" to it, (ii) the relationship between this distinctive character and use of the name in connection with goods or services in commerce, and (iii) the location of the parties and the bearing that this may have on the acquisition of unregistered trademark rights.

personal name in which trademark rights are held and the domain name registration, panels have found that small variations between the two (e.g., such as removing the space between the first and last names), just as in cases involving words or terms other than personal names, are legally insignificant, so long as the registered domain name is "confusingly similar" to the personal name.[15]

184. The location of the parties can be significant for determining whether the complainant has trademark rights.[16] Rule 15(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure") provides that the panel shall decide a complaint on the basis, *inter alia*, of "…any rules and principles of law that it deems applicable." The applicable law will depend on the facts of the case, including the location of the parties. This Rule has allowed panels the flexibility to deal with disputes between parties with different national affiliations and concerning activity on a global medium. It is also a feature that has enabled complainants to seek protection for their names under trademark law, although they have not registered their names as a trademark or service mark in every country of the world.

The Registrant Has No Rights or Legitimate Interests in the Domain Name

185. The second condition of the UDRP requires that there be no evidence that the domain name registrant has any rights or legitimate interests in the domain name that it has registered. Panels normally review the full record in a case to assess whether a respondent has any rights or interests in the domain name. Based on the distinctiveness of the personal name in question and certain facts indicating that (i) the domain name does not correspond to the

and having registered it under the contact, “The Sade Internet Fan Club,” the respondent “has set out to deliberately associate this service with the Complainant.”[18] In a further case, the panel acknowledged that the respondent’s contention was a serious one and that use of the domain name in question, *montyroberts.net*, was for legitimate non-commercial or fair use purposes.[19] In balancing the rights of the complainant in its mark and the rights of the respondent to freely express its views about the complainant, however, the panel determined that:

> “the rights to express one’s views is not the same as the right to use another’s name to identify one’s self as the source of those views. One may be perfectly free to express his or her views about the quality or characteristics of the reporting of the New York Times or Time Magazine. That does not, however, translate into a right to identify one’s self as the New York Times or Time Magazine.”[20]

186. The panel found that, while the respondent’s primary motive for establishing the web site might have been to criticize the complainant, this did “not insulate Respondent from the fact that it is directly and indirectly offering products for sale on its website, or at websites hyperlinked to its site.”[21]

The Domain Name Has Been Registered and Is Being Used in Bad Faith

187. The third condition that must be satisfied is evidence of bad faith. The UDRP sets forth four non-exhaustive examples of what may be considered “evidence of the registration and

Thus, in one case the panel ruled that, where the domain name was identical to the complainant's professional name but was connected to a *non-commercial* web site expressing criticism of the complainant (operated by a brother-in-law), the case involved alleged defamation and not infringement of a trademark right.[24] Defamation, which goes to the reputation of an individual, does not have any necessary relationship to the commercial and infringing exploitation of a personal name used as a mark.

188. The UDRP has proven to be a useful tool for giving expression to the protection of personal names where trademark rights exist in those personal names, where the domain name holder has no right or legitimate interest and where there is evidence of bad faith in the registration and use of the domain name. However, it by no means affords comprehensive protection to personal names. For a start, the names of many persons, particularly ordinary persons, may have no distinctiveness attached to them, either inherently or as a result of use. Secondly, the names of political figures, religious leaders, scientists and historical persons may never have been used in commerce and, thus, are unlikely to have trademarks associated with them. Nevertheless, many sensitivities may attach to their use.

ANALYSIS OF COMMENTS AND VIEWS EXPRESSED IN RESPONSE TO THE INTERIM REPORT

189. The Interim Report formulated three options with respect to the protection of personal names in the DNS and sought further comment on them. These options were:

(iii) The amended UDRP, as proposed in (ii) above, should be introduced only in the forthcoming new gTLD .name, which is intended to serve individuals and allow them to create their own global digital identity.[25]

190. Since the publication of the Interim Report, the registry of .name has developed an extensive rights protection scheme, including dispute resolution, the essential characteristics of which are reflected in the Appendices to the Registry Agreement which it has entered into with ICANN.[26] Although the procedural and operational details of this scheme remain to be clarified at the time of the publication of this Report, it would appear from those Appendices that the .name protection mechanisms at least are intended to achieve the principal policy objectives underlying the third option proposed in the Interim Report. While only practical experience will demonstrate the effectiveness of those mechanisms, their application in .name will practically implement the third option mentioned above. The comments received on it in response to the Interim Report will not therefore be considered below.

191. The comments received were divided on whether the scope of the UDRP should be broadened to cover personal names that do not qualify as trade or service marks. While a significant number of commentators favored broadening the scope of the UDRP for purposes of protecting personal names,[27] the majority believed that the protection offered by the UDRP in its present form is sufficient and that it should not be expanded to cover personality rights at this time.[28]

192. Those who favor the inclusion of a form of personality right as a basis for formulating a

193. A second argument advanced in support of broadening the scope of the UDRP finds its origin in the discrepancies that exist between national laws of countries relating to unregistered trade or service marks. As is apparent from a review of the case law under the UDRP, many celebrities have not registered their personal names as marks, but have been found by panelists to be owners of unregistered marks, which equally qualify for protection under the UDRP. However, not all countries in the world offer protection to unregistered marks. Persons whose activities, even though clearly commercial in nature, are restricted to countries which protect only registered marks (e.g., China, France or Switzerland, amongst others), and who have not obtained any mark registrations corresponding to their personal names in those countries, would normally not benefit from the UDRP's protection. According to certain commentators, this reveals a bias, built into the UDRP, favoring parties from countries with legal systems protecting unregistered marks, typically (but not exclusively) countries with a common-law tradition. They argue that introducing the personality right as an additional basis for formulating a complaint under the UDRP would be an appropriate and reasonable means of rectifying what they perceive to be a form of discrimination between legal systems which has crept into the current procedure.[30]

194. Those who favor broadening the scope of the UDRP to some form of personality right generally agree that protection should nonetheless be limited to abusive behavior on the part of registrants.[31] Certain of these commentators believe that protection should be offered not only in relation to official personal names, but also to pseudonyms of famous persons (for instance, Kirk Douglas being the pseudonym of Issur Danielovitch Demsky).[32]

personality right" varies from one jurisdiction to another. Commentators who resist expanding the scope of the UDRP to personality rights believe that any attempts to create additional protection under these circumstances will have substantial negative effects. They claim that panelists, faced with a void of harmonized international rules, will be tempted to create new law offering greater protection to personality rights through the UDRP than that which is currently available under national laws. They warn that the UDRP thus would run the risk of developing into an illegitimate source of new and undesired regulation in the personality right arena. Furthermore, they believe that, in light of discrepancies between national laws, decisions granted under the UDRP would often be perceived as unfair, contested and ultimately invalidated at the national level. According to these commentators, this would be detrimental to the long-term credibility and viability of the UDRP as a consensus-based dispute resolution mechanism.[33]

196. Most other arguments advanced against including some form of personality right as a basis for a complaint under the UDRP directly or indirectly flow from the fundamental difficulty set out in the previous paragraph. These arguments often are based on concerns that protecting personality rights under the UDRP would have a chilling effect on free speech and would unlawfully restrict the availability of names in the DNS.[34] Furthermore, several commentators state that it would be exceedingly difficult to devise a uniform standard for determining who is sufficiently famous to benefit from protection and who is not,[35] although other commentators argue that, to the extent the system would focus on abusive behavior, there would not be a need to limit the protection it offers to famous persons.[36] Still others argue that it would be wholly inappropriate to expand the scope of the UDRP, be it the area of

procedure which are unlikely to be in proportion to the magnitude of the problem that is to be addressed.

198. A few commentators have suggested that, if additional protection for personal names is to be incorporated into the UDRP, it should in any event be more narrowly drafted than the proposal reflected in the second option of the Interim Report. These commentators refer to a provision of the United States Anticybersquatting Consumer Protection Act, passed into law in November 1999, as a possible model in this connection.[38] The provision in question provides for a cause of action against "[a]ny person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party…".[39]

RECOMMENDATION

199. It is clear that many sensitivities are offended by the unauthorized registration of personal names as domain names. It is clear also that UDRP does not provide solace for all those offended sensitivities, nor was it intended to do so, as originally designed. The result is that there are some perceived injustices. Persons who have gained eminence and respect, but who have not profited from their reputation in commerce, may not avail themselves of the UDRP to protect their personal names against parasitic registrations. The UDRP is thus perceived by some as implementing an excessively materialistic conception of contribution to

201. The most cogent of the arguments against modification of the UDRP is, we believe, the lack of an international norm protecting personal names and the consequent diversity of legal approaches deployed to protect personal names at the national level. We consider that this diversity would place parties and panelists in an international procedure in an untenable position and would jeopardize the credibility and efficiency of the UDRP.

202. It is recommended that no modification be made to the UDRP to accommodate broader protection for personal names than that which currently exists in the UDRP.

203. In making this recommendation, we are conscious of the strength of feeling that the unauthorized, bad faith registration and use of personal names as domain names engenders. We believe, however, that the most appropriate way in which the strength of this feeling should be expressed is through the development of international norms that can provide clear guidance on the intentions and will of the international community.

204. Insofar as ccTLDs are concerned, the lack of international norms is less significant. Clear law at the national level for the protection of personal names against abusive domain name registrations, if it exists, can be applied to registrations in the corresponding ccTLD.

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[1] International Convenant on Civil and Political Rights, Article 10.1.

[2] Kalven, "Privacy in Tort Law-Were Warren and Brandeis Wrong?" (1966) 61 *Law and Contemporary Problems* 326, 331, quoted in *Zacchini* v. *Scripps-Howard Broadcasting*

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Registration); *Drs Foster & Smith, Inc.* v. *Jaspreet Lalli*, NAF FA0007000095284 (August 21, 2000) (same); *Helen Fielding* v. *Anthony Corbet a/k/a Anthony Corbett*, WIPO Case D2000-1000 (Sept. 25, 2000) (Complainant had registered trademark in fictional character "Bridget Jones"); *Alain Delon Diffusion S.A.* v. *Unimetal Sanayi ve Tic A.S.*, WIPO Case D2000-0989 (October 26, 2000) (the domain name *alaindelon.com* was held to have been registered and used in bad faith and was identical to the personal name, Alain Delon, for which the Complainant held International Trademark Registration); *Laurence Fontaine* v. *Visiotex S.A.*, WIPO Case D2001-0071 (March 26, 2001) (the Panelist found that the domain name *lauresainclair.com* was confusingly similar to the personal name of Complainant which had registered as a trademark LAURE SAINCLAIR); *Isabel Preysler Arrastia* v. *Ediciones Delfín, S.L.*, WIPO Case D2001-0298 (May 31, 2001) (Panel found that the domain name *preysler.com* was confusingly similar to the personal name, Isabel Preysler, for which Complainant held a Spanish Trademark Registration).

[9] See J. T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, Vol. 4, ch. 25, §25:74.2 (2000), indicating that "the reference to a trademark or service mark 'in which the complainant has rights' means that ownership of a *registered* mark is not required – unregistered or common law trademark or service mark rights will suffice" to support a complaint under the UDRP. (Emphasis in original).

[10] One of the earliest decisions to rely on unregistered rights in a trademark was handed down in the consolidated cases of *Bennett Coleman & Co.* v. *Steven S. Lalwani*, WIPO Cases D2000-0014 and D2000-0015 (March 11, 2000). The cases involved a Complainant located in India and a respondent located in the United States of America. The Respondent challenged that there were no trademark registrations for the relevant words in the domain names, *theeconomictimes.com* and *the timesofindia.com*, in the United States and that, in any event, any trademark registrations in India had expired. The Panelist, Professor W.R. Cornish, found first that, given the Internet provides worldwide access, the assessment of the propriety of a domain name registration cannot be confined only to comparisons with trademark registrations and other rights in the country where the web site may be hosted. Secondly, the Panelist relied on the "reputation from actual use" of the words in question to determine that, whether or not the Indian trademarks were registered, the Complainant had trademark rights.

[11] See e.g., *Julia Fiona Roberts* v. *Russell Boyd*, WIPO Case D2000-0210 (May 29, 2000) (holding that the Complainant has common law trademark rights in her name: "The Policy does not require that the Complainant should have rights in a registered trademark or service mark. It is sufficient that the Complainant should satisfy the Administrative Panel that she has rights in common law trademark or sufficient rights to ground action for passing off"); *Jeanette*

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give him trademark or service mark rights for the purpose of the rules); *Rosa Montero Gallo* v. *Galileo Asesores S.L.*, WIPO Case D2001-1649 (January 27, 2001) (Panel found that Complainant was sufficiently famous in association with the services offered in connection with Complainant's personal name to establish the requisite common law trademark right); *José Luis Sampedro Sáez* v. *Galileo Asesores S.L.*, WIPO Case D2000-1650 (January 27, 2001) (same); Lorenzo Silva Amador v. *Galileo Asesores S.L.*, WIPO Case D2000-1697 (January 27, 2001) (same); *Julian Barnes* v. *Old Barn Studios Limited*, WIPO Case D2001-0121 (March 26, 2001) (Panel found that Complainant has common law trademark holding that "Complainant has established that he uses his name in the creation and promotion of his work from which he makes his living. His name identifies his work. His work is ordered and called for under and by reference to his name."); *Louis De Bernieres* v. *Old Barn Studios Limited*, WIPO Case D2001-0122 (March 26, 2001) (same); *Anthony Beevor* v. *Old Barn Studios Limited*, WIPO Case D2001-0123 (March 26, 2001) (same); *Margaret Drabble* v. *Old Barn Studios Limited*, WIPO Case D2001-0209 (March 26, 2001) (same); *George-Marie Glover and George-Marie Glover, LLC* v. *Cherie Pogue*, WIPO Case D2001-0600 (June 11, 2001) (Panel held that Complainant has common law trademark in the name "George-Marie" which has been used in connection with complainant's artistic services for 15 years); See also Report of first WIPO Process, paras. 149-50, at 42-43 (allow "consideration of all legitimate rights and interests of the parties (which are not necessarily reflected in a trademark certificate)").

[12] See e.g., *Julia Fiona Roberts* v. *Russell Boyd*, WIPO Case D2000-0210 (May 29, 2000) (the complainant "is a famous motion picture actress"); *Jeanette Winterson* v. *Mark Hogarth*, WIPO Case D2000-0235 (May 22, 2000) (Complainant is an author who has "achieved international recognition and critical acclaim," writing books and screen plays that have been published in over 21 countries in 18 languages); *Mick Jagger* v. *Denny Hammerton*, NAF Case FA0007000095261 (September 11, 2000) (Complainant has a "famous personal name, 'Mick Jagger,'"); *Helen Folsade Adu p/k/a Sade* v. *Quantum Computer Services, Inc.*, WIPO Case D2000-0794 (September 26, 2000) (Complainant is a world famous singer, songwriter and recording artist known under the stage name "SADE"); *Isabelle Adjani* v. *Second Orbit Communications, Inc.,* WIPO Case D2000-0867 (October 4, 2000) (Panel notes that Complainant has achieved "international recognition and acclaim" as a well-known film actress using her real name, Isabelle Adjani); *CMG Worldwide, Inc.* v. *Naughtya Page*, NAF Case FA0009000095641 (Nov. 8, 2000) (finding that, in relation to the domain names *princessdi.com* and *princessdiana.com*, that Princess Diana, during her life time, was well known as Princess Diana or Princess Di); but cf., *Gordon Sumner, p/k/a Sting* v. *Michael Urvan*, WIPO Case D2000-0596 (July 20, 2000) (held that the personal name Sting was not distinctive, as it "is also

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name has come to be recognized by the general public as indicating an association with the Complainant and her activities as an actress); *Mick Jagger* v. *Denny Hammerton*, NAF Case FA0007000095261 (September 11, 2000) ("Complainant presented evidence "of the continuous commercial use ... for more than thirty-five (35) years" of "his famous personal name, 'Mick Jagger,'"); *Helen Folsade Adu p/k/a Sade* v. *Quantum Computer Services, Inc.*, WIPO Case D2000-0794 (September 26, 2000) ("SADE," has been used in connection with sales of records, CDs, CD-ROMS, tickets for concerts and merchandising in many jurisdictions around the world); but cf., *Anne McLellan* v. *Smartcanuk.com*, eResolution Case AF-0303a & AF-0303b (September 25, 2000) (held that Complainant, the most senior Government of Canada official in the Province of Alberta, where both Complainant and Respondent reside, has common law trademark rights in her name, although the decision does not indicate that she has used her name as a mark in commerce).

[15] See e.g., *Harrods Ltd.* v. *Robert Boyd*, WIPO Case D2000-0060 (March 16, 2000) (domain name *dodialfayed.com* was determined to be confusingly similar to the personal name, "Dodi Fayed."); *Steven Rattner* v. *BuyThisDomainName (John Pepin)*, WIPO Case D2000-0402 (July 3, 2000) (Complainant not limited to claiming rights in his full name - small variations in the name are not material).

[16] See *Bennett Coleman & Co.* v. *Steven S. Lalwani*, WIPO Cases D2000-0014 and D2000-0015 (March 11, 2000) (given the Internet provides worldwide access, the assessment of the propriety of a domain name registration cannot be confined only to comparisons with trademark registrations and other rights in the country where the web site may be hosted); see also *Jeanette Winterson* v. *Mark Hogarth*, WIPO Case D2000-0235 (May 22, 2000) ("Since both the Complainant and the Respondent are domiciled in the United Kingdom, … the Panel can look at applicable decisions of English courts"); *Pierre van Hooijdonk* v. *S.B. Tait*, WIPO Case D2000-1068 (Nov. 4, 2000) (Complainant was resident in the Netherlands and the Respondent in the United Kingdom. The Panel makes reference to (i) Complainant's Benelux registered trademark and service mark, (ii) the common law of the United Kingdom, and (iii) the decision of the President of the Amsterdam District Court in *Albert Heijn and 159 other plaintiffs* v. *Name Space* (July 13, 2000), holding that Defendant's registration of 300 "proper names" was unlawful); *Isabelle Adjani* v. *Second Orbit Communications, Inc.,* WIPO Case D2000-0867 (October 4, 2000) ("The Complainant is resident in Switzerland and the Respondents give an address in the United States of America. To the extent that it assists in determining whether the Complainant has met her burden under paragraph 4a(i) of the Policy to establish that she has trademark rights in her name *Isabelle Adjani*, the Panel can look at applicable decision and laws in both countries"); *Estate of Stanley Getz a/k/a Stan Getz* v. *Peter Vogel*, WIPO Case D2000-

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the Respondent of a number of other well known trademarks as domain names, there was no basis for finding that the Respondent have had any good faith basis for registering the disputed domain name).

[18] See *Helen Folsade Adu p/k/a Sade* v. *Quantum Computer Services, Inc.,* WIPO Case D2000-0794 (September 26, 2000).

[19] See *Monty and Pat Roberts, Inc.* v. *Bill Keith,* WIPO Case D2000-0299 (June 9, 2000).

[20] *Id.*; see also; *Nic Carter* v. *The Afternoon Fiasco* WIPO Case D2000-0658 (October 17, 2000) (same); *Jeanette Winterson* v. *Mark Hogarth*, Case D2000-0235 (May 22, 2000), quoting *British Telecommunications plc* v. *One in a Million* (1999) *FSR* 1, at 23 (C.A.) (Aldous L.J.): "The placing on a register of a distinctive name such as *marksandspencer* makes a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name."

[21] *Id.*

[22] See UDRP, para. 4(b):
"For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the panel to be present, shall be evidence of the registration and use of a domain name in bad faith:
(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location."

[23] See e.g., *Experience Hendrix. LLC* v. *Denny Hammerton and the Jimi Hendrix Fan Club,* WIPO Case D2000-0364 (August 15, 2000) (*jimihendrixs.com*); *MPL Communications Ltd.*v. *Denny Hammerton*, NAF Case FA0009000095633 (October 25, 2000) (*paulmccartney.com* and *lindamccartney.com*); *Madonna Ciccone, p/k/a Madonna* v. *Dan Parisi and "Madonna.com,"*

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Industrial (ASIPI) (RFC-2 – December 26, 2001), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of British Telecommunications plc (RFC-2 – December 28, 2000), Comment of Ian Kaufman (RFC-2 – December 20, 2000).

[28] See Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of United States of America, Office of Advocacy: United States Small Business Administration (RFC-3 – June 15, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Association for Computing Machinery's Internet Governance Project (RFC-3 – June 15, 2001), Comment of Copyright Coalition on Domain Names (CCDN) (RFC-3 – June 7, 2001) and (RFC-2 – December 28, 2000), Comment of Fédération internationale des conseils en propriété industrielle (FICPI) (RFC-3 – June 14, 2001) and (RFC-2 – January 18, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of International Chamber of Commerce (ICC) (RFC-3 – June 18, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Motion Picture Association of America (MPAA) (RFC-3 – June 6, 2001), Comment of Icannchannel.de (RFC-3 – June 15, 2001) and (RFC-2 – December 21, 2000), Comment of Rod Dixon (RFC-3 – May 15, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001). For similar views expressed in response to RFC-2, see also Comment of European Commission (RFC-2 – January 16, 2001).

[29] See Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001).

[30] See Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001).

[31] See Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of Association des Praticiens en droit des Marques et des Modèles (APRAM) (RFC-3 – June 7, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001).

[32] See Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001).

[33] See Comment of Fédération Internationale des Conseils en Propriété Industrielle (FICPI) (RFC-3 – June 14, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of Motion Picture Association of America (MPAA) (RFC-3 – June 6, 2001).

[34] See Comment of United States of America, Office of Advocacy: United States Small Business Administration (RFC-3 – June 15, 2001), Comment of Association for Computing Machinery's

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[39] A comparable provision has been enacted by the State of California as part of legislation similar to the ACPA. See Section 17525 (a) of the Cal. Business and Professional Code (August 22, 2000).

6. GEOGRAPHICAL IDENTIFIERS

205. Geographical designations, like many other forms of identifier, also touch a wide variety of interests and sensitivities that range from our most basic territorial instincts to more sophisticated conceptions of market and cultural justice. While the misuse of geographical attributions may offend many feelings, only certain types of such misuse are sanctioned by the law. The present Chapter examines the legal framework that has been developed internationally to regulate the misuse of geographical identifiers; describes the evidence produced in the course of the Second WIPO Internet Domain Name Process on the misuse of geographical identifiers in the domain name system (DNS); analyses the comments submitted in response to the Interim Report; and formulates recommendations on the question which, in the Request initiating the Second WIPO Process, WIPO was asked to address, namely, the "bad faith, abusive, misleading or unfair use" of "geographical indications, geographical terms, or indications of sources."

THE LEGAL PROTECTION OF GEOGRAPHICAL IDENTIFIERS

206. A well-established framework for the prohibition of the misuse of geographical identifiers exists at the international, regional and national levels.

207. The international framework is established in four multilateral treaties: the Paris Convention for the Protection of Industrial Property (the Paris Convention), to which

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North American Free Trade Agreement, between Canada, Mexico and the United States of America, Decision 486 of the Cartagena Agreement between Bolivia, Columbia, Ecuador, Peru and Venezuela, and the Protocol for the Harmonization of Intellectual Property Provisions in Mercosur, between Argentina, Brazil, Paraguay and Uruguay;[6] and in the European Union, the Council Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs and the Council Regulation on the Common Organization of the Market in Wine.

209. At the national level, the foregoing international and regional norms are implemented through a variety of legal approaches, which include *sui generis* or specific legislation, sometimes establishing registration systems, for certain classes of geographical identifiers; protection through collective or certification marks; laws against unfair competition; passing-off; and laws on consumer protection. In many cases, these different legal approaches can be applied cumulatively.

THE MAIN ELEMENTS OF THE INTERNATIONAL FRAMEWORK OF PROTECTION

210. The international framework for the protection of geographical identifiers consists of two elements: (i) a prohibition of false descriptions of the geographical source of goods; and (ii) a more extensive set of rules prohibiting the misuse of one class of geographical source indicators, known as geographical indications.

The seizure should take place at the request of any competent authority or any interested party.[8] Since the name of a geographical place or region is not usually the subject of private rights controlled by a particular party, any "producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in … goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used,"[9] is deemed to be an "interested party" given standing to request seizure of the goods in respect of which a false indication of source is directly or indirectly used.

213. Three features of the rule prohibiting the use of false indications of source in Article 10 of the Paris Convention may be noted. First, the rule applies to goods and does not extend to services. Secondly, any *direct* or *indirect* use of the false indication of the source is proscribed. An indirect use could be, for example, the use of an image uniquely associated with one country (such as a picture of the Matterhorn, a well-known Swiss mountain with a particular and easily recognized shape), as opposed to the use of the name for the country. Thirdly, any geographical identifier may form the basis of the use which creates the false indication of source. Article 10(2), in creating standing to request seizure, mentions "locality," "region" and "country." Thus, for example, the indication "made in [locality]," "made in [region]" or "made in [country]" would engage the operation of Article 10, if false.

214. The provisions in the Paris Convention prohibiting false indications of source are incorporated into the TRIPS Agreement.[10]

> "the countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communications."

Geographical Indications

216. The foregoing provisions governing the misuse of false (and deceptive) indications of the geographical source of goods constitute rules of conduct in the trade of goods. They focus on falseness of indication, rather than on the geographical term itself, which is the means by which falseness is indicated.

217. A separate element in the international system governs a particular class of geographical terms, known as geographical indications, which are defined in Article 22.1 of the TRIPS Agreement as:

> "… indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

In respect of this class of geographical terms, particular rules apply to govern their use. The

218. Further rules prevent unfair competition in respect of geographical indications[13] and provide enhanced protection for geographical indications identifying wines and spirits.[14]

219. The essential difference between the rules relating to geographical indications and those relating to false indications of geographical source is that the former place emphasis on a certain quality attached to a limited class of geographical terms, rather than establishing a rule of market behaviors which may be violated through the false use of any geographical term.

220. It follows that the first question for the application of the framework of rules that apply to geographical indications is the identification of whether a term constitutes a geographical indication. At the national level, this is solved, as mentioned above, in a variety of ways. In some cases, identification is achieved through a registration system, in others preference is given to the registration of the trademark (collective or certification), and in others identification is achieved through recognition in the market or custom sanctioned by legislation or court decisions. At the international level, the question is how these various systems interact. When will one system recognize the geographical indications protected in another? The question is complicated because of custom and use and the foundation of systems of protection for geographical indications in times when international trade, telecommunications and personal mobility were less prevalent. What one system traditionally considers to be specific and distinctive, another system may claim to be generic or descriptive.

221. Various methods are at the disposal of the international community to resolve the

222. The TRIPS Agreement provides for negotiations to be undertaken in the TRIPS Council concerning the establishment of a multilateral system of notification and registration of geographical indications *for wines* eligible for protection in those Members participating in the system.[16] These negotiations have not yet, however, resulted in the establishment of such a system.

EVIDENCE OF THE MISUSE OF GEOGRAPHICAL INDICATIONS IN THE DNS

223. Illustrations of problems experienced in the DNS concerning geographical indications were submitted in response to WIPO2 RFC-2 by entities whose interests, or whose interests they represent, are most affected by the subject matter. These entities include the *Office international de la vigne et du vin (*OIV), an international intergovernmental organization, and the *Institut national des appellations d'origine* (INAO), a French governmental organization charged with the protection of appellations of origin and geographical indications for food and agricultural products.

224. The OIV is an intergovernmental organization with a scientific and technical character, competent in the field of the vine and its derived products. It was created by the International Agreement for the Creation of the *Office international du vin* of November 29, 1924. The Organization has 45 Member States which, together, represent the vast majority of the world's vine planting areas and of the world's wine production and consumption.[17] Already within the framework of the first WIPO Process, the OIV had protested against the "appropriation

> are regulated by the Member States of the OIV and have been communicated to the OIV by them…
>
> … among these domain names, there are a number which are particularly confusing for Internet users and constitute commercial piracy or a misappropriation of notoriety… certain registrations are offered for sale to the highest bidder or are linked to inactive sites, evidencing bad faith…"

225. In addition to this Resolution, the OIV has submitted a study conducted by the *Fédération des syndicats de producteurs de Châteauneuf du Pape* (the Federation of Producers' Associations of Châteauneuf du Pape) covering numerous domain names corresponding to claimed geographical indications and wine varieties. According to the OIV, this study establishes that "a large number of domain names have been registered which correspond to appellations of origin and geographical indications of wine-derived growing products, as well as wine varieties, without there being any relationship between the domain name registrants and the persons who hold rights in these distinctive signs."[19] A representative selection of domain names covered by this study, together with relevant registration data concerning these registrations, has been reproduced in Annex VIII.[20] Similar examples of claimed appellations of origin that have been registered as domain names have been presented by the INAO (see Annex IX).[21]

226. As a complement to the studies presented by the OIV and INAO, we have performed

trademarks and service marks, and which ultimately led to the adoption of the UDRP. As described by OIV and INAO, those practices are the following:

(1) The registration of a domain name corresponding to a claimed geographical indication primarily for the purpose of selling, renting or otherwise transferring the domain name to a third party at a premium.[22]

(2) The use of a domain name corresponding to a claimed geographical indication in connection with a product which does not benefit from the geographical indication, thereby creating a likelihood of confusion as to the quality, other characteristics or reputation of the product.

(3) The use of a domain name corresponding to a claimed geographical indication with a view to attracting Internet users to a website or other on-line location, the contents of which bears no relationship with the geographical indication.[23]

(4) The registration of a domain name corresponding to a claimed geographical indication with a view to preventing others from registering the same name.[24]

228. In light of these practices and their strong resemblance to those that have been observed previously in relation to trademarks and service marks, and taking into account the need to safeguard the interests of legitimate users of geographical indications in the DNS, as well as the interests of consumers, the Interim Report recommended that measures be adopted to

ANALYSIS OF COMMENTS AND VIEWS EXPRESSED IN RESPONSE TO THE INTERIM REPORT

229. In recognition of the significant divergence in views throughout the world on what is to be regarded as a protectable geographical indication, the Interim Report's recommendations focused on attempting to curb only clear-cut cases of abuse of these identifiers, assuming that everyone might agree that manifestly bad faith behavior should be tolerated under no circumstances. The Interim Report proposed that this could be accomplished by broadening the scope of the UDRP to cover geographical indications and indications of source through a revision of the three-pronged test of subparagraph 4(a) of the Policy ("Applicable Disputes"). In view of the essentially collective nature of the rights represented by geographical indications and indications of source, the Interim Report also identified, discussed and proposed options for further reflection on the question of which persons or entities should be deemed to have standing to file a complaint under the proposed revised UDRP and which remedies (transfer or cancellation) should be available under the procedure.

230. A review of the comments submitted in response to the recommendations formulated in the Interim Report reveals continuing disagreement regarding the principle of providing protection in the DNS for geographical indications and indications of source, as well as regarding the form which such protection should take. Several commentators are in favor of the specific proposals contained in the Interim Report.[25] Others, including some representing intellectual property interests,[26] either oppose them, or, at best, consider them premature.[27]

the opinion that an exclusion mechanism for geographical indications would be appropriate, or at least should be given further consideration, in light of ongoing negotiations in the framework of Article 23.4 of the TRIPS Agreement.[29] If protection were to be provided through a revised UDRP, some commentators felt that panels with particular expertise in the subject matter would be needed, in view of its specialized nature and complexity.[30]

232. On the question of who should be deemed to have standing to file complaints under the proposed revised UDRP, the Interim Report presented three options for further consideration: (i) the persons or entities who have standing to enforce these rights in accordance with the law of the country of origin, (ii) governments only, or (iii) the persons or entities who are found to have standing based on the law determined to be applicable to that issue by the panel, in accordance with the ordinary rules of private international law. Most commentators were of the view that the second option would be overly restrictive and favored either the first or last option.[31] As a solution to the standing problem, one commentator proposed that a complainant wishing to avail itself of the proposed revised UDRP could be required to produce a declaration by either the courts or the government of its jurisdiction confirming that it has standing to pursue the complaint in question.[32]

233. In light of the collective nature of the rights concerned, certain commentators proposed the creation of a new remedy for purposes of the proposed revised UDRP which would take the form of a “cancellation + exclusion”. Such a new remedy would serve a dual purpose. On the one hand, it would prevent a prevailing complainant from arrogating to itself a collective right, and, on the other, it would avoid cancelled domain names from being re-

basis for the protection proposed in the Interim Report. In particular, they highlight three specific areas where sufficient uniformity is lacking. First, they argue that the harmonized rules at issue (in particular the TRIPS Agreement) incorporate several qualifications and exceptions to the protection for geographical indications, striking a delicate balance of interests, which would be difficult, if not impossible, to reflect faithfully in the UDRP.[35] Secondly, they state that the legal and administrative mechanisms giving effect at the national level to the internationally harmonized norms vary widely, ranging, as noted above, from *sui generis* registration systems, certification or collective marks, the law on passing-off, unfair competition law and consumer protection legislation.[36] Thirdly, and perhaps most importantly, they claim that there exists no uniform view at the international level of what is to be deemed a protectable geographical indication, and that, consequently, terms which are protectable in some jurisdictions, are freely available in others.[37]

235. The commentators in question conclude that providing protection to geographical indications through the UDRP under this state of incomplete harmonization of the law is doomed to fail. They believe panels would be put in the awkward position of having to take decisions with insufficient guidance available to them, which would lead inevitably to the undesired creation of new law. For the same reasons that are set out in the section of this Report concerning personal names,[38] these commentators are of the view that this would jeopardize the UDRP's long-term viability as an effective dispute resolution system. This risk is considered particularly acute in the area of geographical indications because there has been, for many years now, continuing intense debate internationally between governments on the subject matter.

RECOMMENDATION

237. This is a difficult area on which views are not only divided, but also ardently held. This alone is a cause for reflection about the desirability of introducing a modification dealing with this area to a consensus-based dispute-resolution procedure that is functioning efficiently and cost effectively.

238. It is undeniable that there is widespread evidence of the registration and use of geographical indications and other geographical source identifiers by persons who have no connection whatsoever with the locality to which the identifiers refer. These practices are misleading and harm, first, the integrity of the naming systems in which those geographical identifiers operate and, secondly, the credibility and reliability of the DNS. The question for decision, however, is whether there is a solid and clear basis in existing international law which can be applied so as to prevent erosion of the integrity of geographical indications and enhance the credibility of the DNS.

239. We believe that there are two fundamental problems in endeavoring to apply the existing international legal framework to prevent the bad faith misuse of geographical indications in the DNS.

240. The first problem is that the existing international legal framework for the prohibition of

indications. Such a registration may violate existing standards if it is associated with conduct relating to goods. For example, a domain name registration that is used in relation to an offer of sale of goods may be considered to be a "commercial communication" under Article 3*bis* of the Madrid (Indications of Source) Agreement. If the domain name registration is a geographical identifier and it is false or deceptive, it may, in these circumstances, be considered to violate the prohibition against the use of false indications set out in Article 3*bis* of the Madrid (Indications of Source) Agreement. Additionally, for example, one can imagine various hypothetical uses of domain name registrations with respect to goods which might be considered to constitute violations of the provisions on the protection of geographical indications in the TRIPS Agreement. However, there are many circumstances in which a domain name registration, even though constituting a false or unauthorized use of a geographical indication, may not constitute a violation of existing international rules because there is no relationship between the domain name and goods. Existing rules, therefore, would offer only a partial solution to the problem of what is perceived to be the misuse of geographical indications in the DNS.

241. Secondly, there is a major problem in respect of applicable law because of the different systems that are used, at the national level, to protect geographical indications. For example, suppose that there is a geographical indication recognized and protected as such under the law of country A, but considered to be generic and descriptive under the law of country B.
A resident carrying on business in country B registers, with a registrar based in country B, the geographical indication as a domain name and sells, from the website accessed through that domain name, goods that are available for purchase only by residents in country B. The

example given, it is a simple matter to determine whether there exists a protectable geographical indication.

243. We believe, therefore, that the existing international framework would provide only a partial answer to the perceived problems of false indications of source and geographical indications within the DNS. Furthermore, because of the need to resort to a choice of applicable law to resolve the question of the recognition of the existence of a geographical indication, very complicated questions would be involved in the application of the UDRP in this area. On these questions, international opinion is far from settled, as can be seen from the history of the negotiations with respect to a future Hague Convention on International Jurisdiction and Foreign Judgement in Civil and Commercial Matters.[42] These problems of applicable law could be avoided if a multilaterally agreed list of geographical indications were to be established.

244. It is recommended that no modification be made to the UDRP, at this stage, to permit complaints to be made concerning the registration and use of domain names in violation of the prohibition against false indications of source or the rules relating to the protection of geographical indications.

245. In making this recommendation, it is recognized that there is widespread dissatisfaction

satisfactorily dealing with the interaction of differing systems and levels of protection at the national level and the mutual recognition of geographical indications within those systems.

PREFERENCES AND PROTECTION FOR GEOGRAPHICAL TERMS *PER SE*

246. The foregoing sections of this Chapter discussed the existing international rules with respect to geographical identifiers which relate to the use of geographical terms in connection with goods. A separate issue that has surfaced is the claim for protection for geographical terms *per se* within the DNS, without reference to the use of the domain name in connection with goods or services. The issue centers on entitlement to register and the first-come first-served, automatic and unscreened nature of domain name registration systems. On the one hand, it is argued that the duly constituted authorities with respect to a geographical area, whether a country, state, city or town, should be entitled to register the name of that locality, as well as to prevent any party unassociated with the duly constituted authorities from registering the name. It is argued that the first-come, first-served nature of domain name registration systems exploit the digital divide and disadvantage authorities in countries with less developed infrastructures for the Internet in establishing their own identity in the DNS. Furthermore, it is argued, the fact that domain name registrations can be held by persons unconnected with the geographical locality is misleading to users and may give rise to the unjust enrichment of those persons on the basis of the reputation established by the geographical localities. On the other hand, it is argued that rights have already been acquired within the DNS on the basis of the existing operation of the system and that regulation of this

these issues in the Interim Report; and formulates recommendations. Because of the range and diversity of geographical naming systems, consideration has been limited to only some such systems.

ILLUSTRATIONS OF THE REGISTRATION OF GEOGRAPHICAL TERMS WITHIN THE DNS

249. The illustrations of the registration of geographical terms that follow are grouped into four categories representing names of (i) countries, (ii) ISO 3166 country code elements, (iii) places within countries, and (iv) indigenous peoples. It is recognized that these illustrations are not exhaustive. Furthermore, they are not presented to advocate the position that the registrations at issue are necessarily abusive. The aim is merely to advance discussion in this area by providing some background material and concrete examples of domain registrations incorporating such terms in the currently existing gTLDs.

Country Names

250. There exists an official linguistic publication of the United Nations providing a list of the names of its Member States.[43] The entry for each State includes its usual or "short" name (for example, "Rwanda"), as well as its full or formal name (for example, "the Rwandese Republic"). The usual name is used for all ordinary purposes in the United Nations. The full name, which may also be the same, is used in formal documents such as treaties and formal

(i) The overall majority of country names in Annex XII have been registered by persons or entities that are residing or located in a country that is different from the country whose name is the subject of registration.

(ii) In almost all cases in Annex XII, the registrant is a private person or entity. Only rarely is it a public body or an entity officially recognized by the government of the country whose name has been registered.

(iii) The following activities are conducted under the domain names in Annex XII:

a) No activity (DNS lookup error, under construction, ...);
b) The offering for sale of the domain name in question;
c) The provision of information, products or services that bear no or little relationship with the country in question; and
d) The provision of information regarding the country in question, often on a commercial basis.

253. There are relatively few reports of court decisions or decisions emanating from alternative dispute resolution procedures concerning disputes over the registration of country names as domain names. A complaint regarding the domain name *caymanislands.com* was filed by the Cayman Islands Government with the WIPO Arbitration and Mediation Center under the UDRP, but the case was terminated before a decision was taken on it.[44] There also have been reports regarding the potential filing of a complaint under the UDRP with the

ISO 3166 Country Code Elements

254. The origin of the codes reflecting country top-level domains is the International Organization for Standardization (ISO). ISO, which was established in 1947 as a non-governmental organization, is a worldwide federation of national standards bodies from 137 countries. Its mission is to promote the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services, and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity.[47] One of ISO's most famous standards is Part 1 of ISO 3166 concerning codes for the representation of names of countries and their subdivisions. Part 1 of ISO 3166 contains two letter country codes (alpha-2 codes; for example, au for Australia) and three letter country codes (alpha-3 codes, for example, aus for Australia). It is on the basis of the alpha-2 codes that the country code top-level domains (ccTLDs) were created by the Internet Authority for Assigned Names and Numbers (IANA) during the late eighties and early nineties.[48] Since the creation of the ccTLDs, registrations in the country domains have flourished, as the use of the Internet has spread throughout the world. It is expected that the importance of the ccTLDs will continue to grow in the future.

255. A phenomenon concerning ccTLDs that merits attention is the registration at the second level in the gTLDs of the country code elements (for example, *uk.com*). Often these domain names are registered by persons or entities in order to make them available to the public for the registration of names at the third level (for example, *company.uk.com*).[49] The implications of such practices are discussed below.

the World Heritage Committee of a list of sites forming part of the cultural and natural heritage falling under the scope of the Convention (the "World Heritage List").[50] Featured on the List are a number of cities that are famous for their cultural or historical importance. Annex XIII contains details of searches of domain name registrations with respect to some of the cities appearing on the World Heritage List.

257. The following observations can be made with respect to the information contained in Annex XIII:

(i) The majority of city names in Annex XIII have been registered by persons or entities that are residing or located in a country that is different from the country in which the city whose name is the subject of registration is located.

(ii) In several cases, the domain name is used as the address of a website providing information concerning the city whose name corresponds to the domain name. Often these sites appear to be operated by private entities on a commercial basis.

(iii) In several cases, the domain name is used as the address of a website providing general information (often in the form of a portal) that bears either no, or no significant relationship, to the cities whose names correspond to the domain name.

(iv) In one case, the domain name is offered for sale.

Grande Instance of Paris, by preliminary injunction of April 3, 2001, ordered that the registration of the domain name *laplagne.com* for purposes of selling it to the holder of the trademark La Plagne (Association Office du Tourisme de La Plagne) constituted a tort.[52] In its decision of March 8, 1996, the Landgericht of Munich (Germany) found that the registration of the domain name *heidelberg.de* constituted an infringement of the rights of the City of Heidelberg. Subsequent to this decision, several court cases have been filed in Germany regarding German city names. Most of the cases in question were decided in favor of the cities.[53] By decision of May 2, 2000, the Federal Court of Switzerland upheld a complaint filed by a semi-official tourist organization regarding the registration of the domain name *berner-oberland.ch*, a region of Switzerland with a reputation for its picturesque landscapes. By decision of May 23, 2000, the Obergericht Luzern upheld a decision of a lower court ordering the holder of the domain name *luzern.ch* to refrain from offering e-mail services under this name, pending resolution of a complaint brought by the City of Lucerne seeking the transfer to it of that domain name by the registrant.

259. Several cases regarding place names within countries also have been filed with the WIPO Arbitration and Mediation Center under the UDRP.[54] Two of these cases that involved city names have received much attention. These two cases concerned the domain names *barcelona.com* and *stmoritz.com*. By decision of August 4, 2000, the complaint regarding *barcelona.com* was upheld and, by decision of August 17, 2000, the complaint regarding *stmoritz.com* was denied.[55] Other more recent such cases filed with WIPO concerned the domain names *lapponia.org/lapponia.net (*complaint granted),[56] *portofhelsinki.com* (complaint denied) [57] *portofhamina.com* (complaint denied),[58] *brisbanecity.com* (complaint

necessarily stand for the proposition that the registration of a city name or the name of a region, as such, is to be deemed abusive.

261. Finally in connection with place names, it may also be noted that several ccTLD administrators have adopted the policy of excluding the names of places in their countries from registration as domain names, at least under certain conditions. This is the case, for instance, for .AU (Australia),[64] .CA (Canada),[65] .CH (Switzerland), .DZ (Algeria),[66] .ES (Spain),[67] .FR (France),[68] .PE (Peru),[69] and .SE (Sweden).[70] Often these exclusions are based on official lists of place names compiled by the Government of the country concerned.[71]

Names of Indigenous Peoples

262. The question of the protection of the intellectual property rights of the world's indigenous peoples has received increasing attention over the last several years.[72] While global trade in the creations and knowledge of indigenous peoples has yielded important returns for some, it is felt by others that such commercial exploitation has not always been in harmony with the rights or expectations of the peoples concerned. In light of this ongoing policy debate, it seems appropriate to consider the incidence of the registration of the names of indigenous peoples as domain names. Annex XIV sets out details concerning domain name registrations of a number of well-known indigenous peoples.

263. The following remarks may be made with respect to the information contained in Annex XIV:

(iii) The activities conducted under the domain names in Annex XIV only rarely are aimed at providing information about the peoples concerned.

(iv) Most activities that are conducted under the domain names in Annex XIV fall under one of the following categories: no activity (DNS lookup error or holding page), general information or portal sites (of widely differing varieties) of a person or entity which does not appear to represent the people, website of company with a (product) name corresponding to the name of the people, and personal website of an individual whose first name corresponds to the name of a people.

(v) In one case in Annex XIV, the domain name is offered for sale.

ANALYSIS OF COMMENTS AND VIEWS EXPRESSED IN RESPONSE TO THE INTERIM REPORT

Country Names and Names of Places Within Countries

264. On these names, the Interim Report presented two options for further consideration. The first option was to maintain the status quo (i.e., not introduce any protective measures), in recognition of the novelty of the subject matter, as well as the tenuous legal grounds for introducing protective measures in this area. The second option attempted to balance the competing interests of countries, domain name registrants and Internet users, by proposing a

265. A review of the comments received on the Interim Report reveals that it has failed to bridge the gap between those who oppose establishing protection for the designations in question[73] and those who favor such protection.[74] While the specific formulation of the proposed new cause of action was well received by some commentators, it is strongly opposed by the most ardent advocates of protection in this area, because it would legitimize conduct which they deem totally unacceptable: the commercial exploitation in the DNS by private parties of country names, assets which they consider the inherent property of sovereign States. The latter view is advocated in particular by one Government which is of the view that all full (or formal) names, as well as all short (or usual names) of countries, should be excluded from registration as domain names.[75] The same Government also advocates the creation of a challenge procedure permitting governments to recuperate such names in all circumstances and irrespective of the use which is being made of them by their registrants, without any possibility of recourse to national courts to obtain the reversal of the decisions emanating from the procedure. According to the Government in question, this protection is particularly important for developing countries, in light of the difficulties they are facing in attempting to bridge the digital divide. The same Government also believes that the protection of country names in the DNS is fully supported by existing international intellectual property law.

266. Those who oppose the protection of country names (as well as the names of places within countries) in the gTLDs advance several arguments in support of their position. Most importantly, they state that there exist no international intellectual property norms protecting country names and names of places within countries and that, in the absence of such norms,

267. Specifically with regard to the protection of country names, some commentators appear not to oppose continued consideration of the issue, but suggest that the ICANN system may not be the appropriate venue for this purpose, because of the likely need to create new rules of law, should protection be desired. References are made by these commentators to treaty processes or other forms of agreement between sovereign States and, in particular, to the Assembly of the Paris Union for the Protection of Industrial Property, the competent organ for the Paris Convention.[80]

ISO 3166 Country Code Elements

268. The Interim Report recommended the exclusion of the ISO 3166 alpha-2 country code elements from registration as domain names in the new gTLDs, in the absence of an agreement to the contrary from the relevant competent authorities. Furthermore, the Interim Report recommended that persons or entities who have registered such codes at the second level in the existing gTLDs and who accept registrations of names under them should take measures to render the UDRP applicable to such lower level registrations.

269. Several commentators favored the exclusion mechanism proposed in the Interim Report for the ISO 3166 alpha-2 country code elements,[81] while others opposed it.[82] Some of the entities offering the possibility of registrations under the codes in the existing gTLDs have expressed a willingness to adopt the UDRP or a similar procedure, as recommended in the Interim Report.[83] Few administrators of ccTLDs submitted comments on the Interim Report's recommendations in this area. Trademark owners have expressed concerns that the exclusion

the Interim Report correspond to similar intellectual property issues relating to traditional knowledge, folklore and symbols in the physical world.[85]

RECOMMENDATION

Country Names and Names of Places Within Countries

271. Prior to considering which protective measures (if any) might be in order in relation to this class of geographical terms, it is necessary first to determine with more precision which concepts are intended to benefit from such protection. As far as countries are concerned, no particular difficulties arise as, apart from a few exceptional cases, it is clear which countries exist and what their names are.[86] However, the term "places within countries" is more vague and therefore requires further elucidation.

272. As the protection of place names within the gTLDs is a novel concept, it is proposed to take a conservative approach and interpret the term, at least at this stage, narrowly. It is therefore recommended that its scope be restricted to those items that are most closely associated with the territorial integrity of the State, namely regions that have received administrative recognition from the State (for example, provinces, departments…) and municipalities (cities, towns, communes...). This interpretation excludes from consideration other items which also might qualify as "places," such as streets, squares, natural, historical or cultural sites, mountains, rivers, lakes and waterways, buildings and edifices, monuments, and

(ii) administratively recognized regions and municipalities within countries.

274. The comments received on the Interim Report's preliminary recommendations on the protection in the gTLDs of country names and the names of administratively recognized regions and municipalities within countries reveal that the concerns of those who are in favor of such protection relate in particular to the names of countries. While many of the arguments that are advanced in support of the protection of country names also can find application in relation to other place names, the present analysis will focus primarily (but not exclusively) on the protection of country names, in light of the concerns and expectations of the commentators. Whether it would be opportune at this stage to create this protection must be considered from both a policy, as well as a legal perspective.

275. *Policy Perspective.* Current registration policies in the open gTLDs allow persons or entities to appropriate for themselves, as domain names, terms with which they otherwise have no, or only a loose, connection, to the exclusion of countries and peoples whose history and culture are deeply and inextricably linked to the terms in question. It should come as no surprise that such registrations are a source of concern for these countries and peoples, particularly if the domain names are exploited commercially or used in a manner that is deemed inappropriate or disrespectful. As the number of gTLDs expand, the value of a registration in any one of them may correspondingly decrease, and it is possible that the problem will become less acute.[87] However, as long as domain names are used as a de facto Internet directory, it is unlikely that the problem will disappear completely, particularly in

much more advantageous position in terms of securing their interests in the DNS than those in countries where the Internet has made little or no penetration. This point of view is underscored by the fact that many of the names of countries whose populations have benefited less from exposure to the Internet appear to have been registered as domain names by parties from countries that are at the forefront of Internet developments.

277. The consideration of the interest of a country or a people in a term with which it has a strong historical and cultural link is one way to approach the problem of the registration of geographical terms as domain names. Another possible approach is to consider whether the manner in which the term is used as a domain name adds value by permitting users to retrieve more efficiently the information that they are seeking on the Internet. Under this approach, any geographical term that is registered as a domain name in order to function as the address of a website that provides information on the territory or location corresponding to the domain name may be deemed to add value, as users generally rely on domain names as a primary means of accessing information on the Internet. However, if a domain name corresponding to a geographical term does not resolve to any site or to a site which does not contain any meaningful information regarding the territory or region concerned, it may be argued that there is no added value, only a waste of resources and a cause of consumer confusion. Taking into account the use to which the domain name is put and the nature of the gTLD in which it is registered in assessing the appropriateness of the registration of a geographical term may be worthwhile also because such use, or the lack thereof, can be an indicator of the true purpose for which the name was registered (for example, speculative intent) .

textual comparison between subparagraphs 1(a) and 1(b) of Article 6*ter* and, on the other hand, the preparatory work for the Geneva Diplomatic Conference on the Revision of the Paris Convention.

279. Article 6*ter* (1)(a) reads as follows:

> "The countries of the Union agree to refuse or invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view."

280. Article 6*ter* (1)(b) reads as follows:

> "The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, *and names*, of international intergovernmental organizations of which one or more countries of the Union are members... ."
> (*Emphasis added*)

281. The fact that subparagraph 1(b) refers explicitly to names of international intergovernmental organizations, while subparagraph 1(a) does not refer to names of countries supports the view that the latter provision does not provide an existing legal basis for the protection of country names in the DNS (*expressio unius exclusio alterius*).

> "As regards Article 6*ter*, after a full discussion, agreement was reached on October 22, 1982, on the text which is reproduced in Annex I to this report and which extends the protection under Article 6*ter* to official names of States. Main Committee I unanimously adopted this text and transmitted it to the Drafting Committee".[93]

283. However, for other reasons, the Diplomatic Conference did not result in a revision of the Paris Convention and Article 6*ter* therefore remained unchanged.

284. In light of the above, the following observations seem in order:

(i) Considering that the States party to the Paris Convention were of the view that Article 6*ter* would need to be amended to offer protection for the official names of countries, the position that Article 6*ter*, in its current unrevised form, covers country names seems difficult to maintain.

(ii) At the time of the Diplomatic Conference, developing countries only sought to obtain protection under Article 6*ter* for the official names of countries (for example, the Republic of South Africa) and not for their usual names (for example, South Africa). However, this statement must be qualified in two respects. First, it may have been possible for countries to notify also their usual names as official names to the International Bureau under the notification procedures foreseen in Article 6*ter*. Secondly, discussions were held at the Diplomatic Conference on the need to offer protection also for the usual names of creation of new intellectual property rights or of enhanced protection of rights in cyberspace compared to the protection that exists in the real world.[94] Furthermore, in considering whether it would be opportune, under these circumstances, to introduce any protective measures for these names and what the nature of those measures might be, account should be taken of the fact that terms in this area are protected in certain jurisdictions but are freely available in others. Due to this lack of harmonization and the resultant differing treatment of the issues at the national level, any protective measures that might be adopted for the gTLDs, and the results that they might produce, run a greater risk of being invalidated, if contested at the national level.

286. Notwithstanding the considerations expressed in the preceding paragraph, we strongly believe that, as a matter of policy, country names and the names of administratively recognized regions and municipalities within countries should be protected against abuse in the gTLDs and the Interim Report set out a proposal intended to achieve that goal. That proposal, which was centered on a definition of abuse aimed at striking a reasonable balance of competing interests between countries, domain name registrants and general Internet users, did not receive sufficient support to be put forward as a final recommendation in the present Report. An important reason for this is that those commentators who are most ardently in favor of the protection of country names are of the view that the mere registration of these names as domain names by private parties constitutes in and of itself an abusive misappropriation of a national asset, irrespective of the use (if any) which may be made of the domain names. Rather than expressing agreement or disagreement with this position, we draw attention to the following fundamental characteristics of the debate, as they have

287. Both points lead us to conclude that we have reached the limits of what can be achieved legitimately through consultation processes, such as the WIPO Internet Domain Name Processes or any similar ICANN processes. In other words, we agree with those commentators who are of the view that this particular question is more appropriately dealt with by governments.

288. It is recommended that the question of the protection in the gTLDs of country names and the names of administratively recognized regions and municipalities be further considered in the appropriate intergovernmental fora, in particular with a view to a discussion on the need for new international rules for the protection of country names.

289. Our reluctance to recommend the introduction of new protective measures for country names in the gTLDs principally stems from the view that the international intellectual property framework offers insufficient basis therefor at the present time. This finding, however, is without prejudice to the situation in the ccTLDs. As explained above, the administrators of many ccTLDs have already foreseen mechanisms to safeguard interests in place names within their domains. In line with the policy objectives outlined above, we generally encourage the introduction of such safeguards, in particular, if they are aimed at

the existing gTLDs and who accept registrations of names under them take measures to ensure that the UDRP applies to such lower level registrations.

291. In connection with the first recommendation, we note that the current version of Appendix K to the Registry Agreements between ICANN and the sponsors and operators of the new gTLDs states that "[a]ll two-character labels shall be initially reserved. The reservation of a two-character label string shall be released to the extent that the Registry Operator reaches agreement with the government and country-code manager, or the ISO 3166 maintenance agency, whichever appropriate. The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes."[95]

Exclusions for ISO 3166 Country Code Elements. A number of factors, highlighted in the comments and reactions received on the Interim Report, have lead us to re-consider our recommendation that the ISO 3166 alpha-2 country code elements should be excluded from registration as domain names in the gTLDs. These factors are as follows:

(i) While, on the Internet, the ISO 3166 codes have been associated in particular with country code top-level domains, in the physical world they find broad application and use throughout a wide variety of industries. This is consistent with the nature and purpose of the standard, which itself states that "[it] provides *universally applicable* coded representations of names of countries ..." and that "[it] is intended for use *in any application* requiring the expression of current country names in coded form." (*Emphasis added*)[96] We

(ii) Certain ISO 3166 country codes correspond to the acronyms of other identifiers, in particular trademarks. Excluding the codes from registration in the DNS would prevent such other identifiers from being registered as domain names without seeming justification.

292. In light of the above considerations, we no longer subscribe to the view that the ISO 3166 country code elements should be excluded from registration in the new gTLDs under all circumstances. Nonetheless, we remain concerned that, depending on the manner in which these codes are registered and used in the DNS, confusion may be created with the ccTLDs. That being the case, we believe that the proper focus should be on the avoidance of confusion with regard to those codes, rather than on an absolute prohibition of their registration and use.

293. If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimizes the potential for confusion with the ccTLDs.

294. The practice of registering ISO 3166 country code elements at the second level in the gTLDs in order to offer to the public the opportunity to register names under them raises questions regarding the application of the UDRP.[97] The current version of the UDRP essentially is aimed at ensuring that names registered at the second level under the gTLDs to which the UDRP applies are not abusive. If they are found to be abusive, the UDRP foresees

who may not have included a submission to the UDRP as a condition for accepting the registration of the name at the third level). Secondly, even if it were found that the UDRP indirectly applies to the third level, enforcement issues nonetheless would persist. The UDRP foresees that the ICANN-accredited registrars must cancel or transfer the name registered at the second level in case a violation of the Policy is found to exist. However, numerous names may be registered under the country code at the third level, only some of which might be abusive. Canceling or transferring the registration at the second level (i.e., the country code) might then be a disproportionate measure, because all the names at the third level (as well as those at any lower levels) would be adversely affected, irrespective of whether they were abusive or not. In view of these considerations, the persons or entities who have registered ISO 3166 country code elements and accept registrations of names under them should take measures to render the UDRP applicable to these registrations and to ensure the proper and prompt implementation of decisions transferring or canceling the registrations resulting from the UDRP. We are encouraged by the fact that certain such entities through comments submitted on the Interim Report have expressed a desire to work toward this goal.[98]

295. With regard to the ISO 3166 alpha-2 code elements, it is recommended that the persons or entities in whose name such codes are registered at the second level in the existing gTLDs and who accept registrations of names under them be encouraged to take measures to render the UDRP applicable to

Names of Indigenous Peoples

296. While the Interim Report provided illustrations of certain domain name registration practices regarding the names of indigenous peoples, it did not propose any specific recommendations in relation to those practices. Few comments were received regarding this topic, but those commentators that addressed the issue, urged further consideration of the matter.[99]

297. We believe that it is too early, at this stage, to formulate any recommendations regarding the protection of the names in question in the DNS. An important reason for this is that the communities who are most affected by the topic (indigenous peoples) have not yet had the opportunity to participate fully in the debate. It is therefore proposed that, for the time being, efforts in this area be focused on sensitizing indigenous peoples to the phenomenon and encouraging them to make their voices heard. This could be achieved through a variety of channels, including WIPO's program of work on intellectual property and genetic resources, traditional knowledge, and folklore.[100]

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[1] See Annex II.

[2] See Annex II.

[3] See Annex II.

[4] See Annex II.

[5] Agreement Relating to the Creation of an African Intellectual Property Organization Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property (Bangui (Central African Republic), March 2, 1977). See *http://www.oapi.cm*.

[Endnote continued from previous page]

[18] See Comment of *Office international de la vigne et du vin* (OIV) (RFC-3 of first WIPO Process - April 30, 1999).

[19] "*Une étude menée en 1999 a constaté le dépôt d'un grand nombre de noms de domaine (.com) qui correspondent aux noms d'appellations d'origines et d'indications géographiques de produits vitivinicoles et de noms de cépages sans que les dépositaires aient un lien quelconque avec les titulaires réels des droits liés à ces signes distinctifs*." in Comment of *Office international de la vigne et du vin* (OIV) (RFC-1 - August 14, 2000).

[20] As the study was conducted in 1999, and as registration data often change, all information regarding the domain name holder as well as the web site's activity has been verified as at January 26, 2001, as reflected in the Annex.

[21] See Comment of *Institut national des appellations d'origine* (INAO) (RFC-2 – January 31, 2001).

[22] See Annex IX, INAO: *fitou.com*.

[23] See Annex VIII, Châteauneuf du Pape: *bade.com*, *barsac.com*, *rhodes.net;* Annex IX, INAO: *bourgueil.com, corton.com, gigondas.com, vacqueyras.com;* Annex X, Lisbon: *champagne.org*, *chinon.org*, *frascati.com*.

[24] See Annex VIII, Châteauneuf du Pape: *bourgogne.com*, *eiswein.com*, *lambrusco.com*, *medoc.com*; Annex X, Lisbon: *armagnac.com*, *hoyo-de-monterrey.com*, *tequila.com*.

[25] See Comment of France, *Institut national des appellations d'origine* (INAO) (RFC-3 – June 13, 2001), Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 15, 2001), Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of European Brands Association (AIM) (RFC-3 – May 16, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 - June 18, 2001), Comment of International Chamber of Commerce (ICC) (RFC-3 – June 18, 2001), Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001), Comment of UAEnic (RFC-3 –June 6, 2001), Comment of Elzaburu (Luis H. De Larramendi) (RFC-3 – June 14, 2001). For similar views expressed in response to RFC-2, see also Comment of Government of Australia (RFC-2 – January 23, 2001), Comment of Government of The Netherlands, Ministry of Transport, Public Works and Water Management (RFC-2 – December 20, 2000), Comment of Republic of Moldova, State Agency

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Corporation (RFC-3 – January 1, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Icannchannel.de (RFC-3 – June 15, 2001), Comment of Andy Eastman (RFC-3 – June 16, 2001), Comment of Christine Haight Farley (RFC-3 – June 11, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001). For similar views expressed in response to RFC-2, see also Comment of Tim Heffley, Z-Drive Computer Service (RFC-2 – December 19, 2000), Comment of Christa Worley (RFC-2 December 19, 2000), Comment of Alexander Svenssen (RFC-2 – December 21, 2000).

[28] See Comment of France, *Institut national des appellations d'origine* (INAO) (RFC-3 – June 13, 2001).

[29] See Comment of France, *Institut national des appellations d'origine* (INAO) (RFC-3 – June 13, 2001) and Comment of European Commission (RFC-3 – June 25, 2001).

[30] See Comment of Elzaburu (Luis H. De Larramendi) (RFC-3 – June 14, 2001).

[31] See Comment of European Commission (RFC-3 – June 25, 2001), Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001).

[32] See Comment of Elzaburu (Luis H. De Larramendi) (RFC-3 – June 14, 2001).

[33] See Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001).

[34] See Comment of France, *Institut national des appellations d'origine* (INAO) (RFC-3 – June 13, 2001).

[35] See Comment of Christine Haight Farley (RFC-3 – June 11, 2001).

[36] See Comment of United States of America, U.S. Patent and Trademark Office (USPTO) (RFC- 3 – June 14, 2001) and Comment of Christine Haight Farley (RFC-3 – June 11, 2001).

[37] See Comment of United States of America, U.S. Patent and Trademark Office (USPTO) (RFC- 3 – June 14, 2001), Comment of *Fédération internationale des conseils en propriété industrielle* (FICPI) (RFC-3 – June 14, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Christine Haight Farley (RFC-3 – June 11, 2001).

[38] See paragraph 195, above.

[39] See Comment of Michael Froomkin (RFC-3 – June 4, 2001).

[40] See Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 – June 15, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of Icannchannel.de

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[49] See, for instance, the services of CentralNic offering the possibility of registering names under the following: *br.com, cn.com, eu.com, gb.com, gb.net, hu.com, no.com, qc.com, ru.com, sa.com, se.com, se.net, uk.com, uk.net, us.com, uy.com*, and *za.com*. For more information, see *http:*//www.centralnic.com/.

[50] The World Heritage List is available at *http://www.unesco.org/whc/nwhc/pages/doc/mainf3.htm*.

[51] See *http://www.legalis.net/jnet/decisions/marques/tgi_sttropez.htm.*

[52] This case is available at *http://www.legalis.net*.

[53] Next to heidelberg.de, these cases concerned the following cities: *kerpen.de, pullheim.de, celle.de, herzogenrath.de, bad-wildbad.com*. They are all available at *http://www.bettinger.de/datenbank/domains_ge.html*.

[54] See, for instance, WIPO Case D2000-0064 (*1800rockport.com*); WIPO Case D2000-0505 (*barcelona.com*); WIPO Case D2000-0617 (*stmoritz.com*); WIPO Case D2000-0629 (*parmaham.com*; WIPO Case D2000-0638 (*manchesterairport.com*); D2000-0699 (*paris-lasvegas.com*; WIPO Case D2000-1017 (*xuntadegalicia.net/xuntadegalicia.org*); WIPO Case D2000-1218 (*wembleystadiumonline.com*); WIPO Case D2000-1224 (*sydneyoperahouse.net*); WIPO Case D2000-1377 (*axachinaregion.com*); WIPO Case D2000-1435 (*capeharbour.com/capeharbor.com*). These cases are available at *http://arbiter.wipo.int/domains/decisions/index-gtld.html*.

[55] WIPO Case D2000-0505, available at *http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0505.html* and WIPO Case D2000-0617, available at *http://arbiter.wipo.int/domains/decisions/html/d2000-0617.html*.

[56] WIPO Case D2000-1728, available at *http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1278.html*.

[57] WIPO Case D2001-0001, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0001.html*.

[58] WIPO Case D2001-0002, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2000-0002.html*.

[59] WIPO Case D2001-0047, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0047.html*.

[60] WIPO Case D2001-0069, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0069.html*.

[61] WIPO Case D2001-0321, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0321.html*.

[62] WIPO Case D2001-0348, available at *http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0348.html*

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[68] See .FR registration policy at *http://www.nic.fr/enregistrement/fondamentaux.html.*

[69] See .PE registration policy at *http://www.nic.pe/interna/normas.htm.*

[70] See .SE registration policy at *http://www.iis.se/regulations.shtml.*

[71] For instance, for .AU, this is Australian Surveying and Land Information Group's database of Australian place names.

[72] See, for instance, the work conducted since 1982 by the United Nations Commission on Human Rights, its Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Sub-Commission's Working Group on Indigenous Populations. More particularly in the area of intellectual property, see WIPO's work on traditional knowledge, innovations and creativity, information about which is available at *http://wipo.int/traditionalknowledge/introduction/index.html.*

[73] See Comment of United States of America, U.S. Patent and Trademark Office (USPTO) (RFC-3 - June 14, 2001), Comment of United States of America, Office of Advocacy: U.S. Small Business Administration (RFC-3 – June 15, 2001), Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 - June 15, 2001), Comment of *Fédération internationale des conseils en propriété industrielle* (FICPI) (RFC-3 – June 14, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI), (RFC-3 – June 18, 2001), Comment of the International Chamber of Commerce (ICC) (RFC-3 – June 18, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of EasyLink Services Corporation (RFC-3 – January 1, 2001), Comment of Icannchannel.de (RFC-3 – June 15, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001). For similar views expressed in response to RFC-2, see also Comment of Tim Heffley, Z-Drive Computer Service (RFC-2 – December 19, 2000), Comment of Alexander Svenssen (RFC-2 – December 21, 2000), Comment of Christa Worley (RFC-2 – December 29, 2000).

[74] See Comment of Cyprus, Government of Cyprus (RFC-3 – June 7, 2001), Comment of South Africa, Ministry of Telecommunications (RFC-3 – June 7, 2001), Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001), Comment of UAEnic (RFC-3 – June 6, 2001), Comment of Elzaburu (Luis H. De Larramendi) (RFC-3 – June 14, 2001). For similar views expressed in response to RFC-2, see also Comment of Netherlands, Ministry of Transport,

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[77] See Comment of United States of America, Office of Advocacy: U.S. Small Business Administration (RFC-3 – June 15, 2001), Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 – June 15, 2001), Comment of EasyLink Services Corporation (RFC-3 – January 1, 2001).

[78] See Comment of United States of America, Office of Advocacy: U.S. Small Business Administration (RFC-3 – June 15, 2001), Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001), Comment of EasyLink Services Corporation (RFC-3 - January 1, 2001).

[79] See Comment of EasyLink Services Corporation (RFC-3 – January 1, 2001).

[80] See Comment of United States of America, U.S. Patent and Trademark Office (USPTO) (RFC-3 – June 14, 2001), Comment of *Fédération internationale des conseils en propriété industrielle* (FICPI) (RFC-3 – June 14, 2001).

[81] See Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI), (RFC-3 – June 18, 2001), Comment of Japan Network Information Center (JPNIC) (RFC-3 – June 8, 2001).

[82] See Comment of Association for Computing Machinery's Internet Governance Project, Electronic Privacy Information Center (RFC-3 – June 15, 2001), Comment of CentralNic (RFC-3 – May 25, 2001), Comment of Fish & Richardson P.C. (RFC-3 – June 14, 2001).

[83] See Comment of CentralNic (RFC-3 – May 25, 2001).

[84] See Comment of International Trademark Association (INTA) (RFC-3 – May 24, 2001).

[85] See Comment of Canada, Government of Canada (RFC-3 – July 5, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of Christine Haight Farley (RFC-3 – June 11, 2001).

[86] See, in this respect, United Nations Terminology Bulletin No. 347/Rev.1, States Members of the United Nations, Members of the Specialized Agencies or Parties to the Statute of the International Court of Justice, ST/CS/SER.F/347/Rev.1.

[87] See Comment of European Brands Association (AIM) (RFC-2 - December 20, 2000).

[88] See also the discussion of Article 6*ter* in the preceding chapters of this Report.

[89] See Comment of South Africa, Ministry of Communications (RFC-3 – June 7, 2001).

[90] See paragraph 264 of the Interim Report.

[91] See WIPO Document PR/WGAO/II/6.

[92] See Basic Proposals for the Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (Geneva, February 4 to March 4, 1980).

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registrations at levels below the second level, it is discussed here in the context of the registration of country codes at the second level.

[98] See Comment of CentralNic (RFC-3 – May 25, 2001).

[99] See Comment of Canada, Government of Canada (RFC-3 – July 5, 2001), Comment of Auckland District Law Society, Law & Technology Committee (RFC-3 – June 22, 2001), Comment of Christine Haight Farley (RFC-3 – June 11, 2001).

[100] For more information on this Program, see *www.wipo.int/globalissues/index-en.html*.

7. TRADE NAMES

298. A trade name is the designation adopted by a commercial enterprise to describe itself and to distinguish it from other businesses and enterprises. Trade names are also referred to variously as company, corporate, business or firm names, although each of these identifiers may sometimes attract slightly different legal or regulatory conditions. Common examples of familiar trade names are Ericsson, General Motors, Holiday Inn, Lego, Microsoft, Nestlé, Philips, Procter & Gamble and Sony. A trade name may also be registered and separately protected as a trademark, as most of the foregoing examples are.

299. The present Chapter reviews the legal protection of trade names at the international and national levels; analyses the comments received in response to the proposals contained in the Interim Report concerning the protection of trade names against abusive registration and use as domain names; and formulates a recommendation on the treatment of trade names within the DNS.

THE INTERNATIONAL PROTECTION OF TRADE NAMES

300. The Paris Convention for the Protection of Industrial Property (the Paris Convention) establishes a norm requiring the protection of trade names in all States party to the Convention. Article 8 provides as follows:

(iii) The protection must be independent of the protection accorded to trademarks, even if the trade name is also registered as a trademark.

302. The freedom left to States to implement trade name protection at the national level includes, notably, two important areas. The first of those is the definition of what constitutes a trade name and, thus, the conditions that must be satisfied by a designation in order to qualify as a trade name. Various conditions are applied, including the requirement of inherent or acquired distinctiveness, the requirement of use and the requirement of the establishment of reputation or goodwill in the trade name. The second area left to national law is the scope of protection accorded to trade names. Protection is not absolute and is usually defined by reference to one or both of two factors, namely, the field of trade activity in which the trade name is used (thus, for example, the trade name of an enterprise in the field of information technology may only enjoy protection in that particular field); and the geographical area over which the trade name enjoys a reputation (thus, for example, the trade name of a baker's shop may be protected only in the village and commune in which it is found, whereas the trade name of a transnational enterprise may enjoy protection that is commensurate with the geographical area in which that enterprise operates).

NATIONAL PROTECTION OF TRADE NAMES

303. In view of the large scope left to national implementation by Article 8 of the Paris Convention, WIPO conducted, in the course of the Second WIPO Process, a survey of its

to the Second WIPO Process opposed the extension of protection of trade names from the physical world to the DNS.[3] Others, however, took the view that a means of protection for trade names could be established which would recognize the diversity of approaches and still provide protection for this important and valuable form of industrial property.[4] One commentator remarked that, indeed, a failure to protect trade names in the DNS would contravene the international law established by the Paris Convention.[5]

305. As an illustration of the differing treatment accorded to trade names, one commentator noted that in the Scandinavian countries of Denmark, Finland, Norway and Sweden, businesses are protected more commonly through registered trade name protection than through trademark law, and trade names may receive stronger protection than trademarks. This commentator suggested that decisions on disputes between entities that originate from such countries should be determined in light of their local law.[6]

PROTECTION OF TRADE NAMES IN THE DNS

306. National legal systems have developed to accommodate the co-existence of trade names, and enable many businesses to trade in different jurisdictions or in different fields of industry using identical or similar trade names, without conflict. The DNS, at least in the present gTLD space, cannot reflect this plurality, as each domain name is unique and global. Problems may arise for businesses that use their trade names in commerce, and find that the corresponding domain name has been registered by another. In the case of competing claims

action against any use of a trade name that misrepresents the source of the goods or services, or is likely to cause confusion regarding their source. This protection has been extended to the unlawful use of trade names as domain names in the decision *U.S.* v. *Washington Mint, LLC*.[8] In Germany, the courts have found in favor of owners of 'name rights' in cases where the domain name registrant was unable to establish any legitimate interests in the name, in the Düsseldorf Court of Appeal's decision with respect to the domain name "ufa.de", for example.[9] The German courts have readily found against domain name registrants where their use of a commercial name in the DNS is liable to cause confusion or mislead the public,[10] at the same time upholding the rights of domain name registrants who have legitimate rights in the underlying trade name.[11]

308. In the DNS at the level of country-code top-level domains (ccTLDs), many registration authorities impose restrictions on the commercial entities that may register names in their domain, particularly in any second-level domains chartered for commercial use. Many ccTLD administrators require applicants to warrant that their domain name does not infringe the legal or other rights of third parties. However, among respondents to the WIPO trade names questionnaire, a minority of ccTLD administrators require applicants to assert or prove their legitimate right to register a commercial or trade name as a domain name.[12]

309. Evidently there exists no uniform or robust protection for trade names in the DNS. As a result, in the event of abuse, business owners are required either to concede the right to use their trade name online when confronted with its abusive or bad faith registration as a domain name, or else attempt to defend their legal rights through national judicial systems.

evidence of significant abuse of trade names to argue that protection was therefore unnecessary.[13] However one comment from the administrator of .UK estimated that half of the 1,400 disputes handled to date by its Dispute Resolution Service concerned trade names, rather than trademarks or personal names, typically involving small localized businesses and that a "relatively high proportion of those cases show evidence of abusive registration, often as a result of 'board room fall-out', competitors in a narrow geographical area, or an individual warehousing names of businesses in the local area."[14]

311. The majority of commentators to the Second WIPO Process favored the protection of trade names in the DNS through an administrative dispute resolution process that would enable trade name owners to protect the good will and reputation associated with their name against bad faith, abusive, misleading or unfair use as a domain name.[15] Commentators widely recognized that trade names perform the same 'origin function' as trademarks, indicating the source or nature of the business entity they represent, and perform the same investment or advertising function. To the extent that trade names serve an identifying function, like trademarks, there was support for their protection in the DNS, equivalent to that accorded to trademarks.

312. The means of protection favored by most commentators to the Second WIPO Process was the extension of the UDRP, which at present applies only to trademarks and service marks, to cover trade names.[16] It was noted that to the extent that most trade names also function as trademarks, as such, they are already protectable under the UDRP.[17] One commentator noted that extending the UDRP to cover trade names would overcome the

depending on local application of the Paris Convention under national law.[20] This approach could be accommodated, in the context of UDRP, where panelists determine cases in relation to the circumstances of each case and the applicable principles of national law. Some commentators noted that trade names, unlike trademarks, are broadly defined, unregistered and unregulated and that, as a result, their protection in the DNS could compromise individual rights[21] and impact upon small businesses.[22] Commentators also noted that numerous identical trade names may legitimately co-exist in different jurisdictions, in contrast to the unique global presence offered by a domain name.[23] It is noted that, by way of analogy, the co-existence of trademarks in various jurisdictions is currently accommodated under the UDRP by the requirement of a showing of bad faith registration and use of the domain name by the respondent. If a respondent is able to demonstrate a co-existing legitimate use of the name, the complainant's case is not made out, and the respondent retains its use of the domain name.

314. As with other identifiers addressed in this Report, commentators expressed some concern at the retrospective application of any mechanism of protection for trade names, noting that some business owners could be injured as a result.[24] In addition, some commentators remarked that any system instituted to protect trade names in the DNS could be used to hijack names from individuals and smaller enterprises.[25]

315. Most commentators supported the protection of trade names in all existing and new gTLDs, and particularly in ccTLDs, where the national relevance of trade names lends support to their protection.[26] Some commentators noted the potential for differentiation in the

registration (if applicable), evidence of use and established reputation in a particular field of business, use of the domain name in a same or similar field of interest to the trade name, and whether the trade name had acquired secondary meaning.[31] One commentator stated that complainants should be required to prove that their trade name has become distinctive as an indication of source,[32] and to prove their trade name's inherent or acquired distinctiveness by 'clear and convincing evidence'.[33] Some commentators stated that any protection of trade names in the DNS should not extend to generic words,[34] whether or not they had acquired distinctiveness through use.

317. It was also suggested that the current UDRP definition of 'bad faith abusive, misleading or unfair registration and use' in respect of trademarks could simply be adjusted to apply to trade names. [35] As noted by one commentator, the real issue is to determine what constitutes 'abuse' of a trade name: "Any *abuse* of a sign in the scope of the Domain Name System should – as well as in the 'real world' – not be tolerated and therefore be prevented".[36] Proof of bad faith was seen as critical by commentators, in order to prevent reverse domain name hijacking. [37] In this regard, it was also stated that commercial entities should not automatically take precedence over non-commercial entities in relation to the use of trade names as domain names.[38] In any conflict between two entities with legitimate rights in the name, it was noted by one commentator that the matter should be left to a court of competent jurisdiction to decide.[39]

RECOMMENDATION

This national diversity inevitably creates a problem for the choice of applicable law on a global medium. The situation of trade names is, in this respect, akin to that of geographical indications insofar as it would be necessary for a dispute-resolution panel, in the absence of convergent national approaches, to identify the national law that should be applied to determine the existence of a protectable trade name. We do not believe that the law is sufficiently clear on this question, with the consequence that there would be a risk of lack of coherence in decisions, which might engender dissatisfaction and lack of understanding of the procedure.

(ii) The practice in the use of trade names covers a very large range of commercial activity, including very small one-person enterprises operating in very limited geographical areas, as well as very large enterprises operating in global markets. It is certainly the case that very small enterprises operating in limited geographical areas deserve protection for their trade names when the conditions of eligibility for the protection are satisfied. Whether those conditions of eligibility can be identified with precision for disputes in gTLDs on a global medium, however, is problematic. Where a trade name is used in widespread markets, it is often also the subject of trademark protection or satisfies the conditions for protection as an unregistered trademark so as to qualify, in appropriate circumstances, for protection against bad faith, deliberate misuse under the UDRP.

(iii) The UDRP was designed for, and applies to, straight-forward disputes, where there are rights on one side and no rights or legitimate interests on the other side. It was not designed to accommodate disputes involving interests on both sides, which requires a more *the basis of abusive registrations and use of trade names per se.*

320. In the case of ccTLDs, we believe that much greater scope exists for allowing complaints under a dispute-resolution procedure for abusive registrations of trade names. Within the ccTLD, the problem of diversity does not exist in the same way and there is greater scope for applying the relevant national implementation of protection of trade names.

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[1] See Comment of Switzerland, Swiss Federal Institute of Intellectual Property (RFC-3 – June 1, 2001).

[2] Refer generally to the analysis of the passing-off action in W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (4th ed.) (Sweet & Maxwell, 1999) at Chapter 16, and in T.A. Blanco White and Robin Jacob, *Kerly's Law of Trade Marks and Trade Names*, (12th ed.) (Sweet & Maxwell, 1986) at Chapter 16.

[3] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of *Fédération internationale des conseils en propriété industrielle* (FICPI) (RFC-3 – June 14, 2001), Comment of International Chamber of Commerce (ICC) (RFC-3 – June 18, 2001), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of ACM Internet Governance Project (RFC-1 – September 15, 2000).

[4] See Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-2 – December 28, 2000), Comment of Steven Turnbull, University of Tsukuba (RFC-1 – August 29, 2000).

[5] See Comment of Mexico, National Institute of Copyright (RFC-3 – May 30, 2001).

[6] See Comment of Dipcon – Domain Name and Intellectual Property Consultants AB (RFC-2 – December 22, 2000).

[7] See 15 *U.S.C.*, § 1125(a).

[8] See 15 *F. Supp*.2d 1089 (D.Minn, 2000).

[9] Decision of September 30, 1997 – 4 O 179/97, finding in favor of the UFA-Film-und Fernseh GmbH & Co KG, which had rights in the designation 'UFA'. Similarly, the Munich District Court, in a decision of October 21, 1998 – 1 HK O 167 16/98, found against the domain name registrant of "muenchner-rueck.de", as an unauthorized use of the commercial designation

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name applications based on trade names as follows: .AR (Argentina), .BE (Belgium), .BF (Burkina Faso), .BG (Bulgaria), .BH (Bahrain), .BN (Benin), .BY (Belarus), .CA (Canada), .CR (Costa Rica), .DE (Germany), .DK (Denmark), .EC (Ecuador), .GE (Georgia), .GT (Guatemala), .HN (Honduras), .HU (Hungary), .KG (Kyrgyzstan), .KH (Cambodia), .KR (Republic of Korea), .LT (Lithuania), .MA (Morocco), .MD (Moldova), .MK (the Former Yugoslav Republic of Macedonia), .MN (Mongolia), .MU (Mauritius), .MX (Mexico), .PT (Portugal), .RO (Romania), .RU (Russian Federation), .SG (Singapore), .UA (Ukraine), .US (United States of America) and .UZ (Uzbekistan).

[13] See Comment of Japan, Ministry of Economy, Trade and Industry (METI) (RFC-3 – July 5, 2001), Comment of Michael Froomkin (RFC-3 – June 4, 2001).

[14] See Comment of Nominet UK (RFC-3 – June 14, 2001).

[15] See Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of Associations des Praticiens en droit des Marques et des Modèles (RFC-3 – June 7, 2001), Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001), Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-3 – June 8, 2001), Comment of European Broadcasting Union (EBU) (RFC-3 – June 8, 2001), Comment of International Association for the Protection of Industrial Property (AIPPI) (RFC-3 – June 18, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001), Comment of Nominet UK (RFC-3 – June 14, 2001), Comment of Christian Mogensen (RFC-3 – April 16, 2001), Comment of Daniel R. Tobias (RFC-3 – April 15, 2001). See also Comment of Australia, Government of Australia (RFC-2 – January 23, 2001), Comment of Republic of Moldova, State Agency on Industrial Property Protection (RFC-2 – December 29, 2000), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of Asociación Interamericana de la Propiedad Industrial (ASIPI) (RFC-2 – December 26, 2000), Comment of rexco.com (Des Donnelly) (RFC-1 – August 5, 2000), Comment of the Association of European Trade Mark Owners (MARQUES) (RFC-2 – December 22, 2000), Comment of Matthias Haeuptli (RFC-2 – September 15, 2000).

[16] Indeed, the Administrative Panel in WIPO Case D2000-0025 *SGS Société générale de surveillance S.A.* v. *Inspectorate* (March 17, 2000) stated: "The Panel considers that the Policy and Rules refer only to identity or similarity to trademarks and service marks in which a complainant has rights. No reference is made in the Policy and Rules to *trade names* in which a complainant has rights." In another WIPO Case D2000-0638 *Manchester Airport PLC* v. *Club Club Limited* (August 22, 2000), the three-member Administrative Panel found against a Complainant who had asserted that the domain name registered by the Respondent was identical

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(RFC-2 – December 29, 2000), Comment of European Brands Association (AIM) (RFC-2 – December 20, 2000), Comment of 14us2.com (Billy Reynolds) (RFC-1 – August 15, 2000), Comment of Ben Hwang (RFC-1 – August 11, 2000), Comment of Edwin Philogene (RFC-1 – August 11, 2000).

[20] See Comment of Brazilian Association of Intellectual Property (ABPI) (RFC-2 – December 28, 2000).

[21] See Comment of Bernard H.P. Gilroy (RFC-1 – August 11, 2000), Comment of Jay Orr (RFC-1 – August 14, 2000).

[22] See Comment of United States of America, Office of Advocacy, U.S. Small Business Administration (RFC-3 – June 15, 2001).

[23] See Comment of Gregory Rippel, U.S. Realty Corp. (RFC-1 – August 19, 2000), Comment of John Apolloni (RFC-1 – August 14, 2000), Comment of Alexander Svensson (RFC-2 – December 21, 2000).

[24] See Comment of United Kingdom, The Patent Office (RFC-3 – June 1, 2001), Comment of Frank Azzurro (RFC-1 – August 15, 2000).

[25] See Comment of American Civil Liberties Union (ACLU) (RFC-2 – December 29, 2000), Comment of Leah Gallegos, TLD Lobby (RFC-1 – August 16, 2000), Comment of NewsBank, Inc. (RFC-1 – August 12, 2000), Comment of Edwin Philogene (RFC-1 – August 11, 2000), Comment of Joseph Fowler (RFC-1 – August 11, 2000), Comment of Atilda Alvarido (RFC-1 – August 12, 2000).

[26] See Comment of Hungary, Hungarian Patent Office (RFC-3 – June 13, 2001), Comment of Mexico, Mexican Institute of Industrial Property (IMPI) (RFC-3 – June 5, 2001), Comment of European Commission (RFC-3 – June 25, 2001), Comment of Law and Technology Committee, Auckland District Law Society (RFC-3 – June 22, 2001).

[27] See Comment of Forrester Rupp (RFC-1 – August 14, 2000), Comment of Security Privacy and Internet Equity Symposium of 16/12/00 of the Key West Institute S6/Consortium Board (RFC-2 – December 22, 2000).

[28] See Comment of Australia, Government of Australia (RFC-2 – January 23, 2001).

[29] See Comment of American Civil Liberties Union (ACLU) (RFC-2 – December 29, 2000).

[30] See, for example, Comment of American Intellectual Property Law Association (AIPLA) (RFC-3 – June 7, 2001).

[31] See Comment of Australia, Government of Australia (RFC-2 – January 23, 2001).

[32] See Comment of American Intellectual Property Law Association (AIPLA) (RFC-2 – December 29, 2000).

[33] See Comment of Weikers & Co., Attorneys at Law (RFC-1 – August 11, 2000).

8. THE ROLE OF TECHNICAL MEASURES

321. As described in the first Chapter of this report, the Domain Name System (DNS) is undergoing rapid evolution, as millions of new domain names are registered, currently numbering over 35 million and forecast to exceed 75 million domain names by 2002,[1] new top level domains are added, and new language scripts are sought to be accommodated. In this context, the request addressed to WIPO to initiate the Second WIPO Process also noted that "in undertaking the process, it would be beneficial if any information received or collected concerning technical solutions to domain name collision control was collated for the information of WIPO Members and the Internet community." This Chapter provides a collation of the material received during the course of these consultations, and points to areas of current need, as well as future possibilities in ameliorating conflict in the evolving DNS.

322. At various points in this Report, suggestions had been made about the appropriate fora for the development of new intellectual property law or policy, if such new law or policy is considered to be desirable by the international community. Just as the creation of new law has appropriate fora, the oversight of technical measures and operational questions has an appropriate forum. The management of the operational stability of the DNS falls squarely within the Articles of Incorporation of the Internet Corporation for Assigned Names and Numbers (ICANN). The ensuing analysis of the role of technical measures, therefore, must be understood as a contribution, from the perspective of intellectual property, to questions for which ICANN has responsibility of oversight.

technical data, is not routinely checked for veracity or completeness at the initial stage, and is automatically included in the applicable Whois database. Nor are checks made as a matter of course to ensure that the information is kept up-to-date. Most Whois databases are publicly available online, for real-time searching by all enquirers.

324. The Whois search facilities are used principally by members of the public to determine the identity of domain name registrants and the technical and administrative contacts for the web site hosts. The searches are employed by many users for various legitimate purposes – including by rightsholders to identify and locate possible infringers of their rights in order to enforce those rights, to allow consumers to identify online merchants, to source unsolicited e-mail and to enable law enforcement authorities to investigate illegal activity, including consumer fraud.[2] As first intended, the Whois also provides a crucial resource for network administrators who may need to correct network problems or determine the perpetrators of spam or hacking attacks. In a dispute-resolution context, the availability of accurate Whois data is also vital to ensure that registrants are notified of any legal or administrative UDRP proceedings against them, and thereby to ensure due process. Similarly, rightsholders employing ‘notice and takedown’ provisions under national laws, such as the United States Digital Millenium Copyright Act, depend upon Whois resources to match infringing sites with affiliated service providers for notification purposes.[3] In its multiple capacities, the Whois plays a critical role in the prevention and resolution of conflict in the DNS. At a time when the inscrutability of the Internet is increasingly a cause for concern among consumers, users and their advocates, one commentator remarked that:

COMPREHENSIVE WHOIS SEARCH FACILITIES

326. The Interim Report asked whether the Whois system, as it currently operates, is adequate to fulfil its dispute-prevention function, or whether it should be extended in any of three ways:

(i) to enable Whois searches across any new open gTLDs;
(ii) to enable searches across the Whois databases of all registrars; and
(iii) to enable searches across the Whois databases of all registrars for more than just the exact domain name.

327. Of all the technical issues raised for discussion, the Whois search facilities excited the most forceful comment. The vast majority of commentators were strongly in favor of promoting the integrity of Whois information.[5] To the intellectual property community of rightsholders and consumers, Whois databases are essential for evaluating and protecting intellectual property rights, for combating online copyright piracy and for facilitating the licensed use of copyright materials online.[6]

328. The issue of Whois search capacity is not new – it has been the focus of fierce debate in the course of the first WIPO Process and is now the subject of a survey being conducted by the Domain Names Supporting Organization (DNSO) of ICANN.[7] The first WIPO Process Report recommended that the contact details of all holders of domain names in all open gTLDs should be made publicly available in real time.[8] The Report recommended that, at

329. ICANN's current Registrar Accreditation Agreement requires registrars to make available at least the following information: the domain name, the Internet Protocol address of the primary and secondary nameservers, the corresponding names of those nameservers, the identity of the Registrar involved, the dates of registration and expiry, the name and postal address of the domain name holder, the name, postal address, email address, telephone and fax numbers of the technical and administrative contacts.[11] This information is required to be searchable by simple logical and combined methods, updated promptly, presented in a consistent format, and linked to the registrar or registry's site with nominated contact points to receive any complaints concerning incorrect contact data.[12]

330. Commentators to the WIPO Processes have continued to reiterate the importance of reliable Whois information that is accurate and up-to-date.[13] The Report of the first WIPO Process recommended that domain name registration agreements should contain a term making the provision of inaccurate or unreliable information by the domain name holder, or the failure to update information, a material breach of the registration agreement and a basis for cancellation of the registration by the registration authority, and this has been supported by commentators to the WIPO Processes.[14] In fact, ICANN's Registrar Accreditation Agreement states that the willful provision of false or inaccurate contact data constitutes a material breach of the registration agreement and a basis for its cancellation.[15] ICANN's Statement of Registrar Accreditation Policy requires accredited registrars to provide public access on a real-time basis, such as by way of a Whois service, to the contact details that are required to be provided by a domain name registrant, and to keep such information updated. [16] It is noted that there exist means by which registrars can improve the validity of Whois data, through

332. It is considered essential that the current requirements for free public access to a Whois service should be extended to any new gTLDs.[17] The majority of commentators expressed strong support for such a comprehensive search facility, especially pressing in light of the introduction of new gTLDs.[18] The Intellectual Property Constituency (IPC) of ICANN's Domain Name Supporting Organization (DNSO) proposed criteria that should be required of new gTLD's Whois services, and the methods by which this information could be searched.[19] The IPC recommended that the database information should be searchable by domain name, registrant's name or postal address, contacts' names, NIC handles and Internet Protocol address, and should be required to be kept current and comprehensive. Further, it was stated that searches should not be arbitrarily limited, either in number or in type (e.g., limited only to matches with exact domain names).

333. It is also considered essential that a Whois data facility should be comprehensive, enabling searches across all registrars' databases, including all gTLDs and to the greatest extent possible, as discussed below, the ccTLDs. This need is a consequence of the Shared Registration System introduced by ICANN in early 1999, that has resulted in the accred

Forrest-033

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WIPO

SCT/21/5
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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

Twenty-First Session
Geneva, June 22 to 26, 2009

SUBMISSION BY THE RUSSIAN FEDERATION

Document prepared by the Secretariat

1. In a communication dated March 2, 2009, the Secretariat received a submission from the Russian Federation relating to the extension of the effect of Article 6*ter* of the Paris Convention for the Protection of Industrial Property for consideration by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), at its twenty-first session to be held in Geneva from June 22 to 26, 2009.

2. The said submission is contained in Annex I to the present document.

[Annex I follows]

ANNEX I

Submission by the Russian Federation to the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

1. The proposal of the Delegation of Jamaica, put forward at the twentieth session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (hereinafter, "the SCT"), on the extension of Article 6*ter* of the Paris Convention for the Protection of Industrial Property (hereinafter, "the Paris Convention") to the names of States, is not for the first time being put before WIPO. This issue had already been examined while preparing for and during the Diplomatic Conference for the review of the Paris Convention in 1980.

2. The proposal in question is motivated by the possible benefits which may accrue as a result of providing legal protection for the names of States on the basis of Article 6*ter* of the Paris Convention.

3. As is well known, a basic provision of the Paris Convention contained in paragraph (1)(a) of Article 6*ter*, is that the countries of the Paris Union have come to an agreement to refuse or to invalidate the registration of armorial bearings, flags, and other State emblems and to prohibit by appropriate measures their use, without authorization by the competent authorities, either as trademarks or elements of trademarks.

4. Regardless of the absence in Article 6*ter* of the Paris Convention of a reference to the names of States, the majority of the world's countries have appropriate standards in their national trademark legislation, which allow the issue of protection of these names to be resolved.

5. Thus, in accordance with paragraph 1 of Article 1483 of the Civil Code of the Russian Federation (hereinafter, "the Code"), State registration as trademarks of designations which do not possess distinguishing capacity or which consist solely of elements which characterize goods, including those indicating their place of production or sale, is not permitted.

6. The possibility of rejection of the designations referred to during registration is based on Article 6*quinquies* B(2) of the Paris Convention.

7. In accordance with current Russian legislation, the designation for which registration as a trademark containing the name of a State is claimed, is regarded as an indication as to the place of production or sale of the good. It may be included in the trademark as a non-protectable element, provided two conditions are satisfied.

8. The first condition is that the name of the State must be accurate in relation to the place of manufacture of the good and the place of business of its manufacturer. In the opposite case, the inclusion of this name in the trade mark must be considered false and, consequently, registration of the claimed designation impossible, as contravening paragraph 3(1) of Article 1483 of the Code.

9. The second condition of the inclusion of the name of a State as a non-protectable element in a claimed designation is that such a name must not occupy a dominant position in the claimed designation. When determining whether a non-protectable element occupies a dominant position in the designation, its semantic and/or spatial significance is borne in mind.

10. As evidenced by law-enforcement practice, the significance of a verbal designation which is the name of a State (or of a designation based thereon), even if such a designation does not constitute a major part of the designation, enables a conclusion to be drawn as to its dominant semantic importance.

11. Based on the above, Russian legislation envisages the possibility of providing legal protection for the names of States.

12. With regard to other aspects relating to the proposal of the Delegation of Jamaica on Article 6*ter* of the Paris Convention, these may be discussed as an agenda item on Article 6*ter* of the Paris Convention at the twenty-first session of the SCT.

13. Examples of designations including names of States, in relation to which the provisions of Article 1483 of the Code were applied, are given in Annex II.

[Annex II follows]

ANNEX II

ARtemis OF SWITZERLAND	**Application №2005719567**	Inclusion as a non-protectable element in a trademark of an official name of a State (Switzerland), in which the applicant has its place of business.
patricia of Finland	**Application №2007708407**	Inclusion as a non-protectable element in a trademark of an official name of a State (Finland), in which the applicant has its place of business.
REIJMYRE 18 R 10 SWEDEN	**Application №2006716585**	Inclusion as a non-protectable element in a trademark of an official name of a State (Sweden), in which the applicant has its place of business.
solaris ITALY	**Application №2005706934**	An applicant from Panama requests legal protection of a designation which includes the official name of a State (Italy). Registration of the designation as a trademark is not possible, since it is capable of misleading the consumer regarding the producer and country of origin of the goods.

	**Application №2006706972**	An applicant from Russia requests legal protection of a designation which includes the official name of a State (France). Registration of the designation as a trademark is not possible, since it is capable of misleading the consumer regarding the producer and country of origin of the goods.
	**Application №2008702532**	An applicant from Germany requests legal protection of a designation which includes the official name of a State (Austria). Registration of the designation as a trademark is not possible, since it is capable of misleading the consumer regarding the producer and country of origin of the goods.

[End of Annex II and of document]

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WIPO

SCT/21/6
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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

Twenty-First Session
Geneva, June 22 to 26, 2009

PROPOSAL BY JAMAICA

Document prepared by the Secretariat

1. In a communication dated March 30, 2009, the Secretariat received a proposal from Jamaica relating to the Amendment of Article 6*ter* of the Paris Convention for the Protection of Industrial Property for consideration by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), at its twenty-first session to be held in Geneva from June 22 to 26, 2009.

2. The said proposal is annexed to this document.

[Annex follows]

ANNEX

Proposal by Jamaica
to the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

Article 6*ter*

(1)

(a) **The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.**

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

1. The SCT will recall that during the 1980s, proposals were made to review the Paris Convention in order to broaden the scope of Article 6*ter* to include the protection of country names. The last proposal, regarding a full review of Article 6*ter* for the purpose of possible amendments, was made at a diplomatic conference held in February 1980. At that conference, under the heading of "alternative B", a proposal was placed on the table which recommended that the term "as well as the official names of the countries of the Union" should be included under the category of areas that are to be refused for validation as registered trade marks. This would effectively lead to the expansion of Article 6*ter*(1)(a) to include the protection of country names.

2. Unfortunately, attempts to review Article 6*ter* of the Paris Convention, at the Diplomatic Conference were unsuccessful, due to the rejection of the proposal for the protection of country names by a few States.

3. The rejection of such an inclusion in Article 6*ter*, however, took place against the backdrop of a very different political and socioeconomic reality. Emphasis must be given to the fact that past rejection of the argument to include country names under the protection of Article 6*ter*(1)(a), such as was the case in 1980 (almost 30 years ago), took place under a starkly different international economic order and global trade regime. The widening and deepening of linkages amongst and between countries, as a result of globalization and trade liberalization has facilitated an increase in the trade in goods which carry unauthorized country names.

4. Jamaica is, therefore, proposing to open discussions in the forum of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) for the provision of Article 6*ter* of the Paris Convention to be amended to reflect the protection of these country names, in addition to the other categories of protection already in existence. For this purpose, therefore, Jamaica wishes to revisit elements of the previous proposal made in 1980.

5. Jamaica also wishes to propose the granting of additional protection to a State's identity by way of a further amendment of Article 6*ter* to allow for the protection of country names of the Union to include homonymous sounds of these country names. An example of this would be the official country name "Jamaica" also being protected as "Jah-mey-ka."

6. It should be noted that a discussion concerning the widening of the categories of protection under Article 6*ter* of the Paris Convention to include the protection of country names, must be approached from a holistic point of view having regard to the political, socioeconomic and legal implications of such an amendment, as well as its direct impact on a country's sustainable development and economic survival. In terms to the implications, it is evident that where country names are not protected then the danger of these names becoming generic exists. This has implications not only for the value of private trade marks but on a country's ability to properly protect their Intellectual Property generally, particularly in third countries. Countries like Jamaica that are heavily reliant on their name as a means of marketing suffer greatly when such widespread use of the name without authorization goes unchecked.

7. Based on the foregoing, Jamaica hereby formally requests that the protection of country names be added to the categories under Article 6*ter*(1)(a) of the Paris Convention, and that this matter be included as an agenda item for discussion at the twenty-first session of the Standing Committee on the Law of Trade Marks, Industrial Designs and Geographical Indications, scheduled to be held from June 22 to 26, 2009.

[End of Annex and of document]

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SCT/34/2
ORIGINAL: ENGLISH
DATE: OCTOBER 15, 2015

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

Thirty-fourth Session
Geneva, November 16 to 18, 2015

REVISED DRAFT REFERENCE DOCUMENT ON THE PROTECTION OF COUNTRY NAMES AGAINST REGISTRATION AND USE AS TRADEMARKS

prepared by the Secretariat

I. INTRODUCTION

1. From its twenty-first to its thirty-third session, held in Geneva from June 22 to 26, 2009, and from March 16 to 20, 2015, respectively, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) considered a number of working documents concerning the Protection of Country Names Against Registration and Use as Trademarks.

4. At the thirty-third session of the SCT, held in Geneva from March 16 to 20, 2015, and with a view to informing the future discussions on this agenda item, the Chair requested the Secretariat to revise the Draft Reference Document on the Protection of Country Names (document SCT/30/4), which had been submitted to the thirty-third session, in order to render it more descriptive of office practices in this area (see document SCT/33/5, paragraph 8).

5. Accordingly, the Secretariat prepared a Revised Draft Reference Document, which was subsequently published on the SCT Forum webpage for comments, and additional submissions were received from the following Member States: Colombia, Georgia, Kazakhstan, Peru, Poland, the Republic of Moldova and Switzerland, as well as from the following Observers: the European Communities Trade Mark Association (ECTA) and the Japan Patent Attorneys Association(JPAA).

6. The present document attempts to articulate in a single reference document the wealth of information provided in the above-mentioned sources. In this document, the expressions "country names" and "names of States" are used interchangeably, as it has been the practice in the relevant SCT document series. Moreover and unless otherwise indicated, the word "trademark" is intended to cover marks that apply both to goods and to services.

II. PRELIMINARY CONSIDERATION

7. It is important to note that, when adopting the Questionnaire, the SCT understood that the expression "names of States" intended to cover the short name of the State or the name that is in common use, which may or may not be the official name, the formal name used in an official diplomatic context, translation and transliteration of the name as well as use of the name in abbreviated form and as an adjective. The SCT also understood that the Questionnaire would not address the issue of non-commercial use of names of States, as such uses appeared to be outside the ambit of trademark law (paragraph 4 of document SCT/23/4).

III. EXCLUSION OF REGISTRATION OF NAMES OF STATES AS TRADEMARKS

8. Generally speaking, the registration of a trademark is based on a formal application filed directly or indirectly with a national or regional trademark registration authority. Like any other sign applied for registration as a trademark, a sign consisting of or containing the name of a State will be examined by the competent authority in light of formal and substantive requirements. The scope of examination by offices and, in particular, the nature of the possible grounds for refusing the application, which are examined by the office or that may be raised in opposition procedures, can vary depending on the applicable law.

for or to the names of all States. Generally, national laws do not contain specific references to an official list of country names, and few of them include additional precisions as to whether protection is given to official names only, or also to common names or abbreviated versions of State names.

11. The Trademark Law of Serbia prohibits the registration of the "name or abbreviation of the name of a country"[2]. The Trademark Law of Albania provides that "a sign is not registered as a trademark if it consists of the name of a State"[3]. In addition, the implementing regulation specifies that this absolute ground for refusal was established because of the lack of distinctive character of country names, and that when other distinctive elements accompany that name, the trademark could be registered, provided that the applicant includes a disclaimer concerning the name of the State.

12. Under the Trademark Law of Cambodia, marks which are identical or similar with, or contain as an element "a name or abbreviation or initials of the name of (…) any State" cannot be registered[4]. This provision is included in the enumeration that corresponds to signs protected under Article 6*ter* of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as "the Paris Convention") and could therefore be considered as a national extension of that provision. Similarly, the Trademark Act of Bangladesh includes country names as an absolute ground of refusal equivalent to that contemplated in the Law of Cambodia[5]. The Trademark Law of Iran (Islamic Republic of) stipulates that a mark cannot be registered if "it is identical with, or is an imitation of, or contains as an element, (…) a name or abbreviation or initials of the name of (…) any State"[6] and the legislation of Oman contains an identical ground[7] for refusal.

13. Under the Trademark Law of the Republic of Moldova and the Regulation on conditions for granting a permission to use the official or historical denominations of the State in marks on products and/or services, as well as on industrial designs, a Government appointed Committee[8], needs to consider and authorize the registration and use as a mark (without exclusive right) of the official or historical name of the State (Republic of Moldova), its short name (Moldova) and translations thereof, used separately or in combination with other verbal or figurative elements. However, the State Agency on Intellectual Property (AGEPI) may authorize physical or legal persons having their domicile or commercial establishment in the Republic of Moldova to use abbreviations or derivatives of the official or historical name of the State, as well the presentation of the official or historical name of the State in a form different than as mentioned.

14. The Delegations of Antigua and Barbuda, Argentina, Belarus, Chile, China, Costa Rica, Ecuador, Georgia and Ukraine[9], quoted in their submissions the legal text containing a ground for refusal which extends the notion of State emblem to country names, and in some cases, short names or abbreviations of those names. Yet, in other member submissions, reference

(b) Excluded from Registration if Considered Lacking Distinctive Character

16. The basic function of a trademark is to distinguish the products or services of one undertaking from those of other undertakings. Hence, the lack of distinctiveness of a trademark prevents it from performing that basic function and the application for registration of a sign which is not distinctive, will regularly be refused. An overwhelming majority of returns to the Questionnaire (94.1 per cent) indicated that names of States were excluded from registration as a trademark if they lacked any distinctive character.

(c) Excluded from Registration if Considered Descriptive

17. In order to be protected, a trademark must be distinctive and among the criteria that make a trademark distinctive is the absence of any descriptive feature. This ground for refusal is invoked by offices in examination, by way of determining whether the signs applied for are indications used to designate the characteristics of the goods or services, or *inter alia*, their place of origin. This is the most commonly used ground for refusal against which the registrability of country names as trademarks is examined, since the interest of the public is that such indications remain available for use by any trader in order to provide information relating to the goods or services sold or offered.

18. For that purpose, various jurisdictions simply prohibit the registration and use of marks that consist of geographical names[13], while others adopt the terminology of Article 6*quinquies* B.2 of the Paris Convention and exclude from registration as trademarks those signs or indications which may serve in trade to designate the geographical origin of goods or services [14]. Although this terminology does not expressly refer to country names, it is interpreted by a number of trademark offices as excluding names of States from registration, at least when the sign applied for is constituted exclusively of the name of the State.

19. According to the quantitative summary of replies to the Questionnaire (Question I(1)(b), Annex II of document SCT/24/6), 95.9 per cent of the responding countries indicated that under the applicable legislation, names of States were excluded from registration as a trademark for goods if they could be considered descriptive of the origin of the goods in respect of which registration was sought.

20. According to the Guidelines for Examination in the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), descriptive terms can consist of geographical terms, which are described as “every existing name of a place, for example a country, city, lake or river. This list is not exhaustive. Adjectival forms are not sufficiently different from the original geographical term to cause the relevant public to think of something other than that geographical term” [15]. In assessing the registrability of a geographical term as a mark, the assessment is whether the term describes objective characteristics of the goods or services

23. The Trademark Act of the United States of America provides that “a mark which, when used on or in connection with the goods of the applicant is primarily geographically descriptive of them[18]” could be refused registration. Although no specific protection is provided in the law for country names, it should be noted that marks composed of or consisting of geographical signs, including names of States, could be refused if the mark is considered geographically descriptive.

24. In its submission, the Delegation of Germany referred to the Court of Justice of the European Union decision in joint cases C-108/97 and C-109/97, according to which names designating a geographical origin – for example names of countries – as a rule must be kept available for use by other traders[19]. The Delegation noted that any registrations of country names in the trademark register of Germany usually date from a time prior to that judgment.

25. The Delegation of Germany also noted that a geographical name may be registered as a trademark only if there is special evidence that, exceptionally, it is not capable of serving in trade as a reference to the geographical origin of the goods and services concerned. In this context, it is not only the current need to leave the sign free for use by others that should be considered but, based on a realistic prediction, it should also be considered whether it is reasonable to assume that such a need may be expected in the future[20].

26. In some cases however, registration is only granted if the applicant files a disclaimer with the Office. Therefore, the trademark would be accepted as a whole but the name of the State would not be granted protection. In its submission, the Delegation of Jamaica indicated that where the trademark includes as an element the country name, the national Office requires the applicant to include a disclaimer concerning the latter. According to the submission by the Delegation of Belize, the same practice applies in that jurisdiction[21]. In essence, the country name is kept available for other traders, while it can potentially be included in several marks.

27. Another exception to the refusal of the registration of geographically descriptive terms can be found where the Office accepts special evidence that the geographical name in question does not serve in trade to indicate the geographical origin of the goods or services[22]. Similarly, the Examination Guide adopted by the Spanish Patent and Trademark Office (OEPM) specifies that the registration of a geographic designation is not prohibited *per se*, but only to the extent that it constitutes exclusively an indication of origin of the goods or services[23]. Besides, the OEPM Examination Guide clarifies that the exclusion concerning official emblems of Spain does not extend to the denomination “Spain” or the names of other States, which could be protected against appropriation under the general exclusion concerning geographic indications.

28. In its submission, the Delegation of Italy declared that national law does not contain a specific provision concerning the exclusion of country names from registration as trademarks. In such cases, the general principles of trademark law apply. In particular, the law provides that

(d) Excluded from Registration if Considered Misleading

30. In addition to being descriptive, trademarks consisting of or containing country names may also be likely to mislead the public as to the origin of the goods or services. A false representation through a mark that goods or services originate from a particular place may expose that mark to refusal, if in fact the goods or services have no connection with the country name. The boundaries among the terms misleading, deceptive or false are not clearly defined, and there is a degree of overlap in the subject matter that can be characterized as the one or the other.

31. According to the quantitative summary of replies to the Questionnaire (Question I(1)(c), in Annex II of document SCT/24/6), 98.5 per cent of the responding countries indicated that country names were excluded from registration as trademarks if the use of the name of a State could be considered to be misleading as to the origin of the goods and 77.3 per cent said that names of States would be excluded if they could be considered incorrect as to the origin of the products for which registration is sought (Question I(1)(e), in Annex II of document SCT/24/6).

32. The law in certain jurisdictions provides for a universal bar to registrability of geographically misleading signs. For example, European Council Directive 2008/95 provides that trademarks shall not be registered if they are of "such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service"[26]. This provision is designed to protect the public, i.e., the consumers of the goods or services offered under the trademark for which registration is sought.

33. Under the Trademark Law of the United States of America, a mark may not be registered if it is "primarily geographically deceptively misdescriptive of the goods or services named in the application"[27]. To support a refusal to register a mark on this ground, it must be shown that: (1) the primary significance of the mark is a generally known geographical location; (2) the goods or services do not originate in the place identified in the mark; (3) purchasers would be likely to believe that the goods or services originate in the geographical place identified in the mark. However, if the mark is remote or obscure, the public is unlikely to make a goods/place or services/place association; and (4) the misrepresentation is a material factor in a significant portion of the relevant consumer's decision to buy the goods or use the services.

34. Under the national laws of several States, geographical terms, or names, as well as abbreviations thereof, cannot be registered as trademarks where such indications are likely to mislead the consumers or create confusion concerning the origin of the goods or services[28]. The terminology used in national law to describe misleading character or likelihood of confusion is not always uniform[29]. In addition, the submissions of two Member States, namely Poland and Ukraine referred to an international standard used by their national Offices to determine the official names of States[30]

37. In some jurisdictions, the exclusion of geographical indicators from registration as trademarks, where those indicators include country names, receive a particular consideration when the application concerns goods such as wines and spirits. In those cases, the trademark registration of signs which include country names is prohibited if the goods (wines and spirits) do not originate in the relevant geographic location[33].

(e) Excluded from Registration if Considered Incorrect

38. Signs that are descriptive or indicative of geographical origin are false or incorrect for products that do not come from the region described or indicated. The returns to the Questionnaire showed that names of States are excluded from registration as a trademark if they can be considered incorrect as to the origin of the products and/or services for which registration is sought in more than three quarters of the cases (77.3 per cent in the case of products and 76.6 per cent in the case of services).

(f) Excluded from Registration for Other Reasons

39. The returns to the Questionnaire showed that in certain jurisdictions (37.3 per cent in the case of goods and 31.8 per cent in the case of services) names of States are excluded from registration as a trademark for reasons other than those mentioned above. The name of a State can be excluded from registration *inter alia* because: it is substantially identical or similar to an earlier trademark; there is a likelihood of confusion with existing signs; it is a common name used in the course of trade; there is an indication of bad faith; the name of the State is a generic term; the name of the State has become customary in the current language or in the honest and established practices of trade; or an earlier trademark, consisting also of the name of a State, acquires distinctive character through use.

40. Additional details were provided in the Member State submissions concerning another ground for refusal, namely when a mark consisting of or containing a country name is considered to be contrary to public order or morality. It is a universally accepted principle that signs which are contrary to public order or morality are excluded from registration as trademarks. The appreciation of whether a particular sign is contrary to public order or morality is regularly subject to cultural and historical representations about the meaning of particular signs. Although it might not be *prim*

Forrest-036

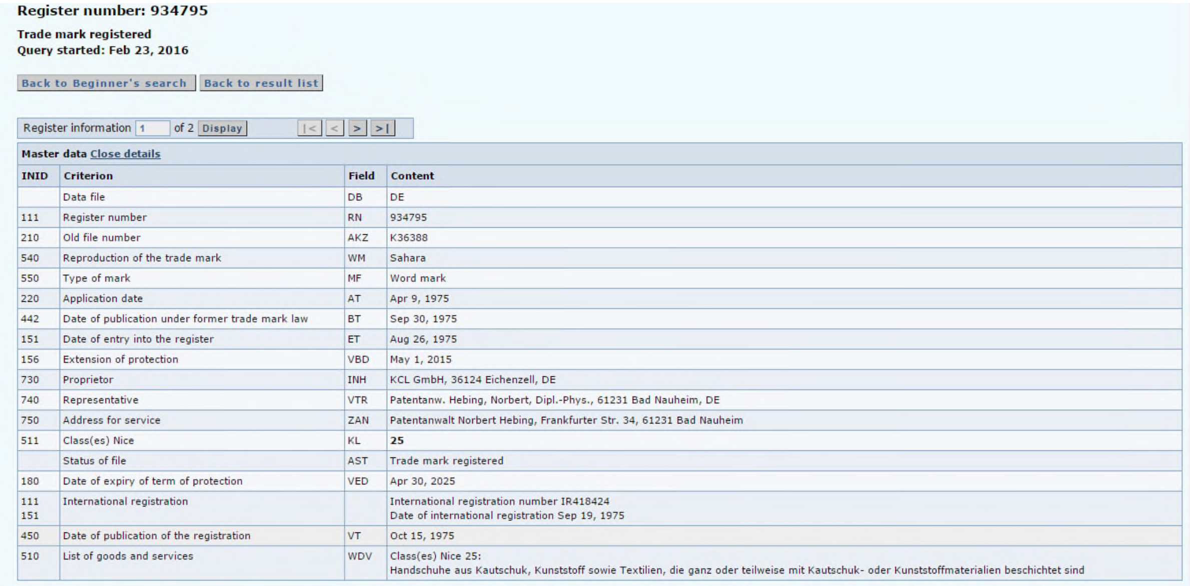
YUKON

Word Mark	YUKON
Goods and Services	IC 020. US 002 013 022 025 032 050. G & S: (Based on Use in Commerce) Non-metal mats for use as load support surfaces in the construction industry(Based on 44(d) Priority Application) Non-metal mats for use as load support surfaces in the construction industry. FIRST USE: 20071100. FIRST USE IN COMMERCE: 20110000 IC 027. US 019 020 037 042 050. G & S: (Based on Use in Commerce) Rubber mats(Based on 44(d) Priority Application) Rubber mats. FIRST USE: 20071100. FIRST USE IN COMMERCE: 20110000
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86105272
Filing Date	October 30, 2013
Current Basis	1A
Original Filing Basis	1A;44D
Published for Opposition	April 8, 2014
Registration Number	**4555562**
Registration Date	June 24, 2014
Owner	(REGISTRANT) Champagne Edition Inc. CORPORATION CANADA Box 29, Site 13, R.R. 1 Legal, Alberta CANADA T0G1L0
Attorney of Record	Nathan Woodruff
Priority Date	October 29, 2013
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS HOME NEW USER STRUCTURED FREE FORM BROWSE DICT SEARCH OG TOP HELP

YUKON

Word Mark	YUKON
Goods and Services	IC 009. US 021 023 026 036 038. G & S: Decontamination showers, shelters and structural parts thereof. FIRST USE: 20100712. FIRST USE IN COMMERCE: 20100712
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85259387
Filing Date	March 7, 2011
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	August 2, 2011
Registration Number	**4041327**
Registration Date	October 18, 2011
Owner	(REGISTRANT) Great Lakes Industrial Controls, Inc. CORPORATION MICHIGAN 3560 Pine Grove Avenue Unit 352 Port Huron MICHIGAN 48060
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	David J Simonelli
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

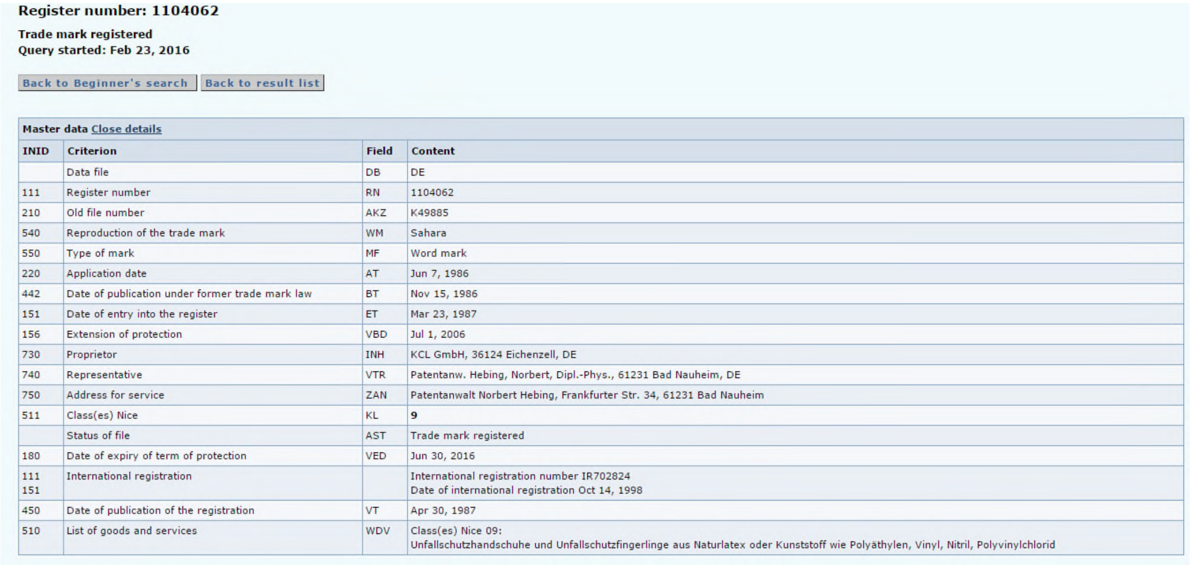


Register number: 934795

Trade mark registered
Query started: Feb 23, 2016

Master data Close details

INID	Criterion	Field	Content
	Data file	DB	DE
111	Register number	RN	934795
210	Old file number	AKZ	K36388
540	Reproduction of the trade mark	WM	Sahara
550	Type of mark	MF	Word mark
220	Application date	AT	Apr 9, 1975
442	Date of publication under former trade mark law	BT	Sep 30, 1975
151	Date of entry into the register	ET	Aug 26, 1975
156	Extension of protection	VBD	May 1, 2015
730	Proprietor	INH	KCL GmbH, 36124 Eichenzell, DE
740	Representative	VTR	Patentanw. Hebing, Norbert, Dipl.-Phys., 61231 Bad Nauheim, DE
750	Address for service	ZAN	Patentanwalt Norbert Hebing, Frankfurter Str. 34, 61231 Bad Nauheim
511	Class(es) Nice	KL	**25**
	Status of file	AST	Trade mark registered
180	Date of expiry of term of protection	VED	Apr 30, 2025
111 151	International registration		International registration number IR418424 Date of international registration Sep 19, 1975
450	Date of publication of the registration	VT	Oct 15, 1975
510	List of goods and services	WDV	Class(es) Nice 25: Handschuhe aus Kautschuk, Kunststoff sowie Textilien, die ganz oder teilweise mit Kautschuk- oder Kunststoffmaterialien beschichtet sind



Register number: 1104062

Trade mark registered
Query started: Feb 23, 2016

Master data Close details

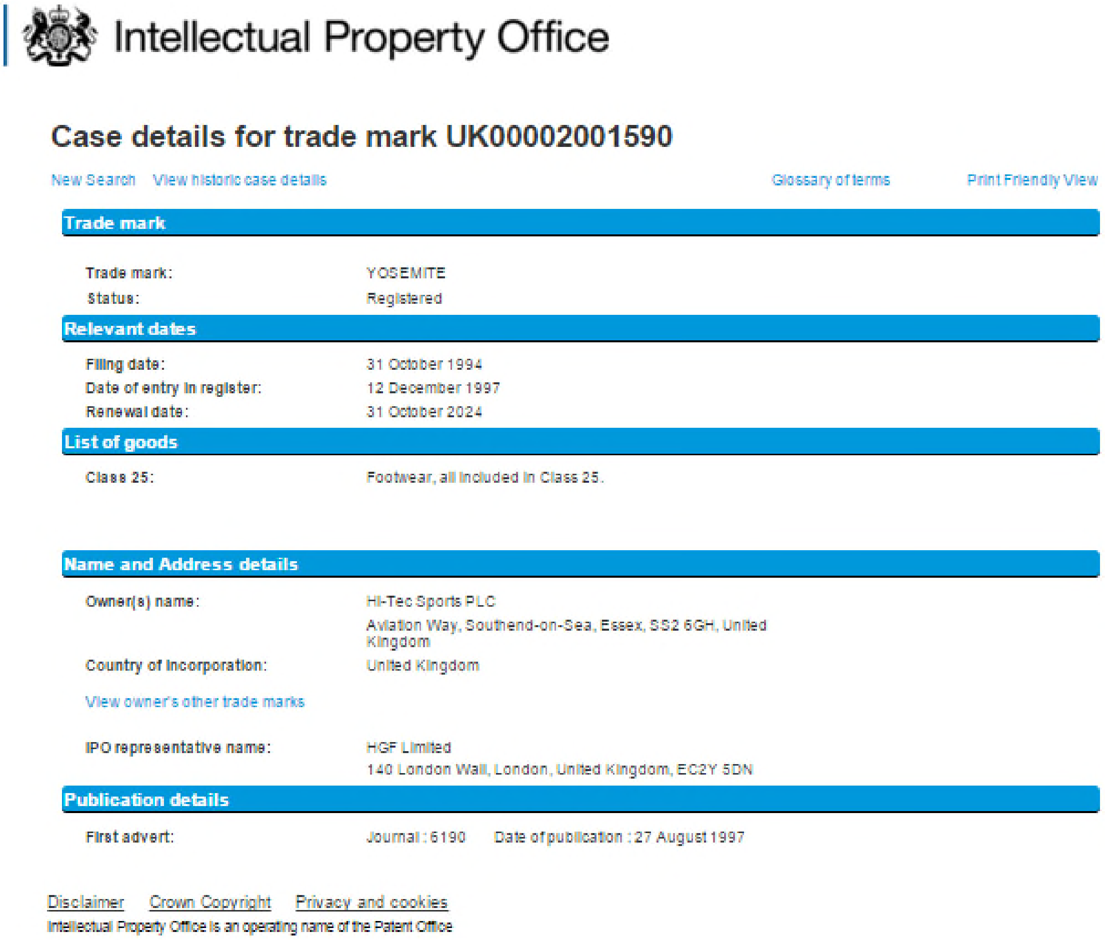
INID	Criterion	Field	Content
	Data file	DB	DE
111	Register number	RN	1104062
210	Old file number	AKZ	K49885
540	Reproduction of the trade mark	WM	Sahara
550	Type of mark	MF	Word mark
220	Application date	AT	Jun 7, 1986
442	Date of publication under former trade mark law	BT	Nov 15, 1986
151	Date of entry into the register	ET	Mar 23, 1987
156	Extension of protection	VBD	Jul 1, 2006
730	Proprietor	INH	KCL GmbH, 36124 Eichenzell, DE
740	Representative	VTR	Patentanw. Hebing, Norbert, Dipl.-Phys., 61231 Bad Nauheim, DE
750	Address for service	ZAN	Patentanwalt Norbert Hebing, Frankfurter Str. 34, 61231 Bad Nauheim
511	Class(es) Nice	KL	**9**
	Status of file	AST	Trade mark registered
180	Date of expiry of term of protection	VED	Jun 30, 2016
111 151	International registration		International registration number IR702824 Date of international registration Oct 14, 1998
450	Date of publication of the registration	VT	Apr 30, 1987
510	List of goods and services	WDV	Class(es) Nice 09: Unfallschutzhandschuhe und Unfallschutzfingerlinge aus Naturlatex oder Kunststoff wie Polyäthylen, Vinyl, Nitril, Polyvinylchlorid

Register number: 2007950

Trade mark registered
Query started: Feb 23, 2016

Master data Close details

INID	Criterion	Field	Content
	Data file	DB	DE
111	Register number	RN	2007950
210	Old file number	AKZ	SCH36949
540	Reproduction of the trade mark	WM	SAHARA
550	Type of mark	MF	Word mark
220	Application date	AT	Jan 25, 1991
442	Date of publication under former trade mark law	BT	Aug 14, 1991
151	Date of entry into the register	ET	Jan 7, 1992
156	Extension of protection	VBD	Feb 1, 2011
730	Proprietor	INH	Zimmermann-Graeff & Müller GmbH & Co. KG, 56856 Zell, DE
740	Representative	VTR	Rohwedder & Partner Rechtsanwälte, 55116 Mainz, DE
750	Address for service	ZAN	Rechtsanwälte Rohwedder & Partner, Postfach 3427, 55024 Mainz
511	Class(es) Nice	KL	**33**
	Status of file	AST	Trade mark registered
180	Date of expiry of term of protection	VED	Jan 31, 2021
450	Date of publication of the registration	VT	Feb 15, 1992
510	List of goods and services	WDV	Class(es) Nice 33: Weine, Schaumweine, weinhaltige Getränke, Weinmischgetränke



Intellectual Property Office

Case details for trade mark UK00002001590

Trade mark

Trade mark:	YOSEMITE
Status:	Registered

Relevant dates

Filing date:	31 October 1994
Date of entry in register:	12 December 1997
Renewal date:	31 October 2024

List of goods

Class 25:	Footwear, all included in Class 25.

Name and Address details

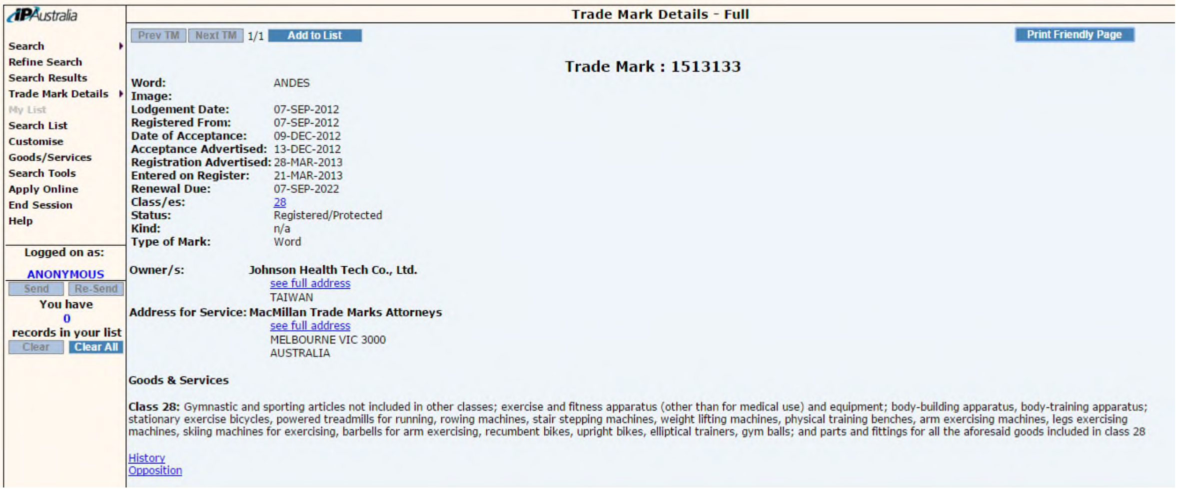
Owner(s) name:	Hi-Tec Sports PLC Aviation Way, Southend-on-Sea, Essex, SS2 6GH, United Kingdom
Country of incorporation:	United Kingdom

View owner's other trade marks

IPO representative name:	HGF Limited 140 London Wall, London, United Kingdom, EC2Y 5DN

Publication details

First advert:	Journal : 6190 Date of publication : 27 August 1997



Trade Mark : 1513133

Word: ANDES
Image:
Lodgement Date: 07-SEP-2012
Registered From: 07-SEP-2012
Date of Acceptance: 09-DEC-2012
Acceptance Advertised: 13-DEC-2012
Registration Advertised: 28-MAR-2013
Entered on Register: 21-MAR-2013
Renewal Due: 07-SEP-2022
Class/es: 28
Status: Registered/Protected
Kind: n/a
Type of Mark: Word

Owner/s: **Johnson Health Tech Co., Ltd.**
see full address
TAIWAN
Address for Service: **MacMillan Trade Marks Attorneys**
see full address
MELBOURNE VIC 3000
AUSTRALIA

Goods & Services

Class 28: Gymnastic and sporting articles not included in other classes; exercise and fitness apparatus (other than for medical use) and equipment; body-building apparatus, body-training apparatus; stationary exercise bicycles, powered treadmills for running, rowing machines, stair stepping machines, weight lifting machines, physical training benches, arm exercising machines, legs exercising machines, skiing machines for exercising, barbells for arm exercising, recumbent bikes, upright bikes, elliptical trainers, gym balls; and parts and fittings for all the aforesaid goods included in class 28

History
Opposition

Canadian trade-mark data

The database was last updated on:2016-02-16

APPLICATION NUMBER:
1199901

REGISTRATION NUMBER:
TMA635347

STATUS:	REGISTERED
FILED:	2003-12-18
FORMALIZED:	2004-01-08
ADVERTISED:	2004-11-24
REGISTERED:	2005-03-16

REGISTRANT:
Tracker Marine, L.L.C.
2500 East Kearney
Springfield, Missouri, 65898
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
GOWLING LAFLEUR HENDERSON LLP
SUITE 1600
1 FIRST CANADIAN PLACE
100 KING STREET WEST
TORONTO
ONTARIO M5X 1G5

TRADE-MARK (Word):

TAHOE

INDEX HEADINGS:
TAHOE

GOODS:
(1) Boats.
(2) Boats other than pontoon boats.

CLASSIFICATION DATA:

The Classification data is provided for information and searching purposes only. CIPO does not warrant the accuracy of the classes assigned to the trademark. This data has no legal value of any kind.

12 - Vehicles

CLAIMS:
Used in CANADA since at least as early as August 31, 1998 on goods (1).
Used in UNITED STATES OF AMERICA on goods (2).
Registered in or for UNITED STATES OF AMERICA on September 21, 1999 under No. 2279858 on goods (2).

Action Information

ACTION	DATE	BF	COMMENTS
Filed	2003-12-18		
Created	2003-12-31		
Formalized	2004-01-08		
Search Recorded	2004-05-31		
Examiner's First Report	2004-05-31	2004-09-30	
Correspondence Created	2004-07-21	2004-11-21	
Approved	2004-10-22		
Extracted for Advertisement	2004-11-10		Vol.51 Issue 2613 2004/11/24
Advertised	2004-11-24		Vol.51 Issue 2613
Allowed	2005-02-11		
Allowance Notice Sent	2005-02-11	2005-08-11	
Registered	2005-03-16		
Rep for Service Changed	2012-04-26		From: 6146 To: 32 / Voir Preuve au dossier/See evidence on File No. 557103

Last updated: 2016-02-16

Canadian trade-mark data

Third-Party Information Liability Disclaimer

The database was last updated on:2016-02-16

APPLICATION NUMBER: 0688966
REGISTRATION NUMBER: TMA407216
STATUS: REGISTERED
FILED: 1991-09-03
ADVERTISED: 1992-08-19
REGISTERED: 1993-01-22

REGISTRANT:
Motors Liquidation Company
300 Renaissance Center
Detroit, Michigan 48265-3000
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
TIMOTHY G. GORBATOFF
GM LEGAL STAFF (DETROIT)
MAIL CODE 482-C23-B-21
GENERAL MOTORS OF CANADA LTD.
1908 COLONEL SAM DRIVE
OSHAWA
ONTARIO L1H 8P7

CURRENT OWNER:
General Motors LLC
300 Renaissance Center
Detroit, Michigan 48265-3000
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
TIMOTHY G. GORBATOFF
GM LEGAL STAFF (DETROIT)
MAIL CODE 482-C23-B-21
GENERAL MOTORS OF CANADA LTD.
1908 COLONEL SAM DRIVE
OSHAWA
ONTARIO L1H 8P7

Canadian trade-mark data

The database was last updated on:2016-02-16

APPLICATION NUMBER:	REGISTRATION NUMBER:
1264521	TMA665248

STATUS:	REGISTERED
FILED:	2005-07-12
FORMALIZED:	2005-07-13
ADVERTISED:	2006-01-11
REGISTERED:	2006-05-30

REGISTRANT:
Kohler Co.
444 Highland Drive
Kohler, Wisconsin 53044-1515
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
CABINET JURIDIQUE ST. LAWRENCE
S.E.N.C.R.L. /
ST. LAWRENCE LAW FIRM LLP
5303-B Boulevard St-Laurent
Montréal
QUÉBEC H2T 1S5

TRADE-MARK (Word):

TAHOE

INDEX HEADINGS:
TAHOE

GOODS:
(1) Sinks.

CLASSIFICATION DATA:

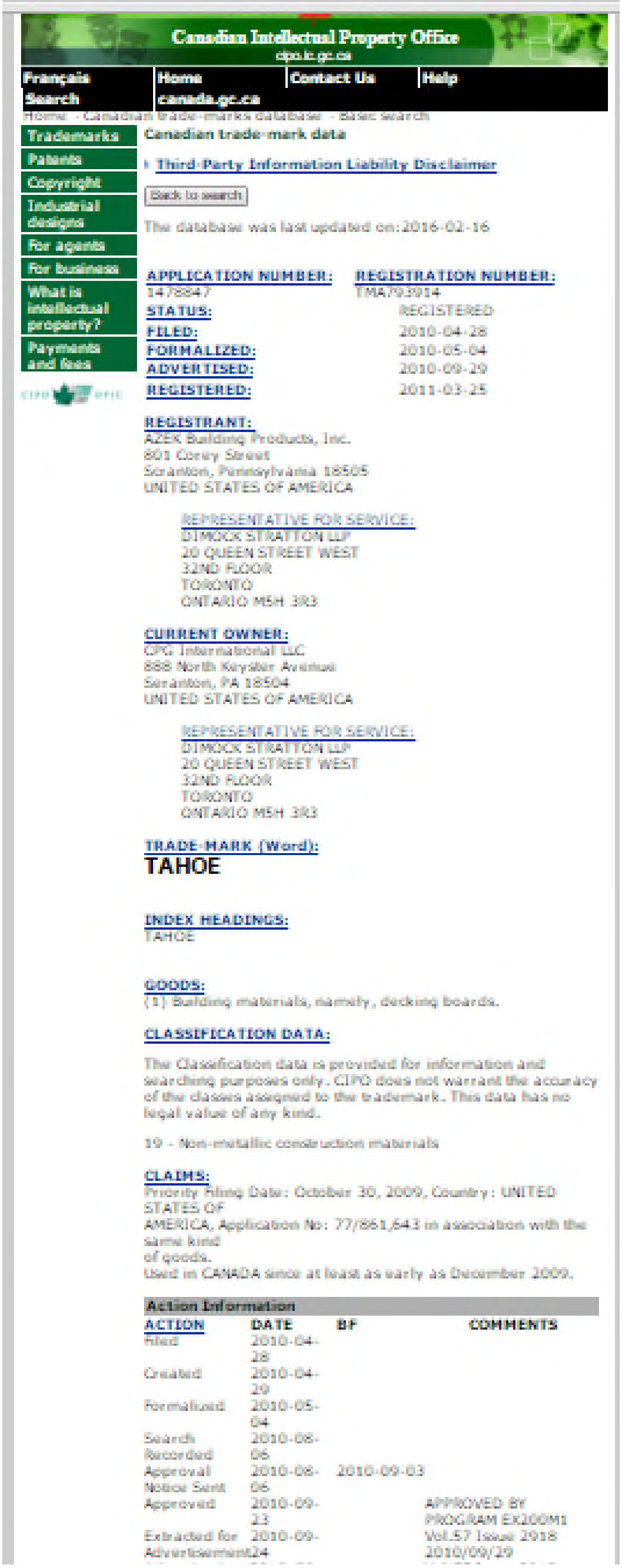
The Classification data is provided for information and searching purposes only. CIPO does not warrant the accuracy of the classes assigned to the trademark. This data has no legal value of any kind.

11 - Appliances, lighting, heating, sanitary installations

CLAIMS:
Used in CANADA since at least as early as 1948.

Action Information

ACTION	DATE	BF	COMMENTS
Filed	2005-07-12		
Created	2005-07-13		
Formalized	2005-07-13		
Search Recorded	2005-12-05		
Approved	2005-12-12		
Extracted for Advertisement	2005-12-29		Vol.53 Issue 2672 2006/01/11
Advertised	2006-01-11		Vol.53 Issue 2672
Allowed	2006-03-31		
Allowance Notice Sent	2006-03-31	2006-09-30	
Registered	2006-05-30		
Rep for Service Changed	2009-07-14		From: 9681 To: 5181 / Voir Preuve au dossier/See evidence on File No. 434934
Rep for Service Name Change	2010-01-15		
Rep for Service Changed	2016-01-28		From: 5181 To: 17421 / Voir Preuve au dossier/See evidence on File No. 1334974



Canadian trade-mark data

The database was last updated on:2016-02-16

APPLICATION NUMBER: 1478847
REGISTRATION NUMBER: TMA793914
STATUS: REGISTERED
FILED: 2010-04-28
FORMALIZED: 2010-05-04
ADVERTISED: 2010-09-29
REGISTERED: 2011-03-25

REGISTRANT:
AZEK Building Products, Inc.
801 Corey Street
Scranton, Pennsylvania 18505
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
DIMOCK STRATTON LLP
20 QUEEN STREET WEST
32ND FLOOR
TORONTO
ONTARIO M5H 3R3

CURRENT OWNER:
CPG International LLC
888 North Keyser Avenue
Scranton, PA 18504
UNITED STATES OF AMERICA

REPRESENTATIVE FOR SERVICE:
DIMOCK STRATTON LLP
20 QUEEN STREET WEST
32ND FLOOR
TORONTO
ONTARIO M5H 3R3

TRADE-MARK (Word):
TAHOE

INDEX HEADINGS:
TAHOE

GOODS:
(1) Building materials, namely, decking boards.

CLASSIFICATION DATA:

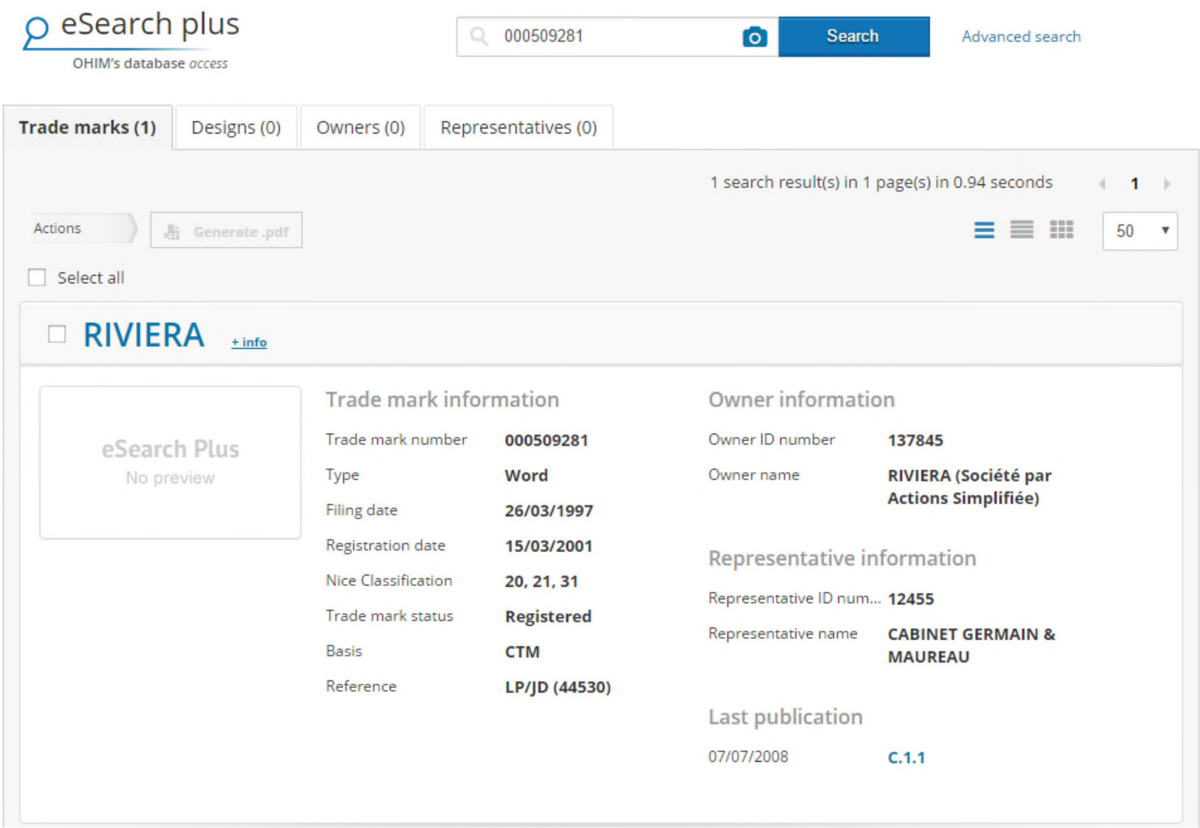
The Classification data is provided for information and searching purposes only. CIPO does not warrant the accuracy of the classes assigned to the trademark. This data has no legal value of any kind.

19 - Non-metallic construction materials

CLAIMS:
Priority Filing Date: October 30, 2009, Country: UNITED STATES OF AMERICA, Application No: 77/861,643 in association with the same kind of goods.
Used in CANADA since at least as early as December 2009.

Action Information

ACTION	DATE	BF	COMMENTS
Filed	2010-04-28		
Created	2010-04-29		
Formalized	2010-05-04		
Search Recorded	2010-08-06		
Approval Notice Sent	2010-08-06	2010-09-03	
Approved	2010-09-23		APPROVED BY PROGRAM EX200M1
Extracted for Advertisement	2010-09-24		Vol.57 Issue 2918 2010/09/29



☐ **RIVIERA**

Trade mark information

Trade mark number	**000509281**
Type	**Word**
Filing date	**26/03/1997**
Registration date	**15/03/2001**
Nice Classification	**20, 21, 31**
Trade mark status	**Registered**
Basis	**CTM**
Reference	**LP/JD (44530)**

Owner information

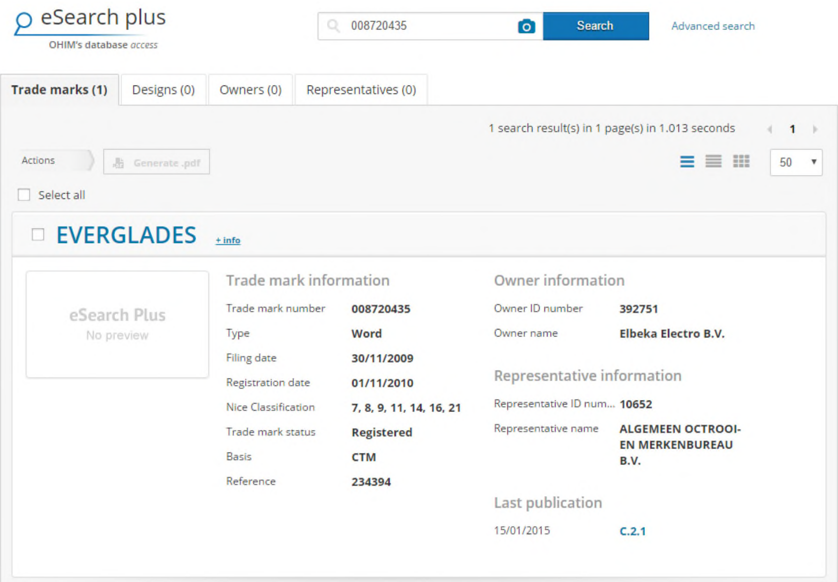
Owner ID number	**137845**
Owner name	**RIVIERA (Société par Actions Simplifiée)**

Representative information

Representative ID num...	**12455**
Representative name	**CABINET GERMAIN & MAUREAU**

Last publication

07/07/2008	**C.1.1**



008720435

1 search result(s) in 1 page(s) in 1.013 seconds

1

☐ EVERGLADES

Trade mark information

Trade mark number	**008720435**
Type	**Word**
Filing date	**30/11/2009**
Registration date	**01/11/2010**
Nice Classification	**7, 8, 9, 11, 14, 16, 21**
Trade mark status	**Registered**
Basis	**CTM**
Reference	**234394**

Owner information

Owner ID number	**392751**
Owner name	**Elbeka Electro B.V.**

Representative information

Representative ID num...	**10652**
Representative name	**ALGEMEEN OCTROOI- EN MERKENBUREAU B.V.**

Last publication

15/01/2015	**C.2.1**

Reg. No.1457495

Detail

Gazette

(111)Registration number : 1457495
(151)Registration date : 1981/03/31
(210)Application number : S45-075555
(220)Application date : 1970/07/21
Date of entry into force of prior right : 1970/07/21
(180)Expiration date of the term of the right : 2021/03/31
Date of final disposition :
Type of final disposition :
Type of application :

(540) :

ORIGINAL

1

Trademark(for retrieval) : ＥＶＥＲＥＳＴ
(541)Trademark(Standard characters) :
(561)Transliteration(reference) : エベレスト
(531)Figure Term :

(732) Holder :
Name : ヤバネスポーツ株式会社

Applied law : Trademark Law in 1996
Edition of International Classification : 7
(500)Number of class : 1

Previous Document 1/1 Next Document

Summary

Reg. No.4700632

Detail Gazette

(111)Registration number : 4700632
(151)Registration date : 2003/08/15
(210)Application number : 2001-080297
(220)Application date : 2001/09/05
Date of entry into force of prior right : 2001/03/12
(180)Expiration date of the term of the right : 2023/08/15
Date of final disposition :
Type of final disposition :
Type of application : Priority

No image data.

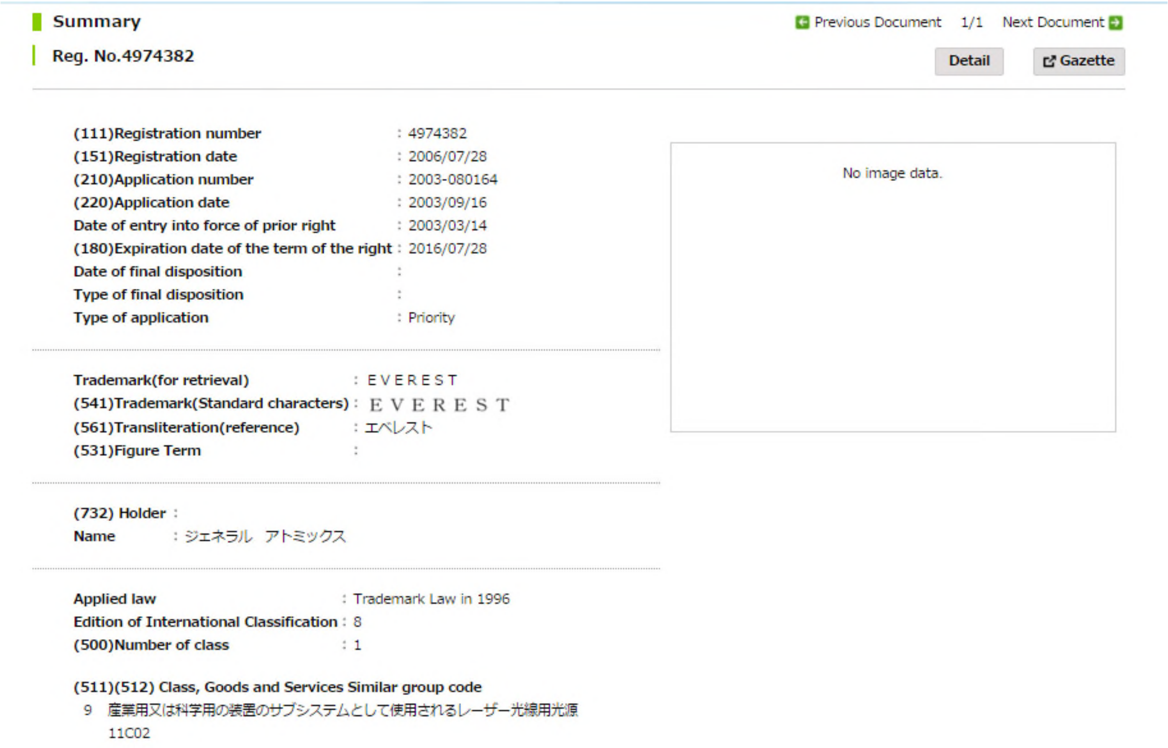
Trademark(for retrieval) : EVEREST
(541)Trademark(Standard characters) : Ｅ code=8275 ＥＲＥＳＴ
(561)Transliteration(reference) : エベレスト
(531)Figure Term :

(732) Holder :
Name : カルテンバッハ　ウント　フォイグト　ゲーエムベーハー

Applied law : Trademark Law in 1996
Edition of International Classification : 7
(500)Number of class : 1

(511)(512) Class, Goods and Services Similar group code

10	歯科用機械器具



Summary

Reg. No.4974382

(111)Registration number : 4974382
(151)Registration date : 2006/07/28
(210)Application number : 2003-080164
(220)Application date : 2003/09/16
Date of entry into force of prior right : 2003/03/14
(180)Expiration date of the term of the right : 2016/07/28
Date of final disposition :
Type of final disposition :
Type of application : Priority

No image data.

Trademark(for retrieval) : EVEREST
(541)Trademark(Standard characters) : EVEREST
(561)Transliteration(reference) : エベレスト
(531)Figure Term :

(732) Holder :
Name : ジェネラル　アトミックス

Applied law : Trademark Law in 1996
Edition of International Classification : 8
(500)Number of class : 1

(511)(512) Class, Goods and Services Similar group code

9　産業用又は科学用の装置のサブシステムとして使用されるレーザー光線用光源
11C02

Forrest-037

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE
INTERNATIONALE

SÉRIE A — N° 10

Le 7 septembre 1927

RECUEIL DES ARRÊTS

AFFAIRE DU «LOTUS»

PUBLICATIONS OF THE PERMANENT COURT
OF INTERNATIONAL JUSTICE.

SERIES A.—No. 10

September 7th, 1927

COLLECTION OF JUDGMENTS

THE CASE OF THE S.S. "LOTUS"

COUR PERMANENTE DE JUSTICE INTERNATIONALE

1927.
7 septembre.
ssier E. c. X.
ôle XII: 2.

DOUZIÈME SESSION (ORDINAIRE)

Présents :

MM.	HUBER, *Président,*	
	LODER, *ancien Président,*	
	WEISS, *Vice-Président,*	
Lord	FINLAY,	*Juges,*
MM.	NYHOLM,	
	MOORE,	
	DE BUSTAMANTE,	
	ALTAMIRA,	
	ODA,	
	ANZILOTTI,	
	PESSÔA,	
	FEÏZI-DAÏM BEY,	*Juge national.*

ARRÊT N° 9

AFFAIRE DU «LOTUS»

Entre le Gouvernement de la République française, représenté par M. Basdevant, professeur à la Faculté de Droit de Paris,

et le Gouvernement de la République turque, représenté par Son Excellence Mahmout Essat Bey, ministre de la Justice.

LA COUR,

composée ainsi qu'il est dit ci-dessus,
après avoir entendu les Parties en leurs observations et conclusions,
a rendu l'arrêt suivant :

PERMANENT COURT OF INTERNATIONAL JUSTICE.

[*Translation.*]

1927.
September
File E. c.
Docket XI

TWELFTH (ORDINARY) SESSION.

Before:

MM. HUBER, *President,*
LODER, *Former President,*
WEISS, *Vice-President,*
Lord FINLAY,
MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTI,
PESSÔA, } *Judges,*
FEÏZI-DAÏM BEY, *National Judge.*

JUDGMENT No. 9.

THE CASE OF THE S.S. "LOTUS".

The Government of the French Republic, represented by M. Basdevant, Professor at the Faculty of Law of Paris,

versus

The Government of the Turkish Republic, represented by His Excellency Mahmout Essat Bey, Minister of Justice.

THE COURT,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment :

Par un compromis signé à Genève le 12 octobre 1926 entre les Gouvernements des Républiques française et turque et déposé au Greffe de la Cour, conformément à l'article 40 du Statut et à l'article 35 du Règlement, le 4 janvier 1927, par les représentants diplomatiques à La Haye desdits Gouvernements, ceux-ci ont soumis à la Cour permanente de Justice internationale la question de compétence judiciaire qui s'est élevée entre eux à la suite de la collision survenue le 2 août 1926 entre les vapeurs *Boz-Kourt* et *Lotus.*

Aux termes du compromis, il incombe à la Cour de statuer sur les questions suivantes :

« 1) La Turquie a-t-elle, contrairement à l'article 15 de la Convention de Lausanne du 24 juillet 1923 relative à l'établissement et à la compétence judiciaire, agi en contradiction des principes du droit international — et si oui, de quels principes — en exerçant, à la suite de la collision survenue le 2 août 1926 en haute mer entre le vapeur français *Lotus* et le vapeur turc *Boz-Kourt* et lors de l'arrivée du navire français à Stamboul, en même temps que contre le capitaine du vapeur turc, des poursuites pénales connexes en vertu de la législation turque, contre le sieur Demons, officier de quart à bord du *Lotus* au moment de la collision, en raison de la perte du *Boz-Kourt* ayant entraîné la mort de huit marins et passagers turcs ?

« 2) En cas de réponse affirmative, quelle réparation pécuniaire, s'il doit en résulter une selon les principes du droit international dans des cas semblables, serait due en faveur du sieur Demons ? »

Donnant suite aux propositions faites d'un commun accord par les Parties dans le compromis conformément aux dispositions de l'article 32 du Règlement, le Président, en vertu de l'article 48 du Statut et des articles 33 et 39 du Règlement, fixa, aux 1er mars et 24 mai 1927, les délais pour le dépôt par chacune des Parties d'un Mémoire et d'un Contre-Mémoire respectivement ; aucun délai ne fut fixé pour le dépôt de répliques, les Parties ayant fait connaître leur intention de n'en pas présenter.

Les Mémoires et Contre-Mémoires furent dûment déposés au Greffe dans les délais fixés et firent l'objet des communications prévues à l'article 43 du Statut.

Au cours des audiences tenues les 2, 3, 6, et 8-10 août 1927, la Cour a entendu, en leurs plaidoiries, réplique et duplique, les agents des Parties, indiqués ci-dessus.

By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representatives at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships *Boz-Kourt* and *Lotus*.

According to the special agreement, the Court has to decide the following questions :

> "(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers ?
>
> "(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases ?"

Giving effect to the proposals jointly made by the Parties to the special agreement in accordance with the terms of Article 32 of the Rules, the President, under Article 48 of the Statute and Articles 33 and 39 of the Rules, fixed the dates for the filing by each Party of a Case and Counter-Case as March 1st and May 24th, 1927, respectively ; no time was fixed for the submission of replies, as the Parties had expressed the wish that there should not be any.

The Cases and Counter-Cases were duly filed with the Registry by the dates fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on August 2nd, 3rd, 6th, and 8th-10th, 1927, the Court has heard the oral pleadings, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

A l'appui de leurs conclusions respectives, les Parties ont soumis à la Cour, en annexes aux pièces de la procédure écrite, certains documents dont le bordereau est reproduit à l'annexe.

Pendant la procédure, les Parties ont eu l'occasion de préciser leurs points de vue respectifs par rapport aux questions soumises à l'appréciation de la Cour. Elles l'ont fait en formulant des conclusions plus ou moins développées, résumant leurs thèses. C'est ainsi que, dans son Mémoire, le Gouvernement français demande qu'il plaise à la Cour :

« Dire et juger que, selon la Convention relative à l'établissement et à la compétence judiciaire signée à Lausanne le 24 juillet 1923 et les règles du droit international, la compétence pour exercer des poursuites pénales contre l'officier de quart d'un navire français, à raison de l'abordage survenu en haute mer entre ce navire et un navire turc, appartient exclusivement aux tribunaux français ;

« Qu'en conséquence, c'est à tort, contrairement à ladite Convention et en contradiction des règles du droit international, que les autorités judiciaires turques ont poursuivi, incarcéré et condamné le sieur Demons, à raison de l'abordage survenu en haute mer entre le *Lotus* et le *Boz-Kourt ;*

« Par suite, fixer l'indemnité pour réparation du préjudice ainsi causé au sieur Demons à six mille livres turques et ordonner que ladite indemnité sera versée par le Gouvernement de la République turque au Gouvernement de la République française. »

De son côté, le Gouvernement turc, dans son Mémoire, demande simplement qu'il plaise à la Cour « statuer en faveur de la compétence judiciaire turque ».

D'autre part, le Gouvernement français a formulé à nouveau, dans son Contre-Mémoire, les conclusions déjà énoncées dans le Mémoire, en en modifiant quelque peu la rédaction, en y introduisant certains éléments nouveaux et en les faisant précéder de considérants qu'il convient de citer *in extenso,* vu qu'ils résument d'une manière brève et précise la thèse du Gouvernement français ; les considérants et les conclusions nouvelles sont ainsi conçus :

« Attendu que la substitution de la compétence des tribunaux turcs à celle des tribunaux consulaires étrangers pour connaître des actions pénales dirigées contre des étrangers a été le résultat du consentement donné par les Puissances à cette substitution dans les Conventions signées à Lausanne le 24 juillet 1923 ;

In support of their respective submissions, the Parties have placed before the Court, as annexes to the documents of the written proceedings, certain documents, a list of which is given in the annex.

In the course of the proceedings, the Parties have had occasion to define the points of view respectively adopted by them in relation to the questions referred to the Court. They have done so by formulating more or less developed conclusions summarizing their arguments. Thus the French Government, in its Case, asks for judgment to the effect that :

"Under the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, and the principles of international law, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts ;

"Consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting M. Demons, in connection with the collision which occurred on the high seas between the *Lotus* and the *Boz-Kourt,* and by so doing acted in a manner contrary to the above-mentioned Convention and to the principles of international law ;

« Accordingly the Court is asked to fix the indemnity in reparation of the injury thus inflicted upon M. Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic."

The Turkish Government, for its part, simply asks the Court in its Case to "give judgment in favour of the jurisdiction of the Turkish Courts".

The French Government, however, has, in its Counter-Case, again formulated the conclusions, already set out in its Case, in a slightly modified form, introducing certain new points preceded by arguments which should be cited in full, seeing that they summarize in a brief and precise manner the point of view taken by the French Government ; the new arguments and conclusions are as follows :

"Whereas the substitution of the jurisdiction of the Turkish Courts for that of the foreign consular courts in criminal proceedings taken against foreigners is the outcome of the consent given by the Powers to this substitution in the Conventions signed at Lausanne on July 24th, 1923 ;

« Que ce consentement, loin d'avoir été donné pour ce qui concerne les actions pénales dirigées contre des étrangers à raison de crimes ou délits commis à l'étranger, a été nettement refusé par les Puissances et notamment par la France ;

« Que ce refus résulte du rejet d'un amendement turc tendant à consacrer cette compétence et des déclarations faites à ce propos ;

« Que, par suite, la Convention de Lausanne du 24 juillet 1923, interprétée à la lumière de ces circonstances et intentions, ne permet pas que les tribunaux turcs connaissent de poursuites pénales contre un Français à raison de crimes ou délits commis hors de Turquie ;

« Au surplus, attendu que selon le droit des gens établi par la pratique des nations civilisées dans leurs rapports mutuels, un État n'est pas en droit, en dehors d'accords spéciaux exprès ou tacites, d'étendre la compétence pénale de ses tribunaux à un crime ou délit commis par un étranger à l'étranger à raison du seul fait qu'un de ses nationaux en a été victime ;

« Attendu que les faits accomplis en haute mer à bord d'un navire de commerce ne sont, en principe, justiciables, au point de vue pénal, que des tribunaux de l'État dont le navire porte le pavillon ;

« Qu'il y a là une conséquence du principe de la liberté des mers et que les États y attachant une importance particulière n'y ont apporté que de rares dérogations ;

« Que, selon le droit existant, la nationalité de la victime n'est pas un motif suffisant de faire échec à cette règle et qu'il en a été jugé ainsi dans l'affaire du *Costa Rica Packet ;*

« Attendu qu'il y a des raisons particulières de maintenir l'application de cette règle en cas d'abordage, raisons tirées notamment du fait que le caractère fautif de l'abordage s'apprécie à la lumière de règlements purement nationaux s'imposant au navire et dont l'exécution doit être surveillée par ses autorités nationales ;

« Que l'abordage ne saurait être localisé sur le navire coulé pour en déduire la compétence des tribunaux du pays de celui-ci, une telle prétention étant en contradiction avec la réalité ;

« Que la prétention d'étendre, pour cause de connexité, la compétence des tribunaux nationaux de l'un des navires à l'action dirigée contre un officier de l'autre navire impliqué dans la collision alors que ces deux navires n'ont pas la même nationalité, ne trouve aucun appui en droit international ;

« Attendu qu'en décider autrement et admettre la compétence des tribunaux turcs pour l'action pénale dirigée contre l'officier de quart du navire français impliqué dans la collision serait introduire une innovation en entière discordance avec des précédents solidement établis ;

"As this consent, far from having been given as regards criminal proceedings against foreigners for crimes or offences committed abroad, has been definitely refused by the Powers and by France in particular ;

"As this refusal follows from the rejection of a Turkish amendment calculated to establish this jurisdiction and from the statements made in this connection ;

"As, accordingly, the Convention of Lausanne of July 24th, 1923, construed in the light of these circumstances and intentions, does not allow the Turkish Courts to take cognizance of criminal proceedings directed against a French citizen for crimes or offences committed outside Turkey ;

"Furthermore, whereas, according to international law as established by the practice of civilized nations, in their relations with each other, a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence ;

"Whereas acts performed on the high seas on board a merchant ship are, in principle and from the point of view of criminal proceedings, amenable only to the jurisdiction of the courts of the State whose flag the vessel flies ;

"As that is a consequence of the principle of the freedom of the seas, and as States, attaching especial importance thereto, have rarely departed therefrom ;

"As, according to existing law, the nationality of the victim is not a sufficient ground to override this rule, and seeing that this was held in the case of the *Costa Rica Packet ;*

"Whereas there are special reasons why the application of this rule should be maintained in collision cases, which reasons are mainly connected with the fact that the culpable character of the act causing the collision must be considered in the light of purely national regulations which apply to the ship and the carrying out of which must be controlled by the national authorities ;

"As the collision cannot, in order thus to establish the jurisdiction of the courts of the country to which it belongs, be localized in the vessel sunk, such a contention being contrary to the facts ;

"As the claim to extend the jurisdiction of the courts of the country to which one vessel belongs, on the ground of the "connexity" (*connexité*) of offences, to proceedings against an officer of the other vessel concerned in the collision, when the two vessels are not of the same nationality, has no support in international law ;

"Whereas a contrary decision recognizing the jurisdiction of the Turkish Courts to take cognizance of the criminal proceedings against the officer of the watch of the French ship involved in the collision would amount to introducing an innovation entirely at variance with firmly established precedent ;

« Attendu que le compromis soumet à la Cour la question d'une indemnité à allouer au sieur Demons comme conséquence de la décision rendue par elle sur la première question ;

« Que toutes autres conséquences éventuelles de ladite décision, non soumises à la Cour, sont par là même réservées ;

« Que l'arrestation du sieur Demons, son emprisonnement et sa condamnation étant le fait d'autorités incompétentes selon le droit international, le principe d'une indemnité à son profit et à la charge de la Turquie ne saurait être contesté ;

« Que son incarcération a duré trente-neuf jours, sa mise en liberté sous caution n'ayant été que tardivement accordée contrairement aux dispositions de la Déclaration sur l'administration judiciaire signée à Lausanne le 24 juillet 1923 ;

« Que cette poursuite a été suivie d'une condamnation de nature à causer au sieur Demons un préjudice au moins moral ;

« Que les autorités turques ont, à la veille de sa condamnation et alors qu'il avait subi une détention à peu près égale à la moitié de celle à laquelle il allait être condamné, subordonné sa mise en liberté à un cautionnement de six mille livres turques ;

. . . .

« Dire et juger, tant en l'absence qu'en la présence du Gouvernement de la République turque :

« Que, d'après les règles du droit international et d'après la Convention relative à l'établissement et à la compétence judiciaire signée à Lausanne le 24 juillet 1923, la compétence pour exercer des poursuites pénales contre l'officier de quart d'un navire français, à raison de l'abordage survenu en haute mer entre ce navire et un navire turc, appartient exclusivement aux tribunaux français ;

« Qu'en conséquence, c'est à tort, contrairement aux règles du droit international et à ladite Convention, que les autorités judiciaires turques ont poursuivi, incarcéré et condamné le sieur Demons à raison de l'abordage survenu en haute mer entre le *Lotus* et le *Boz-Kourt ;*

« Par suite, fixer l'indemnité pour réparation du préjudice ainsi causé au sieur Demons à six mille livres turques et ordonner que ladite indemnité sera versée par le Gouvernement de la République turque au Gouvernement de la République française dans le délai d'un mois à compter de la sentence, et ce sans préjudice du remboursement du cautionnement versé par le sieur Demons ;

« Et donner acte au Gouvernement de la République française que toutes autres conséquences éventuelles de la décision rendue, non soumises à la Cour, sont, par là même, réservées. »

Le Gouvernement turc, dans son Contre-Mémoire, se borne à répéter la conclusion de son Mémoire, en la faisant précéder, "Whereas the special agreement submits to the Court the question of an indemnity to be awarded to Monsieur Demons as a consequence of the decision given by it upon the first question ;

"As any other consequences involved by this decision, not having been submitted to the Court, are *ipso facto* reserved ;

"As the arrest, imprisonment and conviction of Monsieur Demons are the acts of authorities having no jurisdiction under international law, the principle of an indemnity enuring to the benefit of Monsieur Demons and chargeable to Turkey, cannot be disputed ;

"As his imprisonment lasted for thirty-nine days, there having been delay in granting his release on bail contrary to the provisions of the Declaration regarding the administration of justice signed at Lausanne on July 24th, 1923 ;

"As his prosecution was followed by a conviction calculated to do Monsieur Demons at least moral damage ;

"As the Turkish authorities, immediately before his conviction, and when he had undergone detention about equal to one half of the period to which he was going to be sentenced, made his release conditional upon bail in 6,000 Turkish pounds ;

. . . .

"Asks for judgment, whether the Government of the Turkish Republic be present or absent, to the effect :

"That, under the rules of international law and the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that ship and a Turkish ship, belongs exclusively to the French Courts ;

"That, consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting Monsieur Demons, in connection with the collision which occurred on the high seas between the *Lotus* and the *Boz-Kourt*, and by so doing acted in a manner contrary to the principles of international law and to the above-mentioned Convention ;

"Accordingly, the Court is asked to fix the indemnity in reparation of the injury thus inflicted on Monsieur Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic within one month from the date of judgment, without prejudice to the repayment of the bail deposited by Monsieur Demons.

"The Court is also asked to place on record that any other consequences which the decision given might have, not having been submitted to the Court, are *ipso facto* reserved."

The Turkish Government, in its Counter-Case, confines itself to repeating the conclusion of its Case, preceding it, however, by toutefois, d'un court exposé de sa thèse, exposé qu'il convient de reproduire, étant donné qu'il fait contre-partie aux considérants qui précèdent les conclusions du Contre-Mémoire français :

« 1. — L'article 15 de la Convention de Lausanne relative à l'établissement et à la compétence judiciaire réfère entièrement et de façon absolue — sous réserve seulement de l'article 16 — la compétence judiciaire turque aux principes du droit international. Cet article ne saurait supporter la moindre réserve ni la moindre interprétation faite en lui attribuant un sens différent. En conséquence, la Turquie n'a, en vertu de cet article, dans l'emploi de sa compétence judiciaire en toute affaire qui intéresse les étrangers, d'autre souci que de ne pas agir en contradiction des principes du droit international.

« 2. — L'article 6 du Code pénal turc, qui est textuellement emprunté au Code pénal italien, n'est pas, en l'espèce, contraire aux principes du droit international.

« 3. — Les navires en haute mer faisant partie du territoire de la nation dont ils portent le pavillon, et, dans le cas qui nous occupe, le lieu du délit étant le vapeur *Boz-Kourt* battant pavillon turc, la compétence de la Turquie est formelle dans la poursuite exercée comme si le cas s'était produit sur son territoire — ainsi que des faits analogues le démontrent.

« 4. — L'affaire *Boz-Kourt* — *Lotus* étant un cas de « délit connexe », le Code d'instruction criminelle — qui est emprunté à la France — ordonne que l'officier français soit l'objet de poursuites connexes en même temps que l'officier turc, ce que confirment du reste les doctrines et la législation de tous les pays. En conséquence, la Turquie est en droit, à ce point de vue également, d'affirmer sa compétence.

« 5. — Si même l'on considère la question du point de vue de l'abordage seul, aucun principe de droit international d'ordre pénal n'existant pour arrêter la compétence civilement évidente de la Turquie, celle-ci est compétente pour entreprendre des poursuites pénales.

« 6. — La Turquie exerçant une compétence d'ordre essentiel, et les États n'étant d'ailleurs pas, de par les principes du droit international, tenus, dans des cas semblables, de verser des indemnités, il est hors de doute qu'il ne saurait être question, pour le Gouvernement de la République turque, de l'indemnité réclamée dans le Mémoire français, ce Gouvernement étant compétent pour exercer des poursuites contre le citoyen français Demons, qui, par suite d'un abordage, se trouve avoir commis un homicide par imprudence.

« *Plaise à la Cour*, statuer en faveur de la compétence judiciaire turque. »

a short statement of its argument, which statement it will be well to reproduce, since it corresponds to the arguments preceding the conclusions of the French Counter-Case:

"1.—Article 15 of the Convention of Lausanne respecting conditions of residence and business and jurisdiction refers simply and solely, as regards the jurisdiction of the Turkish Courts, to the principles of international law, subject only to the provisions of Article 16. Article 15 cannot be read as supporting any reservation whatever or any construction giving it another meaning. Consequently, Turkey, when exercising jurisdiction in any case concerning foreigners, need, under this article, only take care not to act in a manner contrary to the principles of international law.

"2.—Article 6 of the Turkish Penal Code, which is taken word for word from the Italian Penal Code, is not, as regards the case, contrary to the principles of international law.

"3.—Vessels on the high seas form part of the territory of the nation whose flag they fly, and in the case under consideration, the place where the offence was committed being the S.S. *Boz-Kourt* flying the Turkish flag, Turkey's jurisdiction in the proceedings taken is as clear as if the case had occurred on her territory—as is borne out by analogous cases.

"4.—The *Boz-Kourt—Lotus* case being a case involving "connected" offences (*délits connexes*), the Code of criminal procedure for trial—which is borrowed from France—lays down that the French officer should be prosecuted jointly with and at the same time as the Turkish officer; this, moreover, is confirmed by the doctrines and legislation of all countries. Turkey, therefore, is entitled from this standpoint also to claim jurisdiction.

"5.—Even if the question be considered solely from the point of view of the collision, as no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, that country has jurisdiction to institute criminal proceedings.

"6.—As Turkey is exercising jurisdiction of a fundamental character, and as States are not, according to the principles of international law, under an obligation to pay indemnities in such cases, it is clear that the question of the payment of the indemnity claimed in the French Case does not arise for the Turkish Government, since that Government has jurisdiction to prosecute the French citizen Demons who, as the result of a collision, has been guilty of manslaughter.

"The Court is asked for judgment in favour of the jurisdiction of the Turkish Courts."

Au cours de la procédure orale, l'agent du Gouvernement français s'est borné à renvoyer aux conclusions formulées dans le Contre-Mémoire, en renouvelant simplement la demande de prise d'acte des réserves qui y étaient formulées pour toutes conséquences de l'arrêt futur non soumises à la décision de la Cour ; acte lui est maintenant donné de ces réserves.

De son côté, l'agent du Gouvernement turc s'est abstenu, dans sa plaidoirie et sa duplique, de prendre une conclusion quelconque. Celle qu'il avait libellée dans les pièces par lui présentées au cours de la procédure écrite doit, par conséquent, être considérée comme simplement maintenue.

POINT DE FAIT.

D'après les exposés présentés à la Cour par les agents des Parties dans leurs Mémoires écrits ainsi que dans leurs plaidoiries orales, les faits se trouvant à l'origine de l'affaire sont, de l'accord des Parties, les suivants :

Le 2 août 1926, vers minuit, un abordage s'est produit entre le paquebot français *Lotus*, à destination de Constantinople, et le vapeur charbonnier turc *Boz-Kourt*, en un lieu situé cinq à six milles marins au nord du cap Sigri (Mitylène). Le *Boz-Kourt*, coupé en deux, a sombré, et huit ressortissants turcs se trouvant à son bord ont péri. Après avoir fait toute diligence pour venir à l'aide des naufragés, dont dix ont pu être sauvés, le *Lotus* a continué sa route vers Constantinople, où il est arrivé le 3 août.

Au moment de l'abordage, l'officier de quart à bord du *Lotus* était M. Demons, citoyen français, lieutenant au long cours et premier lieutenant du bord, tandis que les manœuvres du *Boz-Kourt* étaient dirigées par son capitaine, Hassan Bey, qui s'est trouvé parmi les personnes qui ont été sauvées du naufrage.

Dès le 3 août, la police turque procéda, à bord du *Lotus*, à une enquête sur l'abordage ; et le lendemain, 4 août, le commandant du *Lotus* déposa au Consulat général de France son rapport de mer, dont il remit copie au capitaine du port.

Le 5 août, le lieutenant Demons fut invité par les autorités turques à se rendre à terre pour faire une déposition. L'interrogatoire, dont la longueur eut, incidemment, pour effet de retarder le départ du

During the oral proceedings, the Agent of the French Government confined himself to referring to the conclusions submitted in the Counter-Case, simply reiterating his request that the Court should place on record the reservations made therein as regards any consequences of the judgment not submitted to the Court's decision ; these reservations are now duly recorded.

For his part, the Agent for the Turkish Government abstained both in his original speech and in his rejoinder from submitting any conclusion. The one he formulated in the documents filed by him in the written proceedings must therefore be regarded as having been maintained unaltered.

THE FACTS.

According to the statements submitted to the Court by the Parties' Agents in their Cases and in their oral pleadings, the facts in which the affair originated are agreed to be as follows :

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer *Lotus*, proceeding to Constantinople, and the Turkish collier *Boz-Kourt*, between five and six nautical miles to the north of Cape Sigri (Mitylene). The *Boz-Kourt*, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the *Lotus* continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the *Lotus* was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the *Boz-Kourt* were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the *Lotus* ; and on the following day, August 4th, the captain of the *Lotus* handed in his master's report at the French Consulate-General, transmitting a copy to the harbour master.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of

Lotus, aboutit à la mise en arrestation du lieutenant Demons — d'ailleurs sans avis préalable au consul général de France — et de Hassan Bey, entre autres. Cette arrestation, qualifiée par l'agent turc de préventive, aurait eu pour objet d'assurer le cours normal des poursuites pénales intentées, sur plainte des familles des victimes de l'abordage, par le ministère public de Stamboul contre les deux officiers sous l'inculpation d'homicide par imprudence.

La cause fut entendue par la Cour criminelle de Stamboul d'abord le 28 août. A cette occasion, le lieutenant Demons excipa de l'incompétence de la juridiction turque ; la Cour, cependant, se déclara compétente. Lors de la reprise des débats, le 11 septembre, le lieutenant Demons demanda sa mise en liberté sous caution ; il fut donné suite à cette demande le 13 septembre, la caution étant fixée à 6.000 livres turques.

Le 15 septembre, la Cour criminelle rendit sa sentence, dont la teneur n'a pas été communiquée à la Cour par les Parties. Il est cependant constant qu'elle condamnait le lieutenant Demons à quatre-vingt jours de prison et à une amende de 22 livres, Hassan Bey étant condamné à une peine légèrement plus élevée.

Il est également constant que le procureur de la République turque a formé contre cette décision un pourvoi en cassation qui en a suspendu l'exécution ; qu'une décision sur ce pourvoi n'est pas encore intervenue, mais que le compromis du 12 octobre 1926 n'a pas eu pour effet de suspendre « la procédure pénale .... actuellement en cours en Turquie ».

L'action des autorités judiciaires turques à l'égard du lieutenant Demons provoqua aussitôt de nombreuses démarches diplomatiques et autres interventions de la part du Gouvernement français ou de ses représentants en Turquie, visant soit à protester contre l'arrestation du lieutenant Demons, soit à demander sa mise en liberté, soit à obtenir le dessaisissement des tribunaux turcs en faveur de la juridiction française.

A la suite de ces démarches, le Gouvernement de la République turque a déclaré, le 2 septembre 1926, qu'il « ne se refuserait point à ce que le conflit de juridiction soit porté devant la Cour de La Haye ».

the *Lotus*, led to the placing under arrest of Lieutenant Demons—without previous notice being given to the French Consul-General—and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish Agent as arrest pending trial (*arrestation préventive*), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision, should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction ; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail : this request was complied with on September 13th, the bail being fixed at 6,000 Turkish pounds.

On September 15th, the Criminal Court delivered its judgment, the terms of which have not been communicated to the Court by the Parties. It is, however, common ground, that it sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty.

It is also common ground between the Parties that the Public Prosecutor of the Turkish Republic entered an appeal against this decision, which had the effect of suspending its execution until a decision upon the appeal had been given ; that such decision has not yet been given ; but that the special agreement of October 12th, 1926, did not have the effect of suspending "the criminal proceedings . . . . now in progress in Turkey".

The action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.

As a result of these representations, the Government of the Turkish Republic declared on September 2nd, 1926, that "it would have no objection to the reference of the conflict of jurisdiction to the Court at The Hague".

Le Gouvernement français ayant donné, le 6 du même mois, « son plein agrément à la solution proposée », les deux Gouvernements nommèrent leurs plénipotentiaires en vue de la rédaction du compromis à soumettre à la Cour ; ce compromis fut signé à Genève le 12 octobre 1926, ainsi que cela a été dit ci-dessus, et le dépôt des ratifications eut lieu le 27 décembre suivant.

POINT DE DROIT.

I.

Avant d'aborder l'examen des principes du droit international en contradiction desquels la Turquie aurait agi — et cela contrairement à l'article 15 de la Convention de Lausanne du 24 juillet 1923 relative à l'établissement et à la compétence judiciaire —, il convient de préciser, à la lumière de la procédure, tant écrite qu'orale, la situation telle qu'elle résulte du compromis. En effet, la Cour ayant été saisie de la présente affaire au moyen de la notification d'un compromis conclu par les Parties en cause, c'est dans les termes de ce compromis plutôt que dans les conclusions des Parties qu'elle doit rechercher quels sont les points précis sur lesquels il lui appartient de se prononcer. A cet égard, il y a lieu de constater ce qui suit :

1. — La collision, survenue le 2 août 1926, entre le vapeur *Lotus*, battant pavillon français, et le vapeur *Boz-Kourt*, battant pavillon turc, a eu lieu en haute mer : la juridiction territoriale d'un État quelconque, autre que la France et la Turquie, n'entre donc pas en jeu.

2. — La violation éventuelle des principes du droit international aurait consisté dans l'exercice de poursuites pénales contre le lieutenant Demons. Il ne s'agit donc pas d'un acte particulier de ces poursuites — tel que l'ouverture d'une instruction criminelle, l'arrestation, la détention préventive ou le jugement rendu par la Cour criminelle de Stamboul —, mais bien du fait de l'exercice de la juridiction pénale turque comme tel. C'est pourquoi les thèses avancées par les Parties dans les deux phases de la procédure ont

The French Government having, on the 6th of the same month, given "its full consent to the proposed solution", the two Governments appointed their plenipotentiaries with a view to the drawing up of the special agreement to be submitted to the Court; this special agreement was signed at Geneva on October 12th, 1926, as stated above, and the ratifications were deposited on December 27th, 1926.

THE LAW.

I.

Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted—thereby infringing the terms of Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction—, it is necessary to define, in the light of the written and oral proceedings, the position resulting from the special agreement. For, the Court having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide. In this respect the following observations should be made:

1.—The collision which occurred on August 2nd, 1926, between the S.S. *Lotus*, flying the French flag, and the S.S. *Boz-Kourt*, flying the Turkish flag, took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

2.—The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings—such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul—but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of trait exclusivement à la question de savoir si la Turquie a, ou n'a pas, d'après les principes du droit international, compétence pour exercer des poursuites en l'espèce.

Les Parties sont d'accord pour reconnaître que la Cour n'est pas appelée à examiner la conformité des poursuites avec la loi turque ; elle n'a donc pas à examiner si, indépendamment de la question de la compétence même, les dispositions de la législation turque invoquées par les autorités turques étaient réellement applicables en l'espèce, ou si la manière dont les poursuites contre le lieutenant Demons ont été conduites pourrait constituer un déni de justice et à ce titre une violation du droit international. Les débats ont roulé exclusivement sur l'existence ou l'inexistence de la compétence pénale en l'espèce.

3. — Les poursuites pénales ont eu lieu en raison de la perte du *Boz-Kourt* ayant entraîné la mort de huit marins et passagers turcs. Il est évident, d'une part, que cette conséquence de la collision constitue un élément essentiel pour l'institution des poursuites pénales en question ; d'autre part, il résulte des allégations des deux Parties qu'aucune intention criminelle n'a été imputée ni à l'un ni à l'autre des officiers responsables des manœuvres des deux vapeurs ; on est, par conséquent, en présence de poursuites pénales pour homicide par imprudence ou négligence. Le Gouvernement français soutient que les infractions aux règlements de navigation relèvent exclusivement de la juridiction de l'État du pavillon ; mais il ne soutient pas qu'un abordage entre deux navires ne puisse donner lieu également aux sanctions de droit pénal commun prévues pour le cas d'homicide. Les précédents invoqués par lui et ayant trait à des cas d'abordage supposent tous la possibilité de poursuites pénales en vue de pareilles sanctions, la contestation ne portant que sur la compétence — concurrente ou exclusive — qu'un autre État pourrait réclamer à cet égard. Ainsi qu'il a déjà été remarqué, la Cour n'a pas à examiner la légalité des poursuites d'après le droit turc ; les questions de droit pénal relatives au bien-fondé des poursuites et, partant, à l'existence d'un *nexus causalis* entre les actes du lieutenant Demons et la perte de huit ressortissants turcs, n'entrent pas en ligne de compte pour la Cour. Il ne résulte du reste pas de la documentation soumise à la Cour dans quelles conditions précises ces personnes ont péri ; toutefois, il n'est pas douteux que leur mort puisse être considérée comme suite directe de l'abordage,

the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case.

The Parties agree that the Court has not to consider whether the prosecution was in conformity with Turkish law ; it need not therefore consider whether, apart from the actual question of jurisdiction, the provisions of Turkish law cited by Turkish authorities were really applicable in this case, or whether the manner in which the proceedings against Lieutenant Demons were conducted might constitute a denial of justice, and accordingly, a violation of international law. The discussions have borne exclusively upon the question whether criminal jurisdiction does or does not exist in this case.

3.—The prosecution was instituted because the loss of the *Boz-Kourt* involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question ; secondly, it follows from the statements of the two Parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels ; it is therefore a case of prosecution for involuntary manslaughter. The French Government maintains that breaches of navigation regulations fall exclusively within the jurisdiction of the State under whose flag the vessel sails ; but it does not argue that a collision between two vessels cannot also bring into operation the sanctions which apply to criminal law in cases of manslaughter. The precedents cited by it and relating to collision cases all assume the possibility of criminal proceedings with a view to the infliction of such sanctions, the dispute being confined to the question of jurisdiction—concurrent or exclusive—which another State might claim in this respect. As has already been observed, the Court has not to consider the lawfulness of the prosecution under Turkish law ; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a *nexus causalis* between the actions of Lieutenant Demons and the loss of eight Turkish nationals are not relevant to the issue so far as the Court is concerned. Moreover, the exact conditions in which these persons perished do not appear from the documents submitted to the Court ; nevertheless, there is no doubt that their death may be regarded as the direct et il n'a pas non plus été allégué de la part du Gouvernement français que cette relation entre cause et effet ne puisse exister.

4. — Des poursuites pénales connexes ont eu lieu en même temps contre le lieutenant Demons et contre le capitaine du vapeur turc. En ce qui concerne la notion de connexité, l'agent du Gouvernement turc, dans les conclusions de son Contre-Mémoire, a renvoyé au Code d'instruction criminelle turc, dont les dispositions seraient empruntées au Code français correspondant. Or, le droit français connaît, entre autres, la connexité par unité du temps et du lieu. Donc, en l'espèce, la Cour interprète la notion en question dans ce sens que les poursuites contre le capitaine du vapeur turc pour lesquelles la compétence turque n'est pas contestée, et celles qui ont été dirigées contre le lieutenant Demons, ont été considérées par les autorités turques, au point de vue de l'instruction de l'affaire, comme une unité, étant donné que la collision des deux vapeurs constitue un ensemble de faits dont l'appréciation, au point de vue du droit pénal turc, devait être confiée à la même juridiction.

5. — Les poursuites pénales ont eu lieu en vertu de la législation turque. Le compromis n'indique pas quelles dispositions de cette législation — soit une, soit plusieurs — entrent en ligne de compte. Aucun document n'a été soumis à la Cour qui permettrait de savoir sur la base de quel article du Code pénal turc les poursuites ont été exercées ; cependant, le Gouvernement français déclare que la Cour criminelle a fondé sa compétence sur l'article 6 du Code pénal turc, et, loin de contredire cette allégation, la Turquie, dans les conclusions de son Contre-Mémoire, affirme la conformité de cet article avec les principes du droit international. Il ne résulte pas de la procédure si les poursuites auraient été instituées uniquement sur la base dudit article.

L'article 6 du Code pénal turc a la teneur suivante dans la loi n° 765, du 1^er^ mars 1926 (Journal officiel, n° 320, du 13 mars 1926) :

> « L'étranger qui, hors les cas prévus par l'article 4, commet à l'étranger, au préjudice de la Turquie ou d'un Turc, un délit pour lequel la loi turque prononce une peine restrictive de la liberté dont le minimum ne soit pas inférieur à une année,

outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist.

4.—Lieutenant Demons and the captain of the Turkish steamship were prosecuted jointly and simultaneously. In regard to the conception of "connexity" of offences (*connexité*), the Turkish Agent in the submissions of his Counter-Case has referred to the Turkish Code of criminal procedure for trial, the provisions of which are said to have been taken from the corresponding French Code. Now in French law, amongst other factors, coincidence of time and place may give rise to "connexity" (*connexité*). In this case, therefore, the Court interprets this conception as meaning that the proceedings against the captain of the Turkish vessel in regard to which the jurisdiction of the Turkish Courts is not disputed, and the proceedings against Lieutenant Demons, have been regarded by the Turkish authorities, from the point of view of the investigation of the case, as one and the same prosecution, since the collision of the two steamers constitutes a complex of facts the consideration of which should, from the standpoint of Turkish criminal law, be entrusted to the same court.

5.—The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted to the Court indicating on what article of the Turkish Penal Code the prosecution was based ; the French Government however declares that the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in the submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

[*Translation.*]

> "Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a

est puni, d'après le Code pénal turc, pourvu qu'il soit arrêté en Turquie. Mais la peine est diminuée d'un tiers et, au lieu de la peine de mort, on applique vingt ans de prison lourde.

« Toutefois, dans ce cas, les poursuites n'ont lieu qu'à la requête du ministre de la Justice ou sur la plainte de la Partie lésée.

« Si le délit a été commis au préjudice d'un autre étranger, le coupable est puni, à la requête du ministre de la Justice, suivant les dispositions édictées au premier alinéa du présent article, pourvu toutefois :

« 1) qu'il s'agisse d'un fait pour lequel la loi turque prononce une peine restrictive de la liberté, dont le minimum ne soit pas inférieur à trois ans ;

« 2) qu'il n'existe pas de traité d'extradition ou que l'extradition n'ait été acceptée ni par le gouvernement du lieu dans lequel l'inculpé a commis le délit, ni par le gouvernement de sa patrie. »

Même si la Cour doit admettre que les autorités turques aient cru devoir baser les poursuites contre le lieutenant Demons sur l'article 6 précité, la question à elle soumise n'est pas celle de la compatibilité dudit article avec les principes du droit international ; elle est plus générale. La Cour est appelée à constater si, oui ou non, les principes du droit international s'opposent à ce que la Turquie, en vertu de sa législation, exerce des poursuites pénales contre le lieutenant Demons. Ni la conformité de l'article 6, comme tel, avec les principes du droit international, ni l'application de cet article par les autorités turques, ne forment l'objet du litige ; c'est le fait même de l'institution des poursuites qui est considéré par la France comme étant en contradiction avec lesdits principes. Ainsi, le Gouvernement français a protesté d'emblée contre l'arrestation, indépendamment de la question de savoir quelle disposition de sa législation la Turquie invoquerait pour la justifier. Les arguments avancés par le Gouvernement français au cours de la procédure et fondés sur les principes qui, selon lui, devraient régir la navigation en haute mer, démontrent qu'il contesterait à la Turquie la compétence pour les poursuites contre le lieutenant Demons, même si elles se fondaient sur une disposition du Code pénal autre que l'article 6, en prenant, par exemple, comme point de départ, que le délit en question devrait être considéré, à cause de ses effets, comme ayant été commis sur le territoire turc même.

minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles. Thus the French Government at once protested against his arrest, quite independently of the question as to what clause of her legislation was relied upon by Turkey to justify it. The arguments put forward by the French Government in the course of the proceedings and based on the principles which, in its contention, should govern navigation on the high seas, show that it would dispute Turkey's jurisdiction to prosecute Lieutenant Demons, even if that prosecution were based on a clause of the Turkish Penal Code other than Article 6, assuming for instance that the offence in question should be regarded, by reason of its consequences, to have been actually committed on Turkish territory.

II.

Après avoir établi la situation résultant du compromis, la Cour doit maintenant vérifier quels sont les principes du droit international avec lesquels les poursuites contre le lieutenant Demons pourraient éventuellement se trouver en contradiction.

C'est l'article 15 de la Convention de Lausanne du 24 juillet 1923, relative à l'établissement et à la compétence judiciaire, qui renvoie les Parties contractantes aux principes du droit international pour la délimitation de leurs compétences judiciaires respectives.

Cette clause a la teneur suivante :

> « En toutes matières, sous réserve de l'article 16, les questions de compétence judiciaire seront, dans les rapports entre la Turquie et les autres Puissances contractantes, réglées conformément aux principes du droit international. »

Le Gouvernement français soutient que le sens du terme « principes du droit international » dans ledit article devrait être recherché à la lumière de la genèse de la Convention précitée. Il allègue à cet effet qu'au cours des travaux préparatoires, le Gouvernement turc, par un amendement à l'article pertinent d'un projet de texte, a prétendu étendre sa compétence aux crimes commis dans le territoire d'un tiers État, pourvu que, en conformité avec les lois de la Turquie, ces crimes fussent sous la juridiction des tribunaux turcs. Cet amendement, à propos duquel les représentants de la France et de l'Italie ont fait des réserves, a été formellement repoussé par celui de la Grande-Bretagne ; et, la question ayant été depuis renvoyée au Comité de rédaction, celui-ci s'est limité, dans sa version du projet, à déclarer que la compétence judiciaire serait réglée d'accord avec les principes du droit international. Le Gouvernement français déduit de ces faits que le procès intenté contre le lieutenant Demons est contraire à la pensée qui a dirigé l'élaboration de la Convention de Lausanne.

La Cour doit rappeler dans cet ordre d'idées ce qu'elle a dit dans certains de ses arrêts et avis précédents, savoir qu'il n'y a pas lieu de tenir compte des travaux préparatoires si le texte d'une convention est en lui-même suffisamment clair. Or, la Cour estime que le sens des mots « principes du droit international » ne peut, selon leur usage général, signifier autre chose que le droit international tel qu'il est en vigueur entre toutes les nations faisant partie de la

II.

Having determined the position resulting from the terms of the special agreement, the Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

This clause is as follows :

> "Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

The French Government maintains that the meaning of the expression "principles of international law" in this article should be sought in the light of the evolution of the Convention. Thus it states that during the preparatory work, the Turkish Government, by means of an amendment to the relevant article of a draft for the Convention, sought to extend its jurisdiction to crimes committed in the territory of a third State, provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts. This amendment, in regard to which the representatives of France and Italy made reservations, was definitely rejected by the British representative ; and the question having been subsequently referred to the Drafting Committee, the latter confined itself in its version of the draft to a declaration to the effect that questions of jurisdiction should be decided in accordance with the principles of international law. The French Government deduces from these facts that the prosecution of Demons is contrary to the intention which guided the preparation of the Convention of Lausanne.

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. This interpretation communauté internationale. Cette interprétation se trouve soulignée par le contexte de l'article même qui dit que les principes du droit international déterminent entre les Parties contractantes les compétences judiciaires — du reste, non seulement pénales mais aussi civiles —, sauf la seule exception visée par l'article 16. En outre, le préambule de la Convention dit que les Hautes Parties contractantes ont en vue un règlement, conformément « au droit des gens moderne », et l'article 28 du Traité de paix de Lausanne, auquel la Convention en question est annexée, stipule l'abolition complète du régime des Capitulations « à tous points de vue ». Dans ces conditions, il n'est pas possible — sauf en vertu d'un texte précis — d'interpréter le terme « principes du droit international » autrement que comme signifiant les principes en vigueur entre toutes les nations indépendantes et qui, partant, s'appliquent au même titre à toutes les Parties contractantes.

Du reste, les travaux préparatoires de la Convention sur l'établissement et la compétence judiciaire ne fourniraient aucun élément de nature à écarter l'interprétation qu'imposent les termes mêmes de l'article 15. Il est vrai que les représentants de la France, de la Grande-Bretagne et de l'Italie ont repoussé l'amendement turc dont il a déjà été fait mention. Mais seul le délégué britannique — d'ailleurs en harmonie avec le droit intérieur de son pays qui consacre le principe de la territorialité en matière de juridiction pénale — a exposé les raisons de son opposition à l'amendement turc ; les motifs des réserves française et italienne, ainsi que ceux qui ont fait exclure du projet élaboré par le Comité de rédaction toute spécification de l'étendue de la juridiction pénale vis-à-vis des étrangers, sont inconnus et auraient pu n'avoir aucun rapport avec les raisons que la France invoque maintenant.

Il convient d'ajouter à ces observations que le texte primitif de l'article pertinent, lequel texte limitait la juridiction turque aux crimes commis en Turquie même, a été aussi mis de côté par le Comité de rédaction ; ce fait pourrait, au même titre, porter à croire que la pensée des rédacteurs de la Convention a été de ne restreindre aucunement cette juridiction.

Les deux propositions opposées tendant à définir d'une manière déterminée le champ d'application des lois pénales turques ayant été écartées, la formule finalement adoptée d'un commun accord dans l'article 15 ne peut viser que les principes du droit international général sur les compétences judiciaires.

is borne out by the context of the article itself which says that the principles of international law are to determine questions of jurisdiction—not only criminal but also civil—between the contracting Parties, subject only to the exception provided for in Article 16. Again, the preamble of the Convention says that the High Contracting Parties are desirous of effecting a settlement in accordance "with modern international law", and Article 28 of the Treaty of Peace of Lausanne, to which the Convention in question is annexed, decrees the complete abolition of the Capitulations "in every respect". In these circumstances it is impossible—except in pursuance of a definite stipulation—to construe the expression "principles of international law" otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties.

Moreover, the records of the preparation of the Convention respecting conditions of residence and business and jurisdiction would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15. It is true that the representatives of France, Great Britain and Italy rejected the Turkish amendment already mentioned. But only the British delegate—and this conformably to British municipal law which maintains the territorial principle in regard to criminal jurisdiction—stated the reasons for his opposition to the Turkish amendment ; the reasons for the French and Italian reservations and for the omission from the draft prepared by the Drafting Committee of any definition of the scope of the criminal jurisdiction in respect of foreigners, are unknown and might have been unconnected with the arguments now advanced by France.

It should be added to these observations that the original draft of the relevant article, which limited Turkish jurisdiction to crimes committed in Turkey itself, was also discarded by the Drafting Committee ; this circumstance might with equal justification give the impression that the intention of the framers of the Convention was not to limit this jurisdiction in any way.

The two opposing proposals designed to determine definitely the area of application of Turkish criminal law having thus been discarded, the wording ultimately adopted by common consent for Article 15 can only refer to the principles of general international law relating to jurisdiction.

III.

La Cour, appelée à examiner s'il y a des règles de droit international qui auraient été violées par l'exercice de poursuites pénales, en vertu de la législation turque, contre le lieutenant Demons, se trouve placée en premier lieu devant une question de principe, question qui, en effet, s'est révélée comme fondamentale dans les Mémoires, Contre-Mémoires et plaidoiries des deux Parties. Le Gouvernement français soutient la thèse suivant laquelle les tribunaux turcs, pour être compétents, devraient pouvoir se fonder sur un titre de compétence que le droit international reconnaîtrait en faveur de la Turquie. Par contre, le Gouvernement turc se place au point de vue selon lequel l'article 15 admettrait la compétence judiciaire de la Turquie partout où cette compétence ne se heurterait pas à un principe du droit international.

Ce dernier point de vue semble être conforme au compromis même, dont le numéro 1 demande à la Cour de dire si la Turquie a agi en contradiction des principes du droit international et quels seraient — dans l'affirmative — ces principes. Il ne s'agit donc pas, selon le compromis, de préciser les principes qui permettraient à la Turquie d'exercer les poursuites pénales, mais de formuler les principes qui éventuellement auraient été violés par ces poursuites.

Cette manière de poser la question est commandée également par la nature même et les conditions actuelles du droit international.

Le droit international régit les rapports entre des États indépendants. Les règles de droit liant les États procèdent donc de la volonté de ceux-ci, volonté manifestée dans des conventions ou dans des usages acceptés généralement comme consacrant des principes de droit et établis en vue de régler la co-existence de ces communautés indépendantes ou en vue de la poursuite de buts communs. Les limitations de l'indépendance des États ne se présument donc pas.

Or, la limitation primordiale qu'impose le droit international à l'État est celle d'exclure — sauf l'existence d'une règle permissive contraire — tout exercice de sa puissance sur le territoire d'un autre État. Dans ce sens, la juridiction est certainement territoriale ; elle ne pourrait être exercée hors du territoire, sinon en vertu d'une

III.

The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be in conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory règle permissive découlant du droit international coutumier ou d'une convention.

Mais il ne s'ensuit pas que le droit international défend à un État d'exercer, dans son propre territoire, sa juridiction dans toute affaire où il s'agit de faits qui se sont passés à l'étranger et où il ne peut s'appuyer sur une règle permissive du droit international. Pareille thèse ne saurait être soutenue que si le droit international défendait, d'une manière générale, aux États d'atteindre par leurs lois et de soumettre à la juridiction de leurs tribunaux des personnes, des biens et des actes hors du territoire, et si, par dérogation à cette règle générale prohibitive, il permettait aux États de ce faire dans des cas spécialement déterminés. Or, tel n'est certainement pas l'état actuel du droit international. Loin de défendre d'une manière générale aux États d'étendre leurs lois et leur juridiction à des personnes, des biens et des actes hors du territoire, il leur laisse, à cet égard, une large liberté, qui n'est limitée que dans quelques cas par des règles prohibitives ; pour les autres cas, chaque État reste libre d'adopter les principes qu'il juge les meilleurs et les plus convenables.

C'est cette liberté que le droit international laisse aux États, qui explique la variété des règles qu'ils ont pu adopter sans opposition ou réclamations de la part des autres États ; c'est en vue d'apporter un remède aux inconvénients qui dérivent de pareille variété qu'on s'efforce, depuis des années, en Europe aussi bien qu'en Amérique, d'élaborer des conventions, dont l'effet serait justement de restreindre la liberté que le droit international laisse actuellement aux États dans cette matière, en comblant ainsi des lacunes de compétences ou en faisant disparaître des concurrences de compétences résultant de la diversité des principes adoptés dans les différents États.

Dans ces conditions, tout ce qu'on peut demander à un État, c'est de ne pas dépasser les limites que le droit international trace à sa compétence ; en deçà de ces limites, le titre à la juridiction qu'il exerce se trouve dans sa souveraineté.

Il dérive de ce qui précède que la thèse du Gouvernement français, d'après laquelle la Turquie devrait, dans chaque cas, se prévaloir d'une règle du droit international l'autorisant à exercer sa juridiction, est en opposition avec le droit international général, auquel renvoie l'article 15 de la Convention de Lausanne. Pareille thèse, qui, vu les termes dudit article 15 et l'interprétation que la except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which

Cour vient de lui donner, s'appliquerait en matière civile aussi bien que pénale et avec une réciprocité parfaite dans les rapports entre la Turquie et les autres Parties contractantes, aurait pratiquement le résultat de paralyser dans bien des cas l'activité des tribunaux, faute de la possibilité d'invoquer une règle universellement admise, sur laquelle l'exercice de la juridiction pourrait s'appuyer.

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Toutefois, il y a lieu de se demander si les considérations qui précèdent valent réellement pour la matière pénale, ou si ce domaine est régi par un principe différent, qui pourrait s'expliquer par le lien étroit qui a longtemps existé entre la suprême juridiction pénale et la notion d'État, ainsi que par l'importance particulière que possède la juridiction pénale pour la personnalité humaine.

S'il est vrai que le principe de la territorialité du droit pénal est à la base de toutes les législations, il n'en est pas moins vrai que toutes ou presque toutes ces législations étendent leur action à des délits commis hors du territoire ; et cela d'après des systèmes qui changent d'État à État. La territorialité du droit pénal n'est donc pas un principe absolu du droit international et ne se confond aucunement avec la souveraineté territoriale.

Cette situation peut être envisagée de deux manières différentes, correspondant aux points de vue auxquels les Parties se sont respectivement placées. Selon l'un de ces systèmes, le principe de la liberté, en vertu duquel chaque État peut régler sa législation selon sa convenance tant que, ce faisant, il ne se heurte pas à une limitation imposée par le droit international, s'appliquerait également dans le domaine de la législation gouvernant l'étendue de la compétence judiciaire en matière pénale. Selon l'autre système, le caractère exclusivement territorial de la législation en cette matière constituerait un principe qui exclurait *ipso facto*, sauf exceptions expresses, le droit pour les États d'étendre au delà de leurs frontières la juridiction pénale de leurs tribunaux ; les exceptions en question, qui comprennent, par exemple, la juridiction extraterritoriale sur les propres ressortissants et celle relative aux crimes contre la sûreté de l'État, reposeraient, dès lors, sur des règles permissives spéciales faisant partie du droit international.

the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties ; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

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Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction, or whether this jurisdiction is governed by a different principle: this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto,* prevent States from extending the criminal jurisdiction of their courts beyond their frontiers ; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.

Si l'on se place, pour les besoins de la démonstration, au point de vue du dernier de ces systèmes, on doit reconnaître que son exactitude dépend, faute d'une règle conventionnelle, de l'existence d'une coutume ayant force de droit par laquelle il serait consacré. Il en est de même en ce qui concerne l'applicabilité du système en question — à le supposer reconnu comme bien-fondé — au cas d'espèce. Il s'ensuit que, même à ce point de vue, avant de rechercher s'il y a éventuellement une règle du droit international permettant expressément à la Turquie d'instituer des poursuites contre un étranger pour un délit qu'il aurait commis hors la Turquie, il faudrait commencer par démontrer en même temps le bien-fondé du système et son applicabilité à l'espèce. Or, la première de ces démonstrations doit consister, ainsi qu'on vient de le voir, précisément dans la preuve de l'existence d'un principe du droit international limitant la liberté des États en matière de législation pénale.

Par conséquent, que l'on adopte l'un ou l'autre des deux systèmes exposés ci-dessus, on aboutit, dans le cas d'espèce, au même résultat : la nécessité de rechercher si, *oui ou non*, le droit international comporte un principe en vertu duquel il aurait été interdit à la Turquie d'exercer, dans les circonstances de ce cas, des poursuites pénales contre le lieutenant Demons. Et, dans les deux hypothèses également, la recherche doit se faire au moyen d'un examen de précédents présentant une analogie étroite avec le cas d'espèce ; car c'est seulement dans les précédents de cette nature que pourrait se manifester, le cas échéant, l'existence d'un principe général applicable à l'espèce. En effet, si, par exemple, on trouvait que, selon la pratique des États, la compétence de l'État du pavillon n'est pas consacrée comme exclusive par le droit international pour le cas d'abordage en haute mer, il ne serait pas nécessaire de rechercher l'existence éventuelle d'une règle restrictive plus générale ; car, par rapport à cette règle — à supposer qu'elle existât —, l'absence constatée d'une prohibition visant le cas d'abordage en haute mer prendrait l'aspect d'une règle permissive spéciale.

La Cour doit donc, en tout état de cause, examiner s'il existe, oui ou non, une règle de droit international limitant la liberté des États d'étendre la juridiction pénale de leurs tribunaux à une situation réunissant les circonstances du cas d'espèce.

Adopting, for the purposes of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the applicability of this system—assuming it to have been recognized as sound—in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. For if it were found, for example, that, according to the practice of States, the jurisdiction of the State whose flag was flown was not established by international law as exclusive with regard to collision cases on the high seas, it would not be necessary to ascertain whether there were a more general restriction; since, as regards that restriction—supposing that it existed—the fact that it had been established that there was no prohibition in respect of collision on the high seas would be tantamount to a special permissive rule.

The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case.

IV.

La Cour procède maintenant à cette recherche : Y a-t-il dans le droit international général, auquel renvoie l'article 15 de la Convention de Lausanne, une règle qui défende à la Turquie d'exercer des poursuites pénales contre le lieutenant Demons ?

A cet effet, elle examinera, en premier lieu, la valeur des allégations faites par le Gouvernement français, sans toutefois omettre de prendre en considération d'autres aspects possibles du problème, qui pourraient démontrer l'existence de la règle restrictive applicable en l'espèce.

Les arguments invoqués par le Gouvernement français, autres que ceux qui ont été discutés ci-dessus, se réduisent, en somme, aux trois suivants :

1) Le droit international ne permettrait pas à un État de poursuivre les délits commis par les étrangers à l'étranger, en raison seulement de la nationalité de la victime ; et tel serait le cas en l'espèce, car le délit devrait être considéré comme ayant été commis à bord du navire français.

2) Le droit international reconnaîtrait la compétence exclusive de l'État du pavillon pour tout ce qui se passe à bord du navire dans la haute mer.

3) Enfin, ce principe s'imposerait avec une force toute particulière lorsqu'il s'agit d'un fait d'abordage.

* * *

En ce qui concerne le premier argument, la Cour croit devoir rappeler tout d'abord que son examen se borne strictement à la situation d'espèce, car c'est seulement à l'égard de cette situation que sa décision est demandée.

Comme il a été constaté ci-dessus, les éléments caractéristiques de la situation de fait sont les suivants : il s'agit d'une collision en haute mer, entre deux navires de pavillons différents, sur l'un desquels se trouvait un des prétendus auteurs du délit, tandis que les victimes se trouvaient sur l'autre.

Ceci posé, la Cour ne croit pas nécessaire d'examiner la thèse d'après laquelle un État ne pourrait punir les délits commis à l'étranger par un étranger en raison seulement de la nationalité

IV.

The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following :

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim ; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case.

* * *

As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

As has already been observed, the characteristic features of the situation of fact are as follows : there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the de la victime. Car cette thèse ne vise que le cas où la nationalité de la victime est le seul critère sur lequel se fonde la juridiction pénale de l'État. Même si la thèse en général était exacte — et la Cour fait toutes réserves à cet égard —, elle ne saurait être invoquée en l'espèce que si le droit international défendait à la Turquie de tenir compte du fait que les effets du délit se sont produits sur le navire turc et, partant, dans un lieu assimilé au territoire turc dans lequel l'application du droit pénal turc ne peut être contestée, même par rapport aux délits qui y ont été commis par des étrangers. Or, pareille règle du droit international n'existe pas. Aucun argument, d'où il résulterait que les États se reconnaissent obligés, l'un envers l'autre, de tenir compte seulement du lieu où se trouve l'auteur du délit au moment du délit, n'est venu à la connaissance de la Cour. Par contre, il est constant que les tribunaux de beaucoup de pays, même de pays qui donnent à leur législation pénale un caractère strictement territorial, interprètent la loi pénale dans ce sens que les délits dont les auteurs, au moment de l'acte délictueux, se trouvent sur le territoire d'un autre État, doivent néanmoins être considérés comme ayant été commis sur le territoire national, si c'est là que s'est produit un des éléments constitutifs du délit et surtout ses effets. La jurisprudence française a admis, elle aussi, par rapport à des situations diverses, cette manière d'interpréter le principe de la territorialité. D'autre part, la Cour n'a pas connaissance de cas dans lesquels des gouvernements auraient protesté contre le fait qu'une loi pénale contiendrait une règle à cet effet ou que les tribunaux d'un pays auraient interprété leur législation pénale dans ce sens. Par conséquent, du moment que les effets du délit se sont produits sur le navire turc, il est impossible de soutenir qu'il y ait une règle de droit international qui défendrait à la Turquie d'exercer des poursuites pénales contre le lieutenant Demons en raison du fait que l'auteur du délit se trouvait sur le navire français. Puisque, ainsi qu'il a été précédemment constaté, le compromis ne vise pas l'article de la législation turque en vertu duquel les poursuites pénales ont été exercées, mais seulement la contradiction éventuelle entre les poursuites et les principes du droit international, rien ne s'oppose à ce que la Cour se borne à relever que, dans l'espèce, les poursuites pénales peuvent être justifiées aussi au point de vue du principe dit de la territorialité.

victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking—and in regard to this the Court reserves its opinion—it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

Cependant, même si la Cour avait à examiner la compatibilité de l'article 6 du Code pénal turc avec le droit international, et si elle estimait que la nationalité de la victime n'était pas en tout état de cause une base suffisante pour la compétence pénale de l'État dont la victime est un ressortissant, elle arriverait au même résultat pour les raisons qui viennent d'être exposées. Car, quand bien même l'article 6 eût été jugé incompatible avec les principes du droit international, comme il eût pu se faire que les poursuites intentées eussent été fondées sur une autre disposition législative turque, qui, elle, ne serait pas incompatible avec lesdits principes, il en résulte que, du seul fait de la non-conformité éventuelle auxdits principes de l'article 6, l'on ne saurait conclure à la non-conformité des poursuites elles-mêmes. Le fait que les autorités judiciaires auraient commis une erreur dans le choix de la disposition légale, applicable en l'espèce et compatible avec le droit international, ne concerne que le droit interne et ne pourrait intéresser le droit international que dans la mesure où une règle conventionnelle ou la possibilité d'un déni de justice entreraient en ligne de compte.

On a cherché à faire valoir que le délit d'homicide par imprudence ne saurait être localisé dans le lieu où l'effet mortel se produit ; car cet effet n'est pas voulu, et l'on ne saurait dire qu'il y ait intention délictueuse dirigée, dans la pensée du délinquant, vers le territoire où l'effet mortel se produit. Contre cette thèse on pourrait faire observer que l'effet a une importance toute particulière dans les délits tels que l'homicide par imprudence, qui sont punis justement en considération de leur effet plutôt que de la condition subjective du délinquant. Mais la Cour ne se croit pas appelée à examiner cette question, qui est une question d'interprétation de la loi pénale turque. Il lui suffit de constater que rien n'a été allégué et rien n'a pu être trouvé d'où il résulterait que le droit international aurait établi une règle imposant aux États pareille interprétation de la notion du délit d'homicide par imprudence.

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Le second argument invoqué par le Gouvernement français est le principe d'après lequel l'État du pavillon posséderait une compétence exclusive sur tout ce qui se passe à bord d'un navire marchand en haute mer.

Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reasons just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt ; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established a rule imposing on States this reading of the conception of the offence of manslaughter.

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The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.

Il est certainement vrai que — en dehors des cas particuliers déterminés par le droit international — les navires en haute mer ne sont soumis à d'autre autorité qu'à celle de l'État dont ils portent le pavillon. En vertu du principe de la liberté de la mer, c'est-à-dire de l'absence de toute souveraineté territoriale en haute mer, aucun État ne peut y exercer des actes de juridiction quelconques sur des navires étrangers. C'est ainsi que, si un navire de guerre se trouvant sur les lieux où se produit un abordage entre un navire battant son pavillon et un navire étranger, envoyait à bord de ce dernier un officier pour y faire des constatations ou y recueillir des témoignages, cet acte serait sans doute contraire au droit international.

Mais il n'en dérive aucunement qu'un État ne puisse jamais, dans son propre territoire, exercer une juridiction sur des actes qui se sont passés à bord d'un navire étranger en haute mer. Le principe de la liberté de la mer a pour conséquence que le navire en haute mer est assimilé au territoire de l'État dont il porte le pavillon, car, comme dans le territoire, cet État y fait valoir son autorité, et aucun autre État ne peut y exercer la sienne. Tout ce qu'on peut dire est que, en vertu du principe de la liberté de la mer, un navire est placé dans la même situation que le territoire de l'État ; mais rien ne vient à l'appui de la prétention selon laquelle les droits qu'a l'État du pavillon peuvent aller au delà des droits qu'il exerce dans son territoire proprement dit. Il s'ensuit que ce qui se passe à bord d'un navire en haute mer doit être regardé comme s'étant passé dans le territoire de l'État dont le navire porte le pavillon. Si donc un acte délictueux commis sur un navire en haute mer produit ses effets sur un navire portant un autre pavillon ou sur un territoire étranger, il y a lieu d'appliquer les mêmes principes que s'il s'agissait de deux territoires d'États différents, et partant de constater qu'aucune règle de droit international ne défend à l'État dont relève le navire où les effets du délit se sont manifestés, de considérer ce délit comme s'il avait été commis dans son territoire et d'exercer des poursuites pénales contre le délinquant.

Cette conclusion ne saurait être tenue en échec que s'il était démontré qu'il y a une règle de droit international coutumier qui, dépassant le principe susénoncé, consacrerait la compétence exclusive de l'État du pavillon. Le Gouvernement français s'est efforcé de démontrer l'existence d'une pareille règle en ayant recours à la doctrine, aux précédents de la jurisprudence nationale

It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory ; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions et internationale, et surtout à des conventions qui, en même temps qu'elles dérogent au principe de la liberté de la mer, en permettant aux navires de guerre ou de police d'un État d'exercer une surveillance plus ou moins étendue sur les navires de commerce d'un autre État, réservent la juridiction aux tribunaux de l'État dont le navire poursuivi porte le pavillon.

De l'avis de la Cour, cette démonstration n'est pas concluante.

Tout d'abord, en ce qui concerne la doctrine, et quelle que puisse être par ailleurs sa valeur lorsqu'il s'agit de constater l'existence d'une règle de droit coutumier, il est certainement vrai que tous ou presque tous les auteurs enseignent que les navires en pleine mer sont soumis exclusivement à la juridiction de l'État du pavillon. Mais ce qui importe est la signification qu'ils attachent à ce principe ; or, il n'apparaît pas que, généralement, les auteurs donnent à ce principe une portée différente et plus large que celle qui a été exposée ci-dessus et qui revient à dire que la juridiction de l'État sur les navires en haute mer a la même étendue que sa juridiction dans son propre territoire. Par contre, il ne manque pas d'auteurs qui, ayant examiné de près la question spéciale de savoir si un État peut poursuivre des délits commis à bord d'un navire étranger en haute mer, arrivent à la conclusion ferme que ces délits doivent être considérés comme s'ils avaient été commis dans le territoire de l'État dont le navire porte le pavillon, et que, partant, les règles générales de chaque législation concernant les délits commis à l'étranger leur sont applicables.

Quant aux précédents, il convient d'observer en premier lieu que, réserve faite pour les cas d'abordage dont il sera parlé plus loin, aucun n'a trait à des délits qui auraient intéressé deux navires battant le pavillon de deux États différents, et que, partant, ils ne sauraient avoir beaucoup d'importance dans l'affaire qui est devant la Cour. Le cas du *Costa Rica Packet* ne fait pas exception, car la pirogue sur laquelle les actes de déprédation avaient eu lieu était à la dérive sans pavillon ni équipage, et cette circonstance n'a pas été sans exercer une influence, peut-être décisive, sur la conclusion à laquelle l'arbitre est arrivé.

Par contre, il ne manque pas de cas dans lesquels un État a fait valoir son droit de poursuivre un délit commis à bord d'un navire étranger et qu'il regardait comme punissable d'après sa législation. C'est ainsi que la Grande-Bretagne a refusé aux États-of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

In the Court's opinion, the existence of such a rule has not been conclusively proved.

In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable.

In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offences affecting two ships flying the flags of two different countries, and that consequently they are not of much importance in the case before the Court. The case of the *Costa Rica Packet* is no exception, for the prauw on which the alleged depredations took place was adrift without flag or crew, and this circumstance certainly influenced, perhaps decisively, the conclusion arrived at by the arbitrator.

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United

Unis l'extradition de John Anderson, matelot anglais, qui avait commis un homicide à bord d'un navire américain, en alléguant qu'elle ne contestait pas la juridiction des États-Unis, mais qu'elle avait le droit d'exercer la sienne concurremment. Ce précédent, auquel d'autres pourraient être ajoutés, est pertinent, malgré la nationalité britannique d'Anderson, pour démontrer que le principe de la juridiction exclusive du pays du pavillon n'est pas universellement admis.

Les cas dans lesquels la compétence exclusive de l'État du pavillon a été reconnue, semblent être plutôt des cas dans lesquels l'État étranger n'était intéressé qu'au titre de la nationalité de la victime, titre que la législation de cet État même ou la jurisprudence de ses tribunaux ne regardaient pas comme suffisant pour autoriser la poursuite d'un délit commis par un étranger à l'étranger.

Pour ce qui a trait enfin aux conventions qui réservent expressément la juridiction exclusive de l'État du pavillon, il n'est pas absolument certain que cette réserve doive être regardée comme le maintien du droit commun plutôt que comme la contre-partie de la compétence extraordinaire que ces conventions reconnaissent aux navires d'État d'un pays déterminé à l'égard des navires d'un autre pays en haute mer. A part cela, il y a lieu d'observer que dans ces conventions, il s'agit de faits d'un caractère particulier, étroitement liés avec la police des mers, tels que traite des esclaves, endommagement de câbles sous-marins, pêche, etc., et non de délits de droit commun. Surtout, il y a lieu de rappeler que les délits prévus par les conventions dont il s'agit ne mettent en jeu qu'un seul navire ; on ne saurait donc en tirer aucune conclusion à l'égard de faits qui mettent en présence deux navires et, partant, deux juridictions d'États différents.

La Cour arrive donc à la conclusion que le second argument invoqué par le Gouvernement français, pas plus que le premier, ne conduit à admettre l'existence d'une règle de droit international, qui aurait défendu à la Turquie d'exercer des poursuites pénales contre le lieutenant Demons.

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Il ne reste plus alors qu'à examiner le troisième argument allégué par le Gouvernement français et à rechercher si une règle

States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship ; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

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It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially spéciale aux cas d'abordage serait formée, d'après laquelle les poursuites pénales seraient du ressort exclusif de l'État du pavillon.

Dans cet ordre d'idées, l'agent du Gouvernement français a appelé l'attention de la Cour sur le fait que les questions de compétence en matière d'abordage, si fréquentes devant les juridictions civiles, ne se rencontrent que très rarement dans la jurisprudence des tribunaux répressifs. Il en déduit que, en fait, la poursuite pénale ne se présente que devant les tribunaux de l'État du pavillon et qu'il y aurait là la preuve d'un consentement tacite des États et, partant, l'expression du droit international positif en matière d'abordage.

De l'avis de la Cour, cette conclusion n'est pas fondée. Même si la rareté des décisions judiciaires que l'on peut trouver dans les recueils de jurisprudence était une preuve suffisante du fait invoqué par l'agent du Gouvernement français, il en résulterait simplement que les États se sont souvent abstenus, en fait, d'exercer des poursuites pénales, et non qu'ils se reconnaissent obligés de ce faire ; or, c'est seulement si l'abstention était motivée par la conscience d'un devoir de s'abstenir que l'on pourrait parler de coutume internationale. Le fait allégué ne permet pas de conclure que les États aient été conscients de pareil devoir ; par contre, comme on le verra tout à l'heure, il y a d'autres circonstances qui sont de nature à persuader du contraire.

A la connaissance de la Cour, il n'y a pas de décisions de tribunaux internationaux en cette matière ; mais on a cité quelques décisions de tribunaux nationaux. Sans rechercher quelle valeur on pourrait attribuer à des jugements de tribunaux nationaux lorsqu'il s'agit d'établir l'existence d'une règle de droit international, il suffira de constater que les décisions alléguées sont à l'appui tantôt d'une opinion, tantôt de l'autre. Si le cas de l'*Ortigia* — *Oncle-Joseph* devant la Cour d'Aix et celui du *Franconia* — *Strathclyde* devant la Cour anglaise des *Crown Cases Reserved* ont pu être invoqués par le Gouvernement français comme étant en faveur de la compétence exclusive de l'État du pavillon, par contre, le cas de l'*Ortigia* — *Oncle-Joseph* devant les tribunaux italiens et celui de l'*Ekbatana* — *West-Hinder* devant les tribunaux belges ont été cités à l'appui de la thèse contraire.

De longues discussions ont eu lieu entre les Parties quant à l'importance de chacune de ces décisions, pour les détails desquelles applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so ; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty ; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter ; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the *Ortigia—Oncle-Joseph* case before the Court of Aix and the *Franconia—Strathclyde* case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the *Ortigia—Oncle-Joseph* case before the Italian Courts and the *Ekbatana—West-Hinder* case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details la Cour se borne à renvoyer aux Mémoires et Contre-Mémoires des Parties. La Cour ne croit pas nécessaire de s'y attarder. Il lui suffit de constater que, la jurisprudence nationale étant ainsi partagée, il n'est guère possible d'y voir un indice de l'existence de la règle restrictive de droit international, qui seule pourrait servir de fondement à la thèse du Gouvernement français.

En revanche, la Cour croit devoir souligner le fait qu'il n'apparaît pas que les États intéressés se soient opposés aux poursuites pénales relatives à des cas d'abordage devant les tribunaux d'un pays autre que celui du pavillon ou qu'ils aient avancé des protestations : leur conduite ne semble guère avoir été différente de celle qu'ils tiennent dans tous les cas de juridictions concurrentes. Cette circonstance va directement à l'encontre de l'existence du consentement tacite des États en faveur de la compétence exclusive de l'État du pavillon, que l'agent du Gouvernement français a cru pouvoir déduire de la rareté des questions de compétence devant les tribunaux répressifs. Il ne semble guère probable, et il ne serait pas conforme à la pratique internationale, que le Gouvernement français dans le cas de l'*Ortigia — Oncle-Joseph* et le Gouvernement allemand dans celui de l'*Ekbatana — West-Hinder* eussent omis de protester contre l'exercice de la juridiction pénale de la part des tribunaux italiens et belges, si vraiment ils avaient pensé qu'il y avait là une violation du droit international.

Quant à l'affaire du *Franconia* (R. v. Keyn 1877, L. R. 2 Ex. Div. 63), sur laquelle l'agent du Gouvernement français s'est particulièrement appuyé, il convient d'observer que la partie de la décision qui est le plus étroitement reliée au cas présent, est la partie qui a trait à la localisation du délit sur le navire abordeur.

Or, quelle que soit, par ailleurs, la valeur de la thèse adoptée par la majorité des juges sur ce point précis, il ne semble guère douteux que si, dans l'esprit de ces juges, elle découlait d'une règle de droit international, leur conception de ce droit, particulière à la jurisprudence anglaise, est loin d'être généralement admise, même dans les pays de *common law*. Cette manière de voir semble d'ailleurs confirmée par le fait que le point de vue auquel s'est placée la majorité des juges en ce qui a trait à la localisation d'un délit dont l'auteur se trouve dans le territoire d'un État et dont les of which the Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests : their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia—Oncle-Joseph* case and the German Government in the *Ekbatana—West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

As regards the *Franconia* case (R. v. Keyn 1877, L. R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one effets se réalisent dans un autre État, a été abandonné dans des décisions anglaises plus récentes (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). Cette évolution de la jurisprudence anglaise vient à l'appui de la thèse d'après laquelle le droit international laisse toute liberté aux États sous ce rapport.

A l'appui de la thèse d'après laquelle la compétence pénale dans les cas d'abordage appartiendrait exclusivement à l'État du pavillon, on a fait valoir qu'il s'agit de l'observation des règlements nationaux de chaque marine, et que la sanction efficace ne consiste pas autant à infliger au capitaine quelques mois de prison qu'à lui retirer son brevet de capitaine, c'est-à-dire le commandement du navire.

A cet égard, la Cour doit souligner que les poursuites ont lieu pour un délit de droit commun et non pour une infraction disciplinaire. Ni la nécessité de tenir compte d'un règlement administratif (même en laissant de côté la circonstance qu'il s'agit de règlements uniformes adoptés par les États à la suite d'une conférence internationale), ni l'impossibilité d'appliquer certaines sanctions disciplinaires, ne sauraient empêcher l'application de la loi pénale et des mesures répressives pénales.

La conclusion à laquelle la Cour arrive est donc qu'il n'existe pas de règle de droit international, relative aux cas d'abordage, qui réserverait les poursuites pénales à la compétence exclusive de l'État du pavillon.

Cette conclusion s'explique d'ailleurs assez facilement si l'on tient compte de la manière dont l'abordage met en présence deux juridictions d'États différents.

Le délit pour lequel le lieutenant Demons semble avoir été poursuivi serait un acte ayant sa manifestation initiale — négligence ou imprudence — à bord du *Lotus*, tandis que ses effets se sont produits sur le *Boz-Kourt*. Entre ces deux éléments, il y a une indivisibilité juridique absolue, à tel point que, une fois ces éléments séparés, le délit n'existe plus. Ni la compétence exclusive de l'un ou de l'autre État, ni la compétence de l'un et de l'autre limitée aux faits qui se sont passés sur le navire respectif, ne semblent de nature à satisfaire aux exigences de la justice et à une protection efficace des intérêts des deux États. Il n'est que naturel que chacun puisse exercer sa juridiction et que cette juridiction s'étende au fait

State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect.

In support of the theory in accordance with which criminal jurisdiction in collision cases would exclusively belong to the State of the flag flown by the ship, it has been contended that it is a question of the observance of the national regulations of each merchant marine and that effective punishment does not consist so much in the infliction of some months' imprisonment upon the captain as in the cancellation of his certificate as master, that is to say, in depriving him of the command of his ship.

In regard to this, the Court must observe that in the present case a prosecution was instituted for an offence at criminal law and not for a breach of discipline. Neither the necessity of taking administrative regulations into account (even ignoring the circumstance that it is a question of uniform regulations adopted by States as a result of an international conference) nor the impossibility of applying certain disciplinary penalties can prevent the application of criminal law and of penal measures of repression.

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect tout entier. On est donc en présence d'un cas de juridictions concurrentes.

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La Cour, étant arrivée à la conclusion que les arguments invoqués par le Gouvernement français, ou bien ne sont pas pertinents en l'espèce, ou bien ne démontrent pas l'existence d'un principe du droit international qui excluerait la compétence de la Turquie d'entreprendre les poursuites en fait exercées contre le lieutenant Demons, constate que, dans l'accomplissement de sa tâche de connaître elle-même le droit international, elle ne s'est pas bornée à cet examen, mais a étendu ses recherches à tous précédents, doctrines et faits qui lui étaient accessibles et qui auraient, le cas échéant, pu révéler l'existence d'un des principes du droit international visés par le compromis. Ces recherches n'ont pas abouti à un résultat affirmatif. Il y a donc lieu de constater qu'aucun principe de droit international, dans le sens de l'article 15 de la Convention de Lausanne du 24 juillet 1923, ne s'oppose à l'exercice des poursuites pénales dont il s'agit. En conséquence, la Turquie, en intentant, en vertu de la liberté que le droit international laisse à tout État souverain, les poursuites pénales en question, n'a pu, en l'absence de pareils principes, agir en contradiction des principes du droit international aux termes du compromis.

La Cour constate enfin qu'elle n'a pas besoin de s'occuper de la question de savoir si le fait que les poursuites pénales dirigées contre le lieutenant Demons étaient connexes à celles contre le capitaine du *Boz-Kourt* serait de nature à justifier l'extension de la juridiction turque. Cette question ne se serait posée qu'au cas où la Cour serait arrivée à la conclusion qu'une règle de droit international défendait à la Turquie d'exercer des poursuites pénales contre le lieutenant Demons, car alors seulement il y aurait eu lieu de se demander si ladite règle pouvait être tenue en échec par le fait de la connexité.

of the incident as a whole. It is therefore a case of concurrent jurisdiction.

* * *

The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

In the last place the Court observes that there is no need for it to consider the question whether the fact that the prosecution of Lieutenant Demons was "joint" (*connexe*) with that of the captain of the *Boz-Kourt* would be calculated to justify an extension of Turkish jurisdiction. This question would only have arisen if the Court had arrived at the conclusion that there was a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons; for only in that case would it have been necessary to ask whether that rule might be overridden by the fact of the "connexity" (*connexité*) of the offences.

V.

Ayant ainsi répondu négativement à la première question posée par le compromis, la Cour n'a pas à s'occuper de la seconde question, relative à la réparation pécuniaire qui, éventuellement, aurait pu être due en faveur du lieutenant Demons.

PAR CES MOTIFS,

La Cour,

jugeant contradictoirement,
décide, les voix étant également partagées, par la voix prépondérante du Président :

1) qu'en exerçant, à la suite de la collision survenue le 2 août 1926 en haute mer entre le vapeur français *Lotus* et le vapeur turc *Boz-Kourt,* et lors de l'arrivée du navire français à Stamboul, des poursuites pénales en vertu de la législation turque contre le lieutenant Demons, officier de quart à bord du *Lotus* au moment de la collision, en raison de la perte du *Boz-Kourt* ayant entraîné la mort de huit ressortissants turcs, la Turquie n'a pas, contrairement à l'article 15 de la Convention de Lausanne du 24 juillet 1923 relative à l'établissement et à la compétence judiciaire, agi en contradiction des principes du droit international ;

2) que, dès lors, il n'y a pas lieu de statuer sur la question de la réparation pécuniaire qui aurait éventuellement été due en faveur du lieutenant Demons au cas où la Turquie, en intentant des poursuites contre cet officier ainsi qu'il a été dit ci-dessus, aurait agi en contradiction des principes du droit international.

Le présent arrêt ayant été rédigé en français, conformément aux dispositions de l'article 39, premier alinéa, deuxième phrase, du Statut de la Cour, une traduction en anglais y est jointe.

V.

Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons.

FOR THESE REASONS,

The Court,

having heard both Parties,
gives, by the President's casting vote—the votes being equally divided—, judgment to the effect

(1) that, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamship *Lotus* and the Turkish steamship *Boz-Kourt*, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the *Lotus* at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction ;

(2) that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law.

This judgment having been drawn up in French in accordance with the terms of Article 39, paragraph 1, second sentence, of the Statute of the Court, an English translation is attached thereto.

Fait au Palais de la Paix, à La Haye, le sept septembre mil neuf cent vingt-sept, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis aux agents des Gouvernements parties en cause respectivement.

Le Président :

(*Signé*) MAX HUBER.

Le Greffier :

(*Signé*) Å. HAMMARSKJÖLD.

MM. Loder, ancien Président, Weiss, Vice-Président, et lord Finlay, MM. Nyholm et Altamira, juges, déclarant ne pas pouvoir se rallier à l'arrêt rendu par la Cour et se prévalant du droit que leur confère l'article 57 du Statut, ont joint audit arrêt les exposés suivants de leur opinion individuelle.

M. Moore, dont l'opinion diffère de l'arrêt uniquement en raison des rapports entre les poursuites pénales visées en l'espèce et l'article 6 du Code pénal turc, a également joint l'exposé de son opinion individuelle.

(*Paraphé*) M. H.

(*Paraphé*) Å. H.

Done at the Peace Palace, The Hague, this seventh day of September, nineteen hundred and twenty-seven, in three copies, one of which is to be placed in the archives of the Court, and the others to be transmitted to the Agents of the respective Parties.

(*Signed*) MAX HUBER,
President.

(*Signed*) Å. HAMMARSKJÖLD,
Registrar.

MM. Loder, former President, Weiss, Vice-President, and Lord Finlay, MM. Nyholm and Altamira, Judges, declaring that they are unable to concur in the judgment delivered by the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

Mr. Moore, dissenting from the judgment of the Court only on the ground of the connection of the criminal proceedings in the case with Article 6 of the Turkish Penal Code, also delivered a separate opinion.

(*Initialled*) M. H.

(*Initialled*) Å. H.

Forrest-038

Lisbon Agreement for the Protection of Appellations of Origin and their International Registration

of October 31, 1958,
as revised at Stockholm on July 14, 1967,
and as amended on September 28, 1979

Article 1

[Establishment of a Special Union; Protection of Appellations of Origin Registered at the International Bureau][1]

(1) The countries to which this Agreement applies constitute a Special Union within the framework of the Union for the Protection of Industrial Property.

(2) They undertake to protect on their territories, in accordance with the terms of this Agreement, the appellations of origin of products of the other countries of the Special Union, recognized and protected as such in the country of origin and registered at the International Bureau of Intellectual Property (hereinafter designated as “the International Bureau” or “the Bureau”) referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as “the Organization”).

Article 2

[Definition of Notions of Appellation of Origin and Country of Origin]

(1) In this Agreement, “appellation of origin” means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

(2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.

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[1] Articles have been given titles to facilitate their identification. There are no titles in the signed French text. The title of Article 6 has been modified, compared to the previous edition.

Article 3

[Content of Protection]

Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as “kind,” “type,” “make,” “imitation”, or the like.

Article 4

[Protection by virtue of Other Texts]

The provisions of this Agreement shall in no way exclude the protection already granted to appellations of origin in each of the countries of the Special Union by virtue of other international instruments, such as the Paris Convention of March 20, 1883, for the Protection of Industrial Property and its subsequent revisions, and the Madrid Agreement of April 14, 1891, for the Repression of False or Deceptive Indications of Source on Goods and its subsequent revisions, or by virtue of national legislation or court decisions.

Article 5

[International Registration; Refusal; Notifications;
Use Tolerated for a Fixed Period]

(1) The registration of appellations of origin shall be effected with the International Bureau, at the request of the Authorities of the countries of the Special Union, in the name of any natural persons or legal entities, public or private, having, according to their national legislation, the right to use such appellations.

(2) The International Bureau shall, without delay, notify the Authorities of the various countries of the Special Union of such registrations, and shall publish them in a periodical.

(3) The Authority of any country may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it, but only in so far as its declaration is notified to the International Bureau, together with an indication of the grounds therefor, within a period of one year from the receipt of the notification of registration, and provided that such declaration is not detrimental, in the country concerned, to the other forms of protection of the appellation which the owner thereof may be entitled to claim under Article 4, above.

(4) Such declaration may not be opposed by the Authorities of the countries of the Union after the expiration of the period of one year provided for in the foregoing paragraph.

(5) The International Bureau shall, as soon as possible, notify the Authority of the country of origin of any declaration made under the terms of paragraph (3) by the Authority of another country. The interested party, when informed by his national Authority of the declaration made by another country, may resort, in that other country, to all the judicial and administrative remedies open to the nationals of that country.

(6) If an appellation which has been granted protection in a given country pursuant to notification of its international registration has already been used by third parties in that country from a date prior to such notification, the competent Authority of the said country shall have the right to grant to such third parties a period not exceeding two years to terminate such use, on condition that it advise the International Bureau accordingly during the three months following the expiration of the period of one year provided for in paragraph (3), above.

Article 6

[Shield Against Becoming Generic]

An appellation which has been granted protection in one of the countries of the Special Union pursuant to the procedure under Article 5 cannot, in that country, be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin.

Article 7

[Period of Validity of Registration; Fee]

(1) Registration effected with the International Bureau in conformity with Article 5 shall ensure, without renewal, protection for the whole of the period referred to in the foregoing Article.

(2) A single fee shall be paid for the registration of each appellation of origin.

Article 8

[Legal Proceedings]

Legal action required for ensuring the protection of appellations of origin may be taken in each of the countries of the Special Union under the provisions of the national legislation:

1. at the instance of the competent Authority or at the request of the public Prosecutor;

2. by any interested party, whether a natural person or a legal entity, whether public or private.

Article 9

[Assembly of the Special Union]

(1) (a) The Special Union shall have an Assembly consisting of those countries which have ratified or acceded to this Act.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) (a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Special Union and the implementation of this Agreement;

(ii) give directions to the International Bureau concerning the preparation for revision conferences, due account being taken of any comments made by those countries of the Special Union which have not ratified or acceded to this Act;

(iii) modify the Regulations, including the fixation of the amount of the fee referred to in Article 7(2) and other fees relating to international registration;

(iv) review and approve the reports and activities of the Director General of the Organization (hereinafter designated as “the Director General”) concerning the Special Union, and give him all necessary instructions concerning matters within the competence of the Special Union;

(v) determine the program and adopt the biennial budget of the Special Union, and approve its final accounts;

(vi) adopt the financial regulations of the Special Union;

(vii) establish such committees of experts and working groups as it may deem necessary to achieve the objectives of the Special Union;

(viii) determine which countries not members of the Special Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(ix) adopt amendments to Articles 9 to 12;

(x) take any other appropriate action designed to further the objectives of the Special Union;

(xi) perform such other functions as are appropriate under this Agreement.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) (a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 12(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(f) A delegate may represent, and vote in the name of, one country only.

(g) Countries of the Special Union not members of the Assembly shall be admitted to the meetings of the latter as observers.

(4) (a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of one-fourth of the countries members of the Assembly.

(c) The agenda of each session shall be prepared by the Director General.

(5) The Assembly shall adopt its own rules of procedure.

Article 10

[International Bureau]

(1) (a) International registration and related duties, as well as all other administrative tasks concerning the Special Union, shall be performed by the International Bureau.

(b) In particular, the International Bureau shall prepare the meetings and provide the secretariat of the Assembly and of such committees of experts and working groups as may have been established by the Assembly.

(c) The Director General shall be the chief executive of the Special Union and shall represent the Special Union.

(2) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly and of such committees of experts or working groups as may have been established by the Assembly. The Director General, or a staff member designated by him, shall be *ex officio* secretary of those bodies.

(3) (a) The International Bureau shall, in accordance with the directions of the Assembly, make the preparations for the conferences to revise the provisions of the Agreement other than Articles 9 to 12.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for revision conferences.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at those conferences.

(4) The International Bureau shall carry out any other tasks assigned to it.

Article 11

[Finances]

(1) (a) The Special Union shall have a budget.

(b) The budget of the Special Union shall include the income and expenses specific to the Special Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Special Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Special Union in such common expenses shall be in proportion to the interest the Special Union has in them.

(2) The budget of the Special Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Special Union shall be financed from the following sources:

(i) international registration fees collected under Article 7(2) and fees and charges due for other services rendered by the International Bureau in relation to the Special Union;

(ii) proceeds from the sale of, or royalties on, the publications of the International Bureau concerning the Special Union;

(iii) gifts, bequests, and subventions;

(iv) rents, interest, and other miscellaneous income;

(v) contributions of the countries of the Special Union, if and to the extent to which receipts from the sources indicated in items (i) to (iv) do not suffice to cover the expenses of the Special Union.

(4) (a) The amount of the fee referred to in Article 7(2) shall be fixed by the Assembly on the proposal of the Director General.

(b) The amount of the said fee shall be so fixed that the revenue of the Special Union should, under normal circumstances, be sufficient to cover the expenses of the International Bureau for maintaining the international registration service, without requiring payment of the contributions referred to in paragraph (3)(v), above.

(5) (a) For the purpose of establishing its contribution referred to in paragraph (3)(v), each country of the Special Union shall belong to the same class as it belongs to in the Paris Union for the Protection of Industrial Property, and shall pay its annual contributions on the basis of the same number of units as is fixed for that class in that Union.

(b) The annual contribution of each country of the Special Union shall be an amount in the same proportion to the total sum to be contributed to the annual budget of the Special Union by all countries as the number of the units of the class to which it belongs is to the total of the units of all contributing countries.

(c) The date on which contributions are to be paid shall be fixed by the Assembly.

(d) A country which is in arrears in the payment of its contributions may not exercise its right to vote in any of the organs of the Special Union if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, such a country may be allowed to continue to exercise its right to vote in that organ if, and as long as, the latter is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(e) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, as provided in the financial regulations.

(6) Subject to the provisions of paragraph (4)(a), the amount of fees and charges due for other services rendered by the International Bureau in relation to the Special Union shall be established, and shall be reported to the Assembly, by the Director General.

(7) (a) The Special Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Special Union. If the fund becomes insufficient, the Assembly shall decide to increase it.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country as a member of the Paris Union for the Protection of Industrial Property to the budget of the said Union for the year in which the fund is established or the decision to increase it is made.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(8) (a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of those advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(9) The auditing of the accounts shall be effected by one or more of the countries of the Special Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

Article 12

[Amendment of Articles 9 to 12]

(1) Proposals for the amendment of Articles 9, 10, 11, and the present Article, may be initiated by any country member of the Assembly, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment to Article 9, and to the present paragraph, shall require
four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Special Union shall bind only those countries which have notified their acceptance of such amendment.

Article 13

[Regulations; Revision]

(1) The details for carrying out this Agreement are fixed in the Regulations.

(2) This Agreement may be revised by conferences held between the delegates of the countries of the Special Union.

Article 14

[Ratification and Accession; Entry into Force; Reference to Article 24 of Paris Convention (Territories); Accession to the Act of 1958]

(1) Any country of the Special Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it.

(2) (a) Any country outside the Special Union, which is party to the Paris Convention for the Protection of Industrial Property, may accede to this Act and thereby become a member of the Special Union.

(b) Notification of accession shall, of itself, ensure, in the territory of the acceding country, the benefits of the foregoing provisions to appellations of origin which, at the time of accession, are the subject of international registration.

(c) However, any country acceding to this Agreement may, within a period of one year, declare in regard to which appellations of origin, already registered at the International Bureau, it wishes to exercise the right provided for in Article 5(3).

(3) Instruments of ratification and accession shall be deposited with the Director General.

(4) The provisions of Article 24 of the Paris Convention for the Protection of Industrial Property shall apply to this Agreement.

(5) (a) With respect to the first five countries which have deposited their instruments of ratification or accession, this Act shall enter into force three months after the deposit of the fifth such instrument.

(b) With respect to any other country, this Act shall enter into force three months after the date on which its ratification or accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of ratification or accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(6) Ratification or accession shall automatically entail acceptance of all the clauses and admission to all the advantages of this Act.

(7) After the entry into force of this Act, a country may accede to the original Act of October 31, 1958, of this Agreement only in conjunction with ratification of, or accession to, this Act.

Article 15

[Duration of the Agreement; Denunciation]

(1) This Agreement shall remain in force as long as five countries at least are party to it.

(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of the original Act of October 31, 1958, of this Agreement and shall affect only the country making it, the Agreement remaining in full force and effect as regards the other countries of the Special Union.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided for by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Special Union.

Article 16

[Applicable Acts]

(1) (a) This Act shall, as regards the relations between the countries of the Special Union by which it has been ratified or acceded to, replace the original Act of October 31, 1958.

(b) However, any country of the Special Union which has ratified or acceded to this Act shall be bound by the original Act of October 31, 1958, as regards its relations with countries of the Special Union which have not ratified or acceded to this Act.

(2) Countries outside the Special Union which become party to this Act shall apply it to international registrations of appellations of origin effected at the International Bureau at the request of the Authority of any country of the Special Union not party to this Act, provided that such registrations satisfy, with respect to the said countries, the requirements of this Act. With regard to international registrations effected at the International Bureau at the request of the Authorities of the said countries outside the Special Union which become party to this Act, such countries recognize that the aforesaid country of the Special Union may demand compliance with the requirements of the original Act of October 31, 1958.

Article 17
[Signature, Languages, Depository Functions]

(1) (a) This Act shall be signed in a single copy in the French language and shall be deposited with the Government of Sweden.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in such other languages as the Assembly may designate.

(2) This Act shall remain open for signature at Stockholm until January 13, 1968.

(3) The Director General shall transmit two copies, certified by the Government of Sweden, of the signed text of this Act to the Governments of all countries of the Special Union and, on request, to the Government of any other country.

(4) The Director General shall register this Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries of the Special Union of signatures, deposits of instruments of ratification or accession, entry into force of any provisions of this Act, denunciations, and declarations pursuant to Article 14(2)(c) and (4).

Article 18
[Transitional Provisions]

(1) Until the first Director General assumes office, references in this Act to the International Bureau of the Organization or to the Director General shall be construed as references to the Bureau of the Union established by the Paris Convention for the Protection of Industrial Property or its Director, respectively.

(2) Countries of the Special Union not having ratified or acceded to this Act may, until five years after the entry into force of the Convention establishing the Organization, exercise, if they so desire, the rights provided for under Articles 9 to 12 of this Act as if they were bound by those Articles. Any country desiring to exercise such rights shall give written notification to that effect to the Director General; such notification shall be effective from the date of its receipt. Such countries shall be deemed to be members of the Assembly until the expiration of the said period.

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GUIDE

TO THE APPLICATION OF THE

PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

AS REVISED AT STOCKHOLM IN 1967

by

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Director of BIRPI

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Guide to the Application of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967

I. INTRODUCTORY OBSERVATIONS

The number of States party to the Paris Convention for the Protection of Industrial Property has increased rapidly in recent years : on January 1, 1963, 51 States had acceded to the Convention ; on January 1, 1968, this number had risen to 79. A further increase may be expected in the near future, as many States are known to be studying or preparing their accession to the Convention. In view of these facts many more governments, national administrations or courts, practitioners, inventors, and industrial or commercial enterprises will have to apply, or may request the application of, the Convention than ever before. It has therefore appeared useful to establish a concise Guide, briefly commenting upon the principal provisions of the Convention and indicating replies to the main questions which may arise from day to day in relation to its application.

Since the International Bureau, which is entrusted with the administration of the Convention, is not competent to determine how it should be interpreted, the views expressed in this Guide are only those of the author. The International Bureau has limited its role to the publication of the Guide in view of its presumed usefulness.

The purpose of the Guide is to deal in a very simple manner with the principal questions relating to the application of the Convention.

For that reason, theoretical considerations have been omitted, other literature is only occasionally mentioned, and national legislations and case law are cited only as examples. Another reason for these latter limitations is that the author's knowledge of languages is unfortunately limited, so that laws, administrative or judicial decisions and legal studies not published in any language known to him will probably have escaped him. In these circumstances, a certain lack of balance would exist if much attention were given to publications in one language and none to equally important publications in another.

The Guide comments on the Paris Convention as revised at Stockholm in 1967. The Stockholm text is not yet in force at the time of publication of the Guide, but it will no doubt soon become the text of the Convention adhered to by many countries. Since, moreover, with one exception (addition of Article 4 I(1) and (2)), the Stockholm text of the Convention differs from the preceding Lisbon text only in the administrative and final clauses (Artices 13 to 30), the Stockholm text seemed to constitute an appropriate basis for a commentary. This commentary is based on the official text of the Convention in English,[1] established in application of Article 29(1)*(b)* of the Convention, a text which presents some differences as to form with the former official English translation of the Lisbon text.

The Guide, after briefly sketching the history and the principal rules of the Convention, comments upon each of its articles and paragraphs separately.

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[1] See *I.P.*, 1968, p. 122.

II. HISTORY AND PRINCIPAL RULES OF THE CONVENTION

The Convention was drafted, after preparatory work in 1873 and 1878, at a Diplomatic Conference in Paris in 1880, signed, with an additional Final Protocol, by 11 States[1] at a similar Conference in 1883 and ratified by these States in 1884.[2] It entered into force one month after the deposit of the instruments of ratification, on July 7, 1884.

The Convention specified that the contracting States constituted themselves into a *Union* for the protection of industrial property, a legal construction the consequences of which will be examined hereinafter.

From the start, the Convention (Article 14) provided for periodical Conferences of Revision with a view to the introduction of amendments designed to improve its system. Such Conferences were held in Rome in 1886, in Madrid in 1890 and 1891, in Brussels in 1897 and 1900, and in Washington in 1911, but since none of the adopted texts is still binding on any of the member States they need not be commented upon as such. Further revisions of the Convention took place at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967. All these last-mentioned texts are, or will soon be, in force between some member States; the relations between States bound by different texts will be examined below.

In discussing the articles and paragraphs of the Convention hereinafter, the development of each provision will be traced throughout the different revisions of the Convention, in order to facilitate further study of the background of each provision in the Acts of each Revision

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[1] Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland.

[2] At the same time instruments of accession were deposited by Ecuador, Tunisia and the United Kingdom

Conference.[1] Where, in many cases, special reference is made to the history of a provision of the Convention, the purpose is to indicate the questions which were before the Conference or Conferences which established the provision, and to illustrate or clarify its meaning.

As to the *principal rules* of the Convention, a distinction must be made between four different categories of rules which it contains :

1. First, the Convention contains provisions of *international public law* regulating *rights and obligations of the member States* and establishing the *organs of the Union* created by the Convention, as well as provisions of an *administrative character.* Examples of this category are :

Article 6*ter*(3) and (4), requiring or allowing the member States—and international organizations of which at least one of these States is a member—to make certain communications concerning emblems, etc., to be excluded from registration and use as trademarks ;

Article 12, which requires the member States to establish a national industrial property service which will issue certain publications (cf. also Article 4 D(2)) ;

Article 13, which establishes an Assembly consisting of the member States, and deals with the composition, the powers and duties of the Assembly, and its voting procedure ;

Article 14, establishing an Executive Committee, again with provisions as to its composition, powers, etc ;

Article 15, regulating the functioning of the International Bureau, which will perform the administrative tasks concerning the Union established by the Convention ;

Article 16, regarding finances, that is, the budget of the Union, the contributions of the member States, etc ;

Articles 17 and 18, concerning the amendment of Articles 13 to 17 and revision of the other Articles of the Convention ;

Article 19, envisaging the possibility of special agreements between the member States, which must not, however, contravene the provisions of the Convention ;

Article 20, concerning ratification of and accession to the Convention by countries already members of the Union, that is, countries party to an earlier Act of the Convention ;

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[1] With respect to the Revision Conference of Stockholm in 1967, references will be limited to those documents of the Conference which, at the time of writing this Guide, were already published; this was not the case as far as the complete Acts of the Conference of Stockholm are concerned.

Article 21, regarding accession by countries outside the Union ;
Article 22, dealing with the consequences of ratification or accession ;
Articles 23 and 27, regarding the relationship with earlier Acts of the Convention ;
Article 24, regulating the possibility of applying the Convention to dependent territories ;
Article 26, concerning the duration and denunciation of the Convention ;
Article 28, relating to disputes between member States concerning the interpretation or application of the Convention ;
Article 29, concerning signature of the Convention, languages and depositary functions ;
Article 30, containing transitional provisions.

2. Secondly, the Convention contains provisions which *require* or *permit* the member States to *legislate* within the field of industrial property.

In this category the following provisions may be mentioned :

Article 4 D(1), (3), (4) and (5), requiring or allowing member States to regulate certain details concerning the right of priority ;
Article 4 G(2), second sentence, containing a similar rule regarding the division of patent applications ;
Article 5 A(2), granting member States the right to legislate against abuses which might result from the exercise of the exclusive rights conferred by a patent ;
Article 5*bis*(2), granting member States the right to provide for the restoration of patents which have lapsed by reason of non-payment of fees ;
Article 6*bis*(2), second sentence, enabling member States to provide a period within which the prohibition must be sought of use by a third party, not made in bad faith, of a mark similar to a well-known mark ;
Article 6*septies*(3), enabling member States to provide an equitable time limit for the exercise of certain rights of the proprietor of a mark against his agent or representative ;
Article 10*bis*(1), requiring member States to assure effective protection against unfair competition ;
Article 10*ter*, obliging member States to provide legal remedies effectively to repress certain unlawful acts concerning trademarks, trade names, false indications of the source of goods or of the

identity of the producer, manufacturer or merchant, and unfair competition ;[1]

Article 11, requiring member States to grant temporary protection to patentable inventions, utility models, industrial designs and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them ; and, finally,

Article 25, containing the *general principle* that any country party to the Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of the Convention, and specifying that a country acceding to the Convention must be in a position under its domestic law to give effect to the provisions of the Convention.

3. A third category of provisions of the Convention relates to *substantive law* in the field of industrial property regarding *rights and obligations of private parties*, but only to the extent of *requiring the domestic law* of the member States to be applied to these parties.

Under this category comes the very important basic rule of the Convention, that nationals of each member State shall, as regards the protection of industrial property, enjoy in all other member States the advantages that their respective laws grant, or may grant in the future, to nationals of these latter member States (Article 2). Nationals of non-member States who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union must be treated in the same manner as nationals of the countries of the Union (Article 3).

This is called the principle of "*national treatment*," or "*assimilation with nationals*," a principle which means that, in the field of industrial property as defined by the Convention, each member State must apply to nationals of other member States (and those assimilated to such nationals by Article 3) the *same treatment as it gives to its own nationals*, without being allowed to require reciprocity. The idea of the Convention is that such reciprocity is sufficiently assured by the obligations involved in adherence to the Convention.

Other, more special, provisions by which the Convention requires the application of domestic legislation are Article 9(3), concerning

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[1] In contrast, Article 9(6) does not create any obligation for member States to legislate according to the preceding paragraphs of that Article: it merely has the character of an invitation which does not even create a moral obligation. Cf. *Actes de La Haye*, pp. 470, 525, 545.

seizure of goods unlawfully bearing a trademark or trade name, and Article 9(6), regarding other actions and remedies available in such cases, both provisions being equally applicable to false indications of source, etc. (cf. Article 10(1)).

With respect to those provisions of the Convention which require the application of the domestic law of member States, the question arises whether private parties may *directly claim* the application of domestic laws by the administrative and judicial authorities of the countries concerned, *by virtue of the provisions of the Convention*, or whether these latter provisions only create *obligations for member States*, whose *domestic laws* would then have to make special provision for "*national treatment*" of nationals of other member States in order to make these laws applicable in such cases.

This is the well-known question whether the cited provisions of the Convention are or are not "*self-executing*." The answer depends on two further questions: first, whether the constitution or constitutional system of the State concerned permits provisions of an international Convention to be "self-executing," that is, directly applicable to private parties without further intervention by the national legislation or possibly even against differing provisions of such legislation, and, secondly, whether the provisions of the international Convention concerned are so drafted as to permit such direct application to private parties. The first question will be discussed below; as to the second, there can be no doubt that the provisions of the Convention cited above may, and therefore must, be directly applied in countries which admit this possibility.

4. Finally, a fourth category of provisions of the Convention contains *rules of substantive law* regarding *rights and obligations of private parties*, rules however which do not merely refer to the application of domestic laws, but the contents of which may *directly govern the situation at issue*.

Here again the question arises whether these provisions *will*, in any given case, directly govern the situation at issue, that is, be considered as "self-executing," or whether national legislation is necessary to implement such provisions.

As has been observed above, this depends in the first place on the constitutional system of each member State.[1]

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[1] Cf. *Actes de Washington*, p. 269; *Actes de La Haye*, pp. 223/4.

In some countries, for example, France, the Soviet Union, the United States, the Netherlands and many others, the constitution or constitutional system permits administrative and judicial authorities to apply directly to private parties the provisions of an international treaty, if these provisions are worded in such a way as to make such direct application possible (" self-executing " provisions).[1] In these countries the provisions of the Convention which are considered "self-executing" may be applied and must be applied without any further intervention by the national legislator.

In other countries, for example, the United Kingdom, Norway, Sweden and several others, the provisions of an international treaty can bind only the *State* and are never applicable to private parties without first having been embodied in domestic legislation. In these countries the provisions of the Convention cannot be " self-executing " ; although they may, even without being binding, *influence* an administrative or judicial decision concerning domestic law, they can only become *binding* by application of Article 25 of the Convention, that is, when the country concerned introduces the rules of the Convention into its domestic law.

Whatever the constitutional system of the member States, the provisions of the Convention of the fourth category referred to above constitute a very important *body of common rules* regarding the protection of industrial property, rules which, either directly, or indirectly through the intermediary of national legislation, have to be respected and applied by all member States.

What remains to be decided in countries which admit the possibility of self-executing provisions of a convention is whether the provisions concerned are so worded *as to permit direct application.*

Provisions of this type are to be found, for example, in the definition of industrial property in Article 1, the right of priority regulated in Article 4, the independence of patents (Article 4*bis*), the right of the inventor to be mentioned in the patent (Article 4*ter*), the limitation of the possibilities of refusal and annulment of patents (Article 4*quater*), the regulation of the obligation to exploit patents, trademarks, etc. (Article 5, with the exception of paragraph A(2)), the period of grace for the payment of maintenance fees (Article 5*bis*(1)), the exemption, under certain circumstances, of ships, aircraft, land vehicles, etc., from infringement of patents (Article 5*ter*), the rights of the patentee of a

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[1] In some of these States the provisions of an international treaty overrule provisions of domestic law, even if the latter are of later date; in other States the later of both types of provisions prevails.

process of manufacture (Article 5*quater*), the conditions of registration and independence of trademarks (Article 6), the assignment of marks (Article 6*quater*), the protection of registered trademarks in other countries (Article 6*quinquies*), the registration of marks by agents, etc. (Article 6*septies*), the exclusion of all consideration of the nature of goods as a bar to the possible registration of a trademark for such goods (Article 7), the provision concerning the protection of trade names (Article 8), the recognition of interest in pursuing false indications of source, etc. (Article 10(2)), the designation of acts of unfair competition (Article 10*bis*(2) and (3)).[1]

Although these common rules regarding the protection of industrial property given in the Convention are of great importance, it should be noted, nevertheless, that their scope is limited and they leave *considerable freedom to the member States* to legislate on questions of industrial property according to their interests or preferences.

In the field of patents, for example, the Convention leaves the member States entirely free to establish the criteria for patentability, to decide whether patent applications should or should not be examined in order to determine, before a patent is granted, whether these criteria have been met, whether the patent should be granted to the first inventor or to the first applicant for a patent, or whether patents should be granted for products only, for processes only, or for both, and in which fields of industry and for what term.[2] With one exception (Article 5*quater*), the Convention does not specify either the acts of third parties against which a patent should protect the patentee, etc.

In the field of trademarks, the Convention does not prescribe whether the right to a trademark will be acquired either through registration or through use, or both. It also leaves the member States free to decide to what extent they desire to submit applications for registration of a trademark to examination. Neither is the scope of protection of a trademark defined in the Convention, except in a few special cases (Articles 6*bis*, 6*quinquies* and 6*septies*).

Other cases in which the Convention leaves the member States free to legislate will be examined below.

Another aspect of the considerable freedom left by the Convention to the domestic law of the member States is that such laws may grant

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[1] In the case of other provisions, for example, Articles 5*quinquies*, 6*bis*, 6*ter*, 5*sexies*, 7*bis*, their self-executing character is questionable. This will be discussed when these Articles are commented upon separately. Articles 9(1) to (5) and 10(1) are not self-executing because of Article 9(6).

[2] Cf. *Actes de La Haye*, p. 536.

a *more extensive protection* of industrial property than is prescribed in the Convention.[1]

For example, the member States may also grant "national treatment," that is, the treatment accorded to nationals in their national legislation, or certain rights provided in the Convention, such as the right of priority, to persons other than those entitled to such treatment by virtue of the Convention, namely, persons who are neither nationals of any country of the Union (Article 2), nor domiciled or established therein (Article 3). The member States may also improve the protection of industrial property prescribed in the Convention, for example, by protecting well-known trademarks (Article 6*bis*) against identical or similar marks for entirely different goods.

However, there is a limit to this freedom to enlarge the protection of industrial property prescribed in the Convention in that more extensive protection must not prejudice the rights granted by the Convention. This could be the case, for example, if a member State would grant to nationals of certain countries priority rights for longer periods than those of Article 4 C(1) of the Convention.

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[1] Cf. *Actes de Paris*, I, p. 131 .

III. COMMENTARY ON THE ARTICLES OF THE CONVENTION

ARTICLE 1, paragraph (1)*(a)*

(1) The countries *(b)* **to which this Convention** *(c)* **applies** *(d)* **constitute a Union** *(e)* **for the protection of industrial property** *(f)***.**

(a) The original text of the Convention of 1883 enumerated the States whose Governments declared that they constituted themselves into a Union for the protection of industrial property. These States were thereafter referred to in the Convention as " contracting States," " States of the Union " or " High Contracting Parties." This terminology was changed at the Revision Conference of Washington in 1911 where, in view of the diversity obtaining in the internal constitution of the contracting parties and the terminology adopted in this respect by similar Conventions,[1] Article 1 of the Convention was worded : " The contracting *countries* constitute themselves into a Union for the protection of industrial property." This text was further modified by the Revision Conference in London in 1934.[2]

(b) As indicated above, the Convention no longer speaks of " contracting *States* " but of " *countries* to which this Convention applies." As was observed at the Revision Conference of London in 1934,[3] the latter expression could also cover the extension of the scope of the Convention to colonies, etc., which, generally speaking, were not " States." This problem, however, was taken care of by what was then

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[1] *Actes de Washington*, p. 41, Note.

[2] *Actes de Londres*, pp. 166/7 (proposal), 340 (report of First Sub-Committee), 448 (report of Drafting Committee), 510 (adoption in Second Plenary Session).

[3] *Ibidem*, p. 166.

Article 16*bis* of the Convention (now, in modified form, Article 24 of the Stockholm text). The main reason for changing the expression " States " into " countries " was probably to enable countries not fully autonomous, such as several British " dominions " and French " protectorates," to claim the status of " country to which the Convention applies " and thus exert the right to vote in revision Conferences.[1]

These phenomena have now disappeared and, in view of the generally accepted rule of international public law according to which only *States* (apart from intergovernmental organizations) have the capacity to conclude treaties,[2] there is no reason to believe that " countries " in the Convention means anything other than " States. "[3]

This question is of some importance because the Convention does not provide any procedure for the admission of new members to the Union. Each member State being therefore its own judge in the matter, it is possible that existing members may not acknowledge the status of a " State " to an entity that newly accedes, and may therefore refuse to recognize its membership.[4]

(c) The Paris Convention, as revised since 1883, is in reality a *series of Conventions* embodied in the successive texts established at the Revision Conferences. However, this series of Conventions, called " Acts " (of the same Convention) since the Revision Conference of Washington in 1911, has constituted and maintained *one and the same Union.* Therefore, in the sentence " to which this Convention applies " the words " this Convention " must be interpreted as meaning " this Convention in whatever text is still in force. "

(d) The Convention *applies* to countries by virtue of their ratification after signature (Article 20) or of their accession (Articles 20 and 21). It applies also to territories for the external relations of which a member country is responsible, by virtue of a declaration or notification made pursuant to Article 24.

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[1] Cf. *Actes de Washington*, pp. 221/2. See also ROUBIER: *Le droit de la propriété industrielle*, I, pp. 247/9.

[2] Cf. Report of the International Law Commission (U.N. doc. No. 9 (A/6309/ Rev. 1)) pp. 20/25; MCNAIR: *The Law of Treaties*, 1961, p. 35; SØRENSEN: *The Manual of Public International Law*, 1968, pp. 177/82.

[3] See also document S/3 prepared for the Revision Conference of Stockholm, p. 18, paragraph 53.

[4] This situation has arisen and was dealt with by various countries in various ways, when in 1956 the German Democratic Republic declared that it regarded as applicable, upon its territory, several treaties, particularly the Paris Convention (Cf. *P.I.*, 1956, pp. 21, 41, 153, 169), and again in 1964 when the same Republic acceded to the Lisbon Act of that Convention (*I.P.*, 1964, p. 254; 1967, p. 75).

The Convention *ceases to apply* to countries after their denunciation of it (Article 26), and to dependent territories after a notification to that effect (Article 24(2)). It will also cease to apply when a country, after having been part of a member country or having been a territory as indicated above, obtains its independence as a State. According to prevailing opinion in the field of international law,[1] in such cases the new sovereign State is no longer bound by treaties applying to it in its former dependent status, unless it expressly accedes to those treaties. For this subject, see further the commentary on Article 21.

(e) The countries to which the Convention (in whatever text is still in force) applies constitute a *Union* for the protection of industrial property. This is more than a declaration of principle : it has important legal effects.

In the first place, in creating a Union, the Paris Convention has not merely remained a treaty establishing rights and obligations for its member States and, wherever permitted by the constitutions of these States (cf. Chapter II.4, above), also for private parties, but has established a legal entity in international law[2] with certain organs to carry out its objectives.[3] One of the effects of this legal construction is that the Union forms a single entity from the administrative point of view : there is only one budget and one set of accounts, and there is no separate administration for each separate Act of the Convention, although the member countries pay their contributions on the basis of these different Acts.

Secondly, the character of the Union is such that a State acceding to the most recent Act of the Convention becomes bound with respect to all member States of the Union, even those which have not yet acceded to the most recent Act (Article 27(3)).[4] Similarly, denunciation of the

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[1] Cf. CASTRÈN: " Aspects récents de la succession d'Etats, " *Recueil des cours Académie de droit international de la Haye*, 1951, I, p. 430; MCNAIR: *The Law of Treaties*, 1961, p. 601; O'CONNELL: *State Succession in Municipal Law and International Law*, II, 1967, pp. 1, 113, 204/8, 212.

[2] Cf. PLAISANT: *Traité de droit conventionnel international concernant la propriété industrielle*, 1949, pp. 33/4, 68/70; ROUBIER: *Le droit de la propriété industrielle*, I, 1952, pp. 225 *et seq.*, 237 *et seq.*; BOGUSLAWSKI: *Internationale Rechtsprobleme des Erfindungswesens*, 1963, p. 61; TROLLER: *Die mehrseitigen völkerrechtlichen Verträge im internationalen gewerblichen Rechtsschutz und Urheberrecht*, 1965, pp. 180/1; MIOSGA: *Internationaler Marken- und Herkunftsschutz*, 1967, pp. 9/10.

[3] These organs are: the Assembly of the Union (Article 13), its Executive Committee (Article 14), the International Bureau (Article 15), the Conferences of Revision (Article 18(2)) and the International Court of Justice (Article 28).

[4] Cf. Report of Main Committee IV of the Intellectual Property Conference of Stockholm, *I.P.*, 1967, p. 222, paragraphs 16, 17.

most recent Act of the Convention is deemed to constitute also denunciation of all earlier Acts (Article 26(2)). Thus, a State can only enter and leave the Union as a whole. This is important because the nationals of such State, and those assimilated to these nationals, may thus require (or, in the case of denunciation, no longer require) the application of the Convention in all member States of the Union. For these questions, see further the commentary on Article 27.

(f) The Paris Convention has constituted a Union *for the protection of industrial property.* This subject is defined in the following paragraphs (2) to (4) of Article 1, but some general observations may be made here, before proceeding to the commentary on these paragraphs.

The term " industrial property " is a traditional but not entirely exact denomination for certain exclusive rights, resembling property rights, regarding creative ideas or distinguishing signs or designations in the industrial or commercial field, supplemented by certain rules against unfair behaviour in the same field.[1] The term is inexact because " industrial property " presents no more than an analogy with normal property; further, because it covers more than industrial subjects only; and, finally, because the rules against unfair behaviour are not necessarily related to property at all.

The definition and delimitation of the notion of industrial property in the Paris Convention is not merely of theoretical interest. The question has been discussed, for example, whether or not the protection of new varieties of plants, now the subject of a separate Convention signed in Paris on December 21, 1961, or inventors' certificates, now mentioned in Article 4 I of the Paris Convention, come under the definition of industrial property. If the answer is in the affirmative,[2] this means that the member States, or such member States as will interpret the Convention in this way, will be bound, as regards the subjects mentioned, to assimilate the treatment of nationals of the other member States (and those assimilated to such nationals by Article 3 of the Convention) to that accorded to their own nationals, and to apply to these subjects the relevant rules of the Convention, without

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[1] *Actes de La Haye*, pp. 534/5.

[2] A question left open in Article 4(5) of the Convention for the Protection of New Varieties of Plants, and solved in the affirmative in the case of inventors' certificates in Article 4 I of the Paris Convention, as revised at Stockholm in 1967.

being entitled to require reciprocity of protection for the same subjects.[1]

ARTICLE 1, paragraph (2)[(a)]

(2) The protection of industrial property has as its object *(b)* **patents** *(c)*, **utility models** *(d)*, **industrial designs** *(e)*, **trademarks** *(f)*, **service marks** *(g)*, **trade names** *(h)*, **indications of source** *(i)* **or appellations of origin** *(j)*, **and the repression of unfair competition** *(k)*.

(a) The earlier Acts of the Paris Convention, although they mentioned several subjects of industrial property, did not contain a definition of this notion as such. This definition was introduced at the Revision Conference of The Hague in 1925.[2] It was afterwards modified only as to form, except that at the Revision Conference of Lisbon in 1958 the subject of service marks was added to the definition.[3]

(b) When, according to the definition given, the protection of industrial property has as its object certain legal phenomena, the question arises whether under the Convention the member States are bound to provide for the protection of or to regulate *all* these phenomena. This question will be discussed below when some comments have been given on the different subjects.

(c) Although paragraph (4) of the Article under consideration gives an enumeration of the different kinds of patents covered by the Convention, the said instrument does not contain any definition of what a " patent " *is*. On this question, as in the case of the other subjects (utility models, etc.) enumerated in the provision under consideration, the countries of the Union are free to define in their national legislation the subject indicated, to which the Convention will then apply. If, as has been observed above, under a given national law patents are granted also for varieties of plants the Convention will apply to these patents.

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[1] Cf. Chapter II.3 and II.4, above. See also the reverse situation in Belgium, where industrial designs were declared excluded from the protection of industrial property: Cour de Cassation, 20/12/1954, *Ing. Conseil*, 1955, p. 35, and the criticism of this decision by LADAS, *ibidem*, p. 141.

[2] *Actes de La Haye*, pp. 332 (proposal of France), 410/2 (report of First Sub-Committee), 534/5 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 624, 626/7 (proposals of U.S.A. and Sweden), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee), 634 (discussion in General Committee), 99 (adoption in Second Plenary Session), 114 (General Report).

The descriptions of the subjects given below represent only what is commonly understood by these subjects and they are merely given to illustrate the probable scope of the Convention. For this purpose, a *patent* can be described as an exclusive right to apply an industrial invention.

(d) Utility models, recognized only in a few countries,[1] can be described as second-class patents. They embody an exclusive right destined to cover industrial innovations of lesser importance than patentable inventions, with possible restrictions as to the kind of innovations to which they apply. The exclusive right granted in this form is normally of shorter duration than that of a patent.

(e) Industrial designs may be described as consisting of those ornamental aspects or elements of a useful article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article.[2] The proprietor of such industrial design will usually, under existing legislations, have the exclusive right to make, sell and use articles embodying such design.

(f) A trademark is usually defined as a sign serving to distinguish the *goods* of one enterprise from those of other enterprises. The proprietor of a trademark generally has the exclusive right to use the trademark, or variations of it, for the same or similar goods.

(g) A service mark is a sign serving to distinguish the *services* of one enterprise from those of other enterprises. The right to a service mark[3] is analogous to that of a trademark.

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[1] Cf., for example, the legislation of the member States: Federal Republic of Germany (*Gebrauchsmustergesetz,* 2/1/1968), Italy (Decree No. 1411 of 25/8/1940), Japan (Utility Model Law No. 123 of 1959), Poland (Inventions Act, 31/5/1962), Portugal (Industrial Property Act, 24/8/1940), Spain (Industrial Property Statute, 26/7/1929 as amended).

[2] Cf. Bills Nos. 450, 1237 and 3366 introduced in the House of Representatives of the 89th Congress of the United States of America.

[3] So far, only a limited number of member States have legislated on service marks, for example, Algeria (Ordinance, 19/3/1966), Canada (Act relating to Trade Marks and Unfair Competition, 14/5/1953), Denmark (Trademarks Act, 11/6/1959), Finland (Trademarks Act, 10/1/1964), France (Act of 31/12/1964), Israel (Trademarks Ordinance, 1938, amended 4/3/1965), Italy (Trademarks Act of 21/6/1942, amended 24/12/1959), Monaco (Law 608 of 20/6/1955), Norway (Trademarks Act, 3/3/1961), Philippines (Trademarks Act No. 166 of 20/6/1947), Rumania (Law on Trademarks and Service Marks, 29/12/1967), Sweden (Trademarks Act, 2/12/1960), Uruguay (Decree of 28/9/1967), U.S.S.R. (Statute on Trademarks, 23/6/1962, amended 31/3/1967), U.S.A. (Trademarks Act, 5/7/1946, as amended), Yugoslavia (Law on Trademarks and Service Marks, 4/11/1961).

(h) The trade name is a notion interpreted in differing ways in existing legislations. It can generally, however, be defined as being the name or designation identifying the enterprise of a natural or legal person. The trade name will usually be protected against certain unlawful acts of third parties.

(i) Indications of source are generally understood to include all expressions or signs used to indicate that a product or service originates in a given country or group of countries, region or locality.[1] False or misleading use of such indications is usually prohibited.

(j) An appellation of origin may be defined as the geographical name of a country, region or locality which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.[2] The word " or " in the text of the Convention, introduced at a time when the terminology was more fluid,[3] is no longer quite correct. Appellations of origin are now considered to be a *species* of the *genus* " indications of source," characterized by their relationship with quality or characteristics derived from the source.[4] Some countries have extensive laws to protect their appellations of origin against misuse.

(k) The repression of unfair competition is included in the protection of industrial property, because in many cases infringement of industrial property rights, such as the right to a trademark or a trade name, or the misuse of an indication of source or an appellation of origin, will at the same time be an act of unfair competition. However, the Convention (Article 10*bis*(2) and (3)) also states the general rule

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[1] Cf. the Madrid Agreement, of 1891, for the Repression of False or Deceptive Indications of Source on Goods, last revised at Lisbon in 1958, with an Additional Act adopted at Stockholm in 1967.

[2] Cf. the Lisbon Agreement, of 1958, for the Protection of Appellations of Origin and their International Registration, revised at Stockholm in 1967.

[3] *Actes de La Haye*, p. 535.

[4] Cf. DEVLÉTIAN: " La protection des appellations d'origine et des indications de provenance, " *P.I.*, 1956, pp. 225, 250; 1957, pp. 17, 35, 58 (English translation in *I.P.Q.*, April 1957, p. 6) and " The Protection of Appellations of Origin and Indications of Source, " *I.P.*, 1968, p. 107; MASCAREÑAS: " Les indications de provenance et les appellations d'origine," *P.I.*, 1959, p. 252. The Revision Conference of Lisbon in 1958 did not accept a proposal to adopt this distinction in the provision under examination, but only because one country thought the actual text sufficient to cover all practical cases: *Actes de Lisbonne*, pp. 771/5.

that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition, and gives examples of such acts.

A question which was reserved above is whether the States party to the Paris Convention, committed to the protection of industrial property (Article 1(1)), are bound to protect or regulate *all* subjects indicated in the definition. The answer to this question is in the negative, because at the Revision Conference of The Hague, where the definition of industrial property was introduced into the Convention, it was expressly stated that the enumeration of industrial property rights would *not* oblige the member States to legislate on *all* the specific rights enumerated.[1]

However, this statement has not completely exhausted the question in view of other provisions in the Convention. Protection of several subjects of industrial property has been expressly prescribed in the Convention, namely, industrial designs (Article 5*quinquies*), service marks (Article 6*sexies*), collective marks (Article 7*bis*), trade names (Articles 8, 9, 10*ter*), indications of source (Articles 10, 10*ter*); and protection against unfair competition (Articles 10*bis* and 10*ter*) is also mandatory, as well as the temporary protection of certain subjects exhibited at international exhibitions (Article 11). Moreover, attention must be directed to Article 25 of the Convention. If a State accedes to the Convention without providing, in its domestic law, for any protection for *important subjects of industrial property,* such as *patents* or *trademarks,* it will not be in a position to give effect to substantial parts of the Convention dealing especially with these subjects, and will therefore probably be considered to have implemented the Convention insufficiently in its domestic law. This opinion seems reasonable, because the reciprocity of protection which is supposed to exist in application of the principle of " national treatment " under the Convention (cf. Chapter II.3, above) would not then exist with respect to the important subjects indicated.

ARTICLE 1, paragraph (3)*(a)*

(3) Industrial property shall be understood in the broadest sense and shall apply *(b)* **not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manu-**

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[1] *Actes de La Haye,* pp. 410/1 (report of First Sub-Committee), 534 (report of Drafting Committee). See also *Actes de Washington,* pp. 245/6, 248.

factured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(a) Some parts of this provision figured already under paragraph 1 of the Final Protocol established as an integral part of the original text of the Convention of 1883.[1] They were, with minor modifications, maintained in the Protocol until after the Revision Conference of Washington in 1911. The provision, with further modifications, was introduced into the text of the Convention itself at the Revision Conference of The Hague in 1925 [2] and was given the form it still has today at the following Revision Conference of London in 1934.[3]

(b) The meaning of the provision is not that *all* subjects of industrial property indicated in paragraph (2) of Article 1, such as patents, trademarks, etc., shall apply to *all* activities and products mentioned in paragraph (3). There is therefore no obligation for the member States to grant patents for wine, cattle or fruit, or to protect trademarks with respect to minerals.[4] The purpose of the provision is merely to avoid *excluding* from the protection of industrial property activities or products which would otherwise run the risk of not being assimilated to those of industry proper.[5] The various industrial property rights will, however, be applied to those activities and products only in so far as appropriate.

ARTICLE 1, paragraph (4)*(a)*

(4) Patents shall include *(b)* **the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation** *(c)*, **patents of improvement** *(d)*, **patents and certificates of addition** *(e)*, **etc.**

(a) This provision was already substantially included under paragraph 2 of the Final Protocol which formed an integral part of

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[1] *Actes de Paris*, I, pp. 32/3, 59/60, 127, 150.

[2] *Actes de la Haye*, pp. 221/2 (proposal), 332/3 (observations), 410/2 (report of First Sub-Committee), 516/7 (report of General Committee), 534/6 (report of Drafting Committee), 570/2 (adoption in Second Plenary Session).

[3] *Actes de Londres*, pp. 247 (proposal of Czechoslovakia), 341/4 (report of Second Sub-Committee), 448/9 (report of Drafting Committee), 511 (adoption in Second Plenary Session).

[4] Cf. in Netherlands: Patent Office (Division of Appeals), 22/12/1960, *G.R.U.R. Int.*, 1963, p. 28.

[5] *Actes de La Haye*, pp. 535/6; *Actes de Londres*, pp. 341/4, 448/9, 511.

the original text of the Convention of 1883.[1] It remained in the Protocol, after modification, until after the Revision Conference of Washington in 1911 and was introduced, again after modification, into the text of the Convention itself at the Revision Conference of The Hague in 1925.[2] It underwent only slight changes as to form at subsequent Revision Conferences.

(b) As has been observed above, a patent may be defined as an exclusive right to apply an industrial invention. Several countries, however, recognize in their national laws different kinds of patents.[3]

The purpose of the provision is to ensure that all these kinds of patents will be included in the application of the Convention, both with respect to the "national treatment" to be granted in each member State to nationals of other member States and persons assimilated to these nationals, and with regard to the rules provided by the Convention itself. The different kinds of patents indicated as examples are:

(c) Patents of importation (sometimes also called patents of introduction, confirmation or revalidation).[4] These patents are generally patents of relatively short duration granted for an invention which has already been patented in a foreign country and which therefore has lost its novelty, but which is nevertheless protected by a patent of importation in the expectation that the patentee will exploit the invention in the country concerned.

(d) Patents of improvement[5] granted for improvements of an invention, generally with special provisions as to duration and the payment of maintenance fees.

(e) Patents or certificates of addition[6] granted in a similar way for additions to an invention which are not necessarily also improvements.

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[1] *Actes de Paris*, I, pp. 127, 150.

[2] *Actes de La Haye*, pp. 332 (proposal of France), 410/2 (report of First Sub-Committee), 534/6 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[3] Cf. " Les différents genres de brevets d'invention, " *P.I.*, 1945, pp. 26, 41, 47, 135.

[4] Cf., for example, the legislations of the member States: Argentina (Patents Law No. 111, 1864), Belgium (Patents Law of 24/5/1854), Iran (Act of 23/6/1931), Spain (Industrial Property Statute of 26/7/1929, as amended), Uruguay (Patent Act No. 10,089 of 12/12/1941). Furthermore, a certain number of British and former British colonies have a system of confirmation or registration of British patents.

[5] Patents of improvement are available in several member States, for example, Belgium, Mexico, Uruguay.

[6] Patents or certificates of addition are available under almost all patent legislations.

ARTICLE 2, paragraph (1)(a)

(1) Nationals *(b)* **of any country of the Union shall, as regards the protection of industrial property** *(c)*, **enjoy in all the other countries of the Union the advantages** *(d)* **that their respective laws** *(e)* **now grant, or may hereafter grant, to nationals ; all without prejudice to the rights specially provided for by this Convention** *(f)*. **Consequently** *(g)*, **they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.**

(a) The principle of "*national treatment*" or "*assimilation with nationals*" embodied in this provision, which can be considered one of the basic rules of the Convention,[1] was already included in the original text of 1883.[2] At the Revision Conference of The Hague in 1925 the final part of the first sentence : "without prejudice, etc.," was added.[3]

(b) The provision applies to *nationals* of the countries of the Union.

In deciding the question who are such nationals, account has to be taken of the fact that the Convention can also apply to *legal persons or entities*,[4] so that a distinction must be made between the nationality of *natural* and *legal* persons, respectively.

With respect to *natural* persons, nationality is a quality accorded or withdrawn by the legislation of the State whose nationality is claimed. Therefore it is only the legislation of that State which can define the said nationality and which must be applied also in other countries where it is invoked.

With respect to *legal* persons, the question is more complicated because generally no "nationality" as such is granted to legal persons by existing legislations. Where these legal persons are the States themselves, or State enterprises, or other bodies of *public status*, it

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[1] This was particularly underlined when the principle was attacked at the Revision Conference of The Hague in 1925. Cf. *Actes de La Haye*, pp. 333 (proposal of U.S.A.), 413/5 (report of First Sub-Committee).

[2] *Actes de Paris*, I, pp. 26 (proposal), 33/47, 124/6 (discussions and adoption).

[3] *Actes de La Haye*, pp. 222/5 (proposal), 333 (observations), 413/5 (report of First Sub-Committee), 517 (report of General Committee), 536/7 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[4] This was unanimously agreed by the Revision Conference at Brussels in 1900: *Actes de Bruxelles*, pp. 196/7 (Third Plenary Session).

would be logical to accord to them the nationality of their country. With regard to corporate bodies of *private status*, such as companies and associations, the authorities of the countries where application of the Convention is sought will have to decide on the criterion of " nationality " which they will employ. This " nationality " can be made dependent upon the law according to which these legal persons have been constituted, or upon the law of their actual headquarters, or even on other criteria.[1] Such law will also decide whether a legal person or entity really exists.

If, by virtue of Article 24, the Convention has been made applicable to territories for the external relations of which a State is responsible, the " nationality " of inhabitants of such territories, even if not the same as that of the State concerned, may be accepted as a basis for application of the Convention. This is reasonable because otherwise application of the Convention to these territories would be only unilateral.

Several other questions may arise with respect to the criterion of nationality, particularly the following:

When does a person have to have the nationality of one of the countries of the Union in order to be able to claim application of the Convention ? Generally this will be the moment at which he claims such application with respect to an application for or the right to a subject of industrial property.[2]

What happens when a person has *more than one nationality* ? He will be considered a national of a country of the Union whenever this is justified by one of his nationalities.

Another possibility is that *several persons together* claim application of the Convention on the basis of nationality, for example, when they are co-applicants for, or co-owners of, an industrial property right, whereas, in fact, these persons are not all nationals of a country of the Union. In such case, application of the Convention cannot be claimed because the member States are not obliged to apply it to a person who is not entitled to benefit therefrom.[3]

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[1] Cf. VON DER HEYDTE: *Völkerrecht*, I, 1958, p. 265; BATIFFOL: *Traité élémentaire de droit international privé*, 1959, paragraphs 192/198; SØRENSEN: *Manual of Public International Law*, 1968, p. 480.

[2] For the particular case of the right of priority, see observation *(b)* on Article 4 A(1), below.

[3] At the Conference of Paris the Chairman expressed a contrary view regarding a trade name belonging jointly to a national and a non-national of a country of the Union *(Actes de Paris*, p. 100*)*, but this has remained an isolated opinion.

(c) The rule of assimilation with nationals applies to the *protection of industrial property* as defined in Article 1 and therefore to all subjects indicated in that Article.

(d) The *advantages* which the nationals of the countries of the Union may claim in any other member country consist in the application, without any discrimination, of the national law as applied to nationals of the country itself. As has already been observed above, under Chapter II.3, this means that no reciprocity of protection can be required by the States party to the Convention. At the Revision Conference of The Hague in 1925, it was pointed out by the United States delegation that this system might lead to inequality of protection under the Convention since, for example, the United States grants patents of a comparatively long duration, without annual maintenance fees and without an obligation to exploit a patent, whereas other member States have more restrictive rules. Notwithstanding these difficulties, the system of "national treatment" embodied in the Convention was found acceptable, the more so because the national legislation of the member States is tending towards greater harmonization.[1]

(e) According to the text of the provision under examination, nationals of any country of the Union must enjoy in all the other countries of the Union the advantages that their respective *laws* grant to nationals of these countries. What is the meaning of " laws " in this sentence ? [2] The addition of the phrase, " without prejudice to the rights specially provided for by this Convention," makes it clear that " laws " does not include the application of the Convention itself, wherever such direct application is possible. The word " laws " must therefore be interpreted as meaning " national laws," not including international treaties, unless and in so far, of course, as such treaties have been incorporated in the national law. It is therefore possible for countries of the Union to conclude between themselves, or with other States, treaties the application of which is available only to nationals (and assimilated persons) of a limited number of countries. Bilateral treaties are an example in point, and also some of the Special

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[1] Cf. *Actes de La Haye*, pp. 413/5.

[2] This subject has been discussed particularly with respect to a Draft Convention on a European Patent Law. See, for example: LADAS: *I.P.*, 1962, p. 23; FRAYNE: *I.P.*, 1962, p. 126; COLAS: *I.P.*, 1963, p. 48; ULMER: *I.P.*, 1963, p. 51; LADD: *I.P.*, 1963, p. 124; CHAVANNE: *Revue trimestrielle de droit commercial*, 1963, p. 505; VANDER HAEGHEN and EVRARD: *Ing. Conseil*, 1965, p. 1.

Agreements concluded in application of Article 19 of the Convention.[1] Only where the provisions of such treaty would entirely *replace* the national laws of the member States, so that important subjects of industrial property would no longer be dealt with by national legislation and therefore nationals of other countries of the Union would not have access to these provisions, could it be considered that the Convention was insufficiently implemented in the national law in view of Article 25 of the Convention.[2]

(f) " National treatment " is not all that can be claimed under the Convention because, as has been pointed out above under Chapter II.4, the Convention also contains a number of *common rules* which have to be respected by the member States. As has been explained, the effect of these common rules in the member States will vary according to their constitutions or constitutional systems. In countries where the possibility of " self-executing " treaty provisions is recognized, nationals of other countries of the Union may directly claim application of the self-executing provisions of the Convention by the administrative and judicial authorities. Examples of such self-executing provisions have been given above and will be further examined below. In countries where the self-executing character of treaty provisions is not accepted, there is no possibility of direct application of the provisions of the Convention by the administrative and judicial authorities, but these countries are bound to introduce such provisions into their domestic law (Article 25 of the Convention), so that they will come under the rule of national treatment.[3]

The question has been raised whether nationals of a country of the Union will be able to claim application of the Convention also *in their own country.* This question is of no importance with respect to the rule of " *national treatment* " because nationals of a country will enjoy such treatment in their own country anyhow. The question remains, however, whether, in these conditions, nationals can also claim application in their own country of *the common rules of the Convention* in so far as they are accepted as " self-executing " when these rules have not been incorporated in the national law. The provision under examination only states that nationals of a country of the Union can

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[1] Cf. Articles 1(2) and 2 of the Madrid Agreement concerning the International Registration of Trademarks, revised at Nice in 1957, and Article 1 of the Hague Agreement concerning the International Deposit of Industrial Designs, revised at London in 1934.

[2] See above *ad* Article 1(2), final part of observation *(k)*.

[3] Cf. *Actes de La Haye*, p. 536.

claim application of national laws and of the Convention " in all the *other* countries " of the Union. This is logical, because the Convention is an international instrument destined to govern international situations. The protection of a national in his own country depends on the domestic legislation of that country and such national will therefore not be able to claim application of the Convention in his own country unless its legislation entitles him to do so.[1]

(g) The sentence beginning with the word " Consequently " explains the consequence of the rule in the first sentence of the provision. It is self-explanatory.

ARTICLE 2, paragraph (2)*(a)*

(2) However *(b)*, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights *(c)*.

(a) This provision was introduced into the Convention at the Revision Conference of Washington in 1911.[2] It has not been substantially modified since.

(b) The word " however " was added to the text at the Revision Conference of The Hague in 1925 in order to indicate that the provision restricts the rule of paragraph (1) of the Article.[3] Even when the conditions imposed upon nationals of a country include the stipulation that *those nationals* can claim protection of certain industrial property rights only if they are domiciled or established in the country, this same stipulation cannot be imposed upon *nationals of other countries* of the Union.[4]

(c) For nationals of the countries of the Union, the question where they are domiciled or established is irrelevant. The fact that no

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[1] Cf. in France: Act of 4/4/1931, commented upon by PLAISANT: *Traité de droit conventionnel international concernant la propriété industrielle*, p. 76, and by ROUBIER: *Le droit de la propriété industrielle*, I, p. 242; in Belgium: Act of 27/4/1965, *Ing. Conseil*, 1965, p. 207.

[2] *Actes de Washington*, pp. 94 (proposal of France), 270 (report of Sub-Committee), 306 (report to Plenary Committee), 245/6 (discussion and adoption in Third Plenary Session).

[3] *Actes de La Haye*, p. 536.

[4] Cf. in France: Cour de Paris, 14/3/1953, *Ann.*, 1953, p. 15; Cour de Cassation, 3/2/1959, *Ann.*, 1959, p. 1.

establishment in the country where protection is claimed may be required does not however diminish the possibility of an obligation to exploit certain industrial property rights in such country.[1]

ARTICLE 2, paragraph (3)(a)

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure *(b)* **and to jurisdiction** *(c)*, **and to the designation of an address for service or the appointment of an agent** *(d)*, **which may be required by the laws on industrial property are expressly reserved.**

(a) Parts of this provision were already introduced under paragraph 3 in the Final Protocol which formed an integral part of the original Convention of 1883.[2] The provision was enlarged in the Final Protocol adopted at the Revision Conference of Washington in 1911,[3] and was introduced into the Convention itself at the Revision Conference of The Hague in 1925.[4] Since then it has been changed only as to form.

(b) An example of a permissible discrimination against nationals of other countries of the Union as to procedure is the obligation to deposit a "*cautio judicatum solvi.*" [5]

(c) An example of a permissible discrimination as to jurisdiction is the right to sue a national of another country in a court of the country where the plaintiff is domiciled or established.

(d) In the same category of procedural questions is the obligation, imposed by the legislation of several countries upon persons not domiciled or established in the country, to elect an address for service or to appoint an agent in order to facilitate procedural matters. Such obligation may be imposed upon nationals of the countries of the Union.

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[1] *Actes de Washington*, pp. 306 (report to Plenary Committee), 245/6 (declaration in Third Plenary Session).

[2] *Actes de Paris*, I, pp. 125, 150.

[3] *Actes de Washington*, pp. 42/4 (proposal), 270/1 (report of Sub-Committee), 311/2 (report to Plenary Committee), 246/7 (adoption in Third Plenary Session).

[4] *Actes de La Haye*, pp. 224 (proposal), 517 (report of General Committee), 536/7 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[5] Cf. in France: Cour de Lyon, 13/5/1957, *Ann.*, 1958, p. 175.

ARTICLE 3[(a)]

Nationals *(b)* of countries outside the Union who are domiciled *(c)* or who have real and effective industrial establishments *(d)* in the territory of one of the countries of the Union shall be treated in the same manner *(e)* as nationals of the countries of the Union.

(a) This provision appeared already in essence in the original text of the Convention of 1883.[1] The words " real and effective " were added in the Additional Act to the Convention, adopted by the Revision Conference of Brussels in 1900.[2] Since then the provision has been changed only as to form.

(b) For the criterion of *nationality,* see above at Article 2, paragraph (1), observation *(b).* The effect of speaking in Article 3 of " nationals " is that only *nationals* of countries outside the Union who also fulfil the further conditions indicated in the Article may claim application of the Convention, and not persons without such nationality fulfilling the same further conditions. However, the member States are free to grant the same protection also to such non-nationals, and they may wish to do so as the wording of the provision would seem unnecessarily narrow.

(c) With respect to the notion of *domicile,* a distinction has again to be made between *natural* and *legal persons.*

With respect to *natural* persons, the word " domicile " can have different meanings depending on national legislation. Under some of these legislations a natural person can obtain " domicile " only by virtue of an official authorization ; other legislations interpret " domicile " as more or less equivalent to residence.

It is generally believed[3] that the Convention has not sought, by using the expression " domicile," to indicate a legal situation, but rather a *more or less permanent situation of fact.* The purpose of the provision under consideration would thus be to admit to the benefits of the Convention foreign nationals *residing* in a country of the Union.

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[1] *Actes de Paris,* I, pp. 129/32, 137/8.

[2] *Actes de Bruxelles,* pp. 163/4 (proposal of France), 196/200 (discussion in Third Plenary Session), 311 (discussion and adoption in Ninth Plenary Session).

[3] Cf. LADAS: *The International Protection of Industrial Property,* pp. 187/8; ROUBIER: *Le droit de la propriété industrielle,* I, pp. 268/9.

With respect to *legal* persons, their "*domicile*" can be considered, according to the same principles, to be the place of their actual headquarters.

Domicile in a country of the Union does not enable the person who is domiciled there to claim application of the Convention in the country itself. This is so because he has to be treated in the same manner as nationals of countries of the Union and these nationals can claim application of the Convention only in the *other* countries of the Union. The protection of persons domiciled in the country itself will depend on the domestic legislation of that country.

(d) A further ground on which nationals of countries outside the Union may claim application of the Convention exists when they have a *real and effective industrial or commercial establishment* in one of the countries of the Union. The words "*industrial or commercial establishment*" will, if necessary, be interpreted by the administrative or judicial authorities of the country where application of the Convention is claimed. The words "*real and effective*" were added in the Additional Act to the Convention adopted by the Revision Conference of Brussels in 1897-1900.[1] The purpose of this addition was to avoid abusive claims to application of the Convention. The question whether an establishment is real and effective, and not a faked or ephemeral one, will again be determined by the administrative or judicial authorities of the country in which application of the Convention is claimed.[2] In the country itself where the real and effective industrial or commercial establishment exists, its protection will depend, for the same reasons as given above with regard to the criterion of domicile, on the domestic legislation.

(e) The prescribed treatment "*in the same manner*" means that persons who are entitled to benefit from Article 3 of the Convention enjoy, as do nationals of the countries of the Union, "*national treatment*" in other countries, without prejudice to the *rights specially provided for by the Convention*. Whether these latter rights will directly apply depends on the question whether their "self-executing" character is recognized in the country concerned.

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[1] *Actes de Bruxelles*, pp. 196/200, 311.

[2] Cf. in U.S.A.: Commissioner of Patents, 21/5/1963, 138 *U.S.P.Q.* 316 (1963).

ARTICLE 4, Section A(1)*(a)*

A(1) Any person *(b)* who has duly filed *(c)* an application *(d)* for a patent *(e)*, or for the registration of a utility model, or of an industrial design, or of a trademark *(f)*, in one of the countries of the Union *(g)*, or his successor in title *(h)*, shall enjoy, for the purpose of filing *(i)* in the other countries, a right of priority *(j)* during the periods hereinafter fixed *(k)*.

(a) The right of priority, which is one of the important elements of the Convention,[1] was already incorporated in the original text of 1883.[2] The extension of the priority right to utility models and to successors in title of the original applicant was introduced at the Revision Conference of Washington in 1911.[3] A clause which submitted the exercise of the right of priority to the rights of third parties was eliminated at the Revision Conference of London in 1934.[4]

(b) The term " any person " must be interpreted within the context of the rules of the Convention which define the persons capable of benefiting therefrom. The term thus means all persons entitled to claim application of the Convention according to Articles 2 and 3, that is, nationals of a country of the Union and nationals of countries outside the Union who are domiciled or have real and effective industrial or commercial establishments in the territory of one of the countries of the Union. This interpretation is confirmed by the discussion of the provision at the Conference of Paris, where the Convention was originally concluded.[5] A similar interpretation was later given to the extension of the provision to successors in title (see, below, observation *(h)*).

National legislation may, however, go further and grant a similar right of prority also to other persons.[6] It may also allow the nationals

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[1] Cf. SEPÚLVEDA: " El derecho internacional convencional en materia de prioridad de patentes (La interpretación mexicana), " *Boletín del Instituto de derecho comparado de Mexico*, IX, 25, 1956, pp. 11, 14.

[2] *Actes de Paris*, I, pp. 26/7 (proposal for Article 3), 47/56, 60/4, 99, 128/32, 138 (discussions and adoption).

[3] *Actes de Washington*, pp. 44/6 (proposal), 275/7 (report of Committee), 307 (report to Plenary Committee), 247/8 (discussion and adoption in Third Plenary Session).

[4] *Actes de Londres*, pp. 167/72 (proposals), 248/50 (observations), 356/61 (report of Second Sub-Committee), 449/52 (report of Drafting Committee), 511/3 (discussion and adoption in Second Plenary Session).

[5] *Actes de Paris*, pp. 99, 128/32, 137/8.

[6] Cf. VANDER HAEGHEN: *Ing. Conseil*, 1965, p. 269.

of the country itself to claim priority there, based on an earlier foreign application.

The conditions as to the competence of persons to claim the right of priority under the Convention must be fulfilled both at the time of the application on which the right of priority is based and at the time when the right is invoked, but not necessarily during the whole period of priority. A national of a country of the Union may, for example, assign the right of priority to a person who is not at that time, but afterwards becomes, a national of such country before claiming the priority right, or he may assign this right first to a non-national of a Union country, who subsequently assigns the right to a national of such country ; in such cases the priority right can be validly claimed.

(c) The right of priority can be based only on an application *duly filed* in one of the countries of the Union. The definition of what is understood by a regular national filing is given in paragraphs A(2) and (3) of the Article, which will be commented upon below.

(d) The right of priority can further be based only on the *first* application for the subject concerned in a country of the Union. This principle, designed to avoid a chain of successive claims of priority for the same subject, is not stated in the provision under consideration itself, but it follows from Article 4 C(2), where it is said that the period of priority starts from the date of filing of the *first* application, and from Article 4 C(4), where, under exceptional circumstances, a subsequent application is considered to be " the *first* application, of which the filing date shall be the starting point of the period of priority." It is therefore not possible, after filing an application for a patent or for the registration of a trademark, etc., in one country of the Union, to base a right of priority on a later application for the same subject in the same or in another such country.[1] However, an earlier filing in a country not belonging to the Union will not count.

(e) The right of priority is granted for applications for patents and other subjects of industrial property, as enumerated, with the addition of inventors' certificates referred to in Article 4 I. Some of these subjects may be interrelated in the exercise of the right of priority (see Article 4 E(1) and (2), and again Article 4 I).

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[1] Cf. in Netherlands: Patent Office (Division of Appeals), 5/10/1960, *G.R.U.R. Int.*, 1961, p. 291.

(f) At the Revision Conference of Lisbon in 1958 the words " service marks " were inserted after " trademarks " in the enumeration of subjects of industrial property contained in Article 1(2). The same words were not inserted in the provision under consideration and the said Revision Conference refused generally to assimilate " service marks " to " trademarks."[1] This means that member States are under no obligation to grant a right of priority for service marks although they are free to do so if they wish.

(g) The right of priority can be based only on a first application filed *in a country of the Union.*[2] This means that, when an application has been filed in a country before its accession to the Convention becomes effective (cf. Article 21), no right of priority can be claimed for such application under the Convention. Conversely, in a country newly acceding to the Convention, no right of priority can be claimed under the Convention based on applications filed in other countries before the new accession took effect, because at the time of such applications the newly acceding country was not yet one of the " other countries " (of the Union).[3] National legislation may, however, adopt a more lenient system.[4]

(h) The right of priority may also be invoked by the " *successor in title* " of the person who has filed the first application. This provision was added at the Revision Conference of Washington in 1911, where it was stated that such successor in title must be capable of benefiting from the Convention according to Articles 2 and 3.[5]

The right of priority may be transferred to a successor in title independently of the transfer or non-transfer of the first application on which it is based, and which can therefore remain with the original applicant or be transferred to a third person.[6] The right of priority based on a first application can also be transferred independently for

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[1] *Actes de Lisbonne*, pp. 624 (proposal of U.S.A.), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee).

[2] Or a first application which is equivalent to a regular national filing under a bilateral or multilateral treaty concluded between countries of the Union (see, below, observation *(d)* on Article 4, Section A(2)).

[3] See for U.S.S.R.: communication of Goscommittee, referred to in *G.R.U.R. Int.*, 1966, *Fortl. Ber.*, 1677/66.

[4] Cf. SCHRICKER: " Die Inanspruchnahme der Unionspriorität bei Beitritt neuer Verbandsländer, " *G.R.U.R. Int.*, 1966, p. 373.

[5] *Actes de Washington*, p. 275.

[6] Cf. in France: Tribunal de Grande Instance de Valence, 16/2/1962, *Ann.*, 1963, p. 313.

one or more countries of the Union. It remains an independent right until, during the period of its duration, it is used as the basis for an application in one or more countries of the Union, in which case it becomes an accessory of such application.[1]

(i) The *subsequent* filing must concern *the same subject* as the *first* filing on which the right of priority is based. This means that in the case of patents, utility models or inventors' certificates it must concern the same invention or innovation, in the case of industrial designs, the same design, and in the case of trademarks, the same trademark for the same goods. However, while preserving the identity of the subject, the right of priority can in some cases be claimed to obtain a different form of protection (see Sections E(1) and (2) and I(1) and (2) of Article 4). Moreover, with regard to patents, special rules concerning the identity of the subject are given in Sections F, G and H of Article 4. These provisions will be commented upon below.

(j) The *consequences* of the right of priority are set out in Article 4 B. See the commentary on that provision.

(k) The *periods* of priority are regulated in Article 4 C(1) to (3), which will be commented upon below.

ARTICLE 4, Section A(2)*(a)*

(2) Any filing that is equivalent to a regular national filing *(b)* under the domestic legislation *(c)* of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union *(d)* shall be recognized as giving rise to the right of priority.

(a) According to paragraph (1) of Article 4 the right of priority can be claimed only by a person who has *duly filed* an application for a patent, etc., in one of the countries of the Union. Several questions have arisen as to what is to be understood by "duly filed." Is it necessary that such filing only be correct as to form or also valid as to substance, so that a patent, etc., can be granted on it? Does it matter whether the application once filed is later withdrawn, abandoned, or rejected, etc.?[2] Attempts to solve these questions were made by

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[1] Cf. MATHÉLY: "Paris Convention — Special Questions concerning Patents and Trademarks," *BIRPI Lecture Course*, 1965, pp. 25/7.

[2] See LADAS: *The International Protection of Industrial Property*, pp. 272/5.

introducing paragraph (2) of the Article at the Revision Conference of London in 1934,[1] and by the further introduction of paragraph (3) at the Revision Conference of Lisbon in 1958.[2]

(b) What is meant by a "regular national filing" is further defined in paragraph (3) of the Article under consideration. See below.

(c) The paragraph under consideration states the principle that the question whether a regular national filing exists depends in the first place on the domestic legislation of the country of the Union where the first application is made.

(d) Since the domestic legislation of the country of the Union where the first application is made decides what a regular national filing is, it is conceivable that the said legislation attributes that quality also to a filing in another country or a filing according to an international treaty to which such country is a party. The latter situation would occur according to the Hague Agreement concerning the International Deposit of Industrial Designs of 1925, revised at London in 1934, because Article 4(4) of that Agreement states that the right of priority established by Article 4 of the Paris Convention will be guaranteed to every design which has been the subject of an *international* deposit, without requiring compliance with any of the formalities specified in the latter Article. This is, of course, binding on the member States of the Hague Agreement, but would it also oblige *other* countries, parties to the Paris Convention but *not* to the Hague Agreement, to acknowledge a priority right based on such international deposit or filing? A provision establishing such obligation was introduced at the Revision Conference of London in 1934.[3]

ARTICLE 4, Section A(3)*(a)*

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned *(b)*, **whatever may be the subsequent fate of the application** *(c)*.

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[1] *Actes de Londres*, pp. 248, 256 (proposals of Switzerland, Germany and Netherlands), 361/2 (report of Second Sub-Committee), 450 (report of Drafting Committee) 512 (discussion and adoption in Second Plenary Session).

[2] *Actes de Lisbonne*, pp. 311/26, 111.

[3] See footnote 1.

(a) The question what is to be understood by "duly filed" not having been entirely solved by the introduction of paragraph (2) in Article 4, the Revision Conference of Lisbon in 1958 decided to introduce a further definition in paragraph (3). The proposal to that effect was extensively discussed and adopted in a modified form.[1]

(b) During the discussions at the Lisbon Conference it was made clear that a regular national filing exists when, according to the domestic legislation of the country in which the filing took place, the application filed is correct *only as to form* and, even when it is incomplete or incorrect as to form, if it is sufficient to establish the *date* on which the application was filed.

(c) It was also made clear during the discussions at the Lisbon Conference that the subsequent fate of the first application on which the right of priority is based cannot prejudice this right. It therefore subsists when the first application is withdrawn, abandoned or rejected. It even exists when it pertains to an invention which is excluded from patentability in the country where the application was filed.[2]

ARTICLE 4, Section B*(a)*

B. Consequently, any subsequent filing *(b)* in any of the other countries of the Union before the expiration of the periods referred to above *(c)* shall not be invalidated by reason of any acts accomplished in the interval *(d)*, in particular, another filing *(e)*, the publication or exploitation of the invention *(f)*, the putting on sale of copies of the design *(g)*, or the use of the mark *(h)*, and such acts cannot give rise to any third-party right or any right of personal possession *(i)*. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union *(j)*.

(a) This provision explaining the effect of the right of priority was, up to the words "and such acts cannot" etc., already included in essence in the original text of the Convention of 1883.[3] However, at

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[1] *Actes de Lisbonne*, pp. 311/2 (proposal), 312/7 (observations), 317/25 (discussion in Second Committee), 522/3 (report of Second Committee), 111 (adoption in Second Plenary Session), 114 (General Report).

[2] *Ibidem*, p. 311.

[3] *Actes de Paris*, I, pp. 26/27 (proposal), 47/52, 60/1, 128, 138 (discussions and adoption).

that time the first paragraph of the Article contained a very important reservation in that it stated that the enjoyment of the priority right was " subject to the rights of third parties." At the Revision Conference of London in 1934 this clause was eliminated from Section A(1) and, instead, the final part of Section B, starting with the words " and such acts cannot " etc., and including a new second sentence, was added.[1]

(b) For the meaning of " subsequent filing " see, above, observation *(i)* regarding Article 4, Section A(1).

(c) The periods of priority are referred to in Article 4, Section A(1), but are regulated in Section C(1), (2) and (3), to be examined below.

(d) The provision states that a subsequent filing during the period of the priority right shall not be " invalidated " by any acts accomplished during such period. However, after the deletion of the reservation of third-party rights at the Revision Conference of London in 1934 the scope of the right of priority has become even wider : it means that the effect of the subsequent filing must not be less than it would have been had that filing been effected at the time of the first filing in another country of the Union on which the right of priority is based.[2] How this end is achieved depends on the domestic legislation of the country in which the right of priority is claimed. However, some *examples* of the effect of the right of priority are indicated in the provision under consideration.

(e) One of the examples of the effect of the right of priority is that another *filing* of an application for the same subject (patent, registration of utility model, design or trademark) during the period of priority cannot invalidate the subsequent filing for which the right of priority is claimed. In case of conflict, the first-mentioned filing will be rejected by the examining Office or invalidated by the courts.

(f) Nor will the *publication* or *exploitation* of the invention, whether by the person who filed the first application for a patent or by third parties,[3] during the period of the priority right, invalidate or

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[1] *Actes de Londres*, pp. 167/72 (proposal), 248/50 (observations), 356/61 (report of Second Sub-Committee), 449/52 (report of Drafting Committee), 511/13 (discussion and adoption in Second Plenary Session).

[2] *Actes de Lisbonne*, p. 311; see also in Federal Republic of Germany: Bundesgerichtshof, 25/11/1965, *G.R.U.R. Int.*, 1966, p. 382.

[3] *Actes de La Haye*, p. 225.

prejudice the subsequent filing for which the right of priority is claimed ; particularly, it will neither destroy the novelty of the invention nor diminish the inventive step embodied in it, as considered at the date of the first application on which the right of priority is based.

(g) The same is true for the putting on sale, during the period of priority, of copies of a design for which the right of priority is claimed, or, for that matter, for any other form of publication of such design during the priority period : such acts will neither destroy the novelty nor diminish the originality of a design which was novel or original at the date of the first application for its registration on which the right of priority is based.

(h) In the case of trademarks, the *use* of a mark, in countries where such use in itself has a legal effect, during the period of priority, cannot effect the validity of an application for registration of the mark for which priority is claimed, nor diminish the scope of its protection. As has been observed above, the same is true for a filing of an application for registration of the same mark during the priority period.

(i) The importance of the right of priority granted by the Convention was limited as long as rights of third parties originating in the priority period were expressly reserved. This reservation was generally interpreted as, for example, enabling third parties who had worked an invention during the priority period or who had obtained knowledge of the invention during that period to use or to continue to use it even in the face of a patent granted on the basis of a priority right.[1] The reservation was abolished by the Revision Conference of London in 1934, which replaced it by a sentence with the opposite effect: acts accomplished during the period of the priority right "cannot give rise to *any* third-party right or *any* right of personal possession."

(j) Since the right of priority comes into being only at the date of the first regular national filing in a country of the Union, it cannot affect rights of third parties acquired under national laws *before* such first filing. This has always been the intention of those drafting the Convention and, in order to render the situation absolutely clear, a provision to that effect was added at the Revision Conference of London in 1934.[2] Whether such rights acquired in one of the countries

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[1] See LADAS: *The International Protection of Industrial Property*, pp. 308 *et seq.*

[2] *Actes de Londres*, pp. 167/72 (proposal), 248/50 (observations), 356/61 (report of Second Sub-Committee), 449/52 (report of Drafting Committee), 512/3 (discussion and adoption in Second Plenary Session).

of the Union will also have any effect in the other member States will depend on the domestic legislation of the latter.

ARTICLE 4, Section C(1), (2) and (3)*(a)*

C(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks *(b)***.**

(2) These periods shall start from the date of filing of the first application *(c)* **; the day of filing shall not be included in the period** *(d)***.**

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day *(e)***.**

(a) These provisions regulate the different periods of duration of the right of priority for the various subjects for which this right may be claimed. In the original text of the Convention of 1883 these periods were six months for patents and three months for industrial designs and trademarks, with an extra month in any of these cases for applications coming from overseas countries. No further regulation of the priority periods was then provided for in the Convention, so that the computation of these periods was left to the member States. Gradually, in the subsequent Revision Conferences, the periods of the duration of the priority right were extended and further rules were given. At the Revision Conference of Brussels in 1900 the priority period for patents was fixed at twelve months and for industrial designs and trademarks at four months, the extra month for overseas applications being abolished. At the Revision Conference of Washington in 1911 these periods were not changed, but the benefit of the right of priority was extended to utility models, with the same period as for patents. Proposals to extend the priority period to twelve months also for industrial designs and trademarks were rejected.[1] At the Revision Conference of The Hague in 1925 the periods of priority for designs and trademarks were fixed at six months, and the additional provisions

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[1] *Actes de Washington*, pp. 91 (proposal of Germany), 95 (proposal of France), 275 (report of Sub-Committee), 307 (report to Plenary Committee), 247 (discussion in Third Plenary Session).

of paragraphs (2) and (3) were added.[1] The regulation thus obtained was not substantially changed at the later Revision Conferences of London in 1934 and Lisbon in 1958 : proposals to extend the period of duration of the priority right for trademarks made at these Conferences[2] were not accepted.

(b) The periods of priority must strike a balance between the interests, on the one hand, of the applicant for an industrial property right, who should be allowed to organize the international extension of such right in the countries of the Union during an adequate period, enjoying a priority as from his first filing date, and the interests, on the other hand, of third parties, who should not be confronted with too extensive periods of priority during which rights they might wish to acquire for the same subjects cannot be validly obtained. The periods adopted in the provision under consideration may be considered to strike such a balance, because they have not been changed since 1925.

(c) The question whether an application is the *first* application for the subject concerned is relatively easy to solve for trademarks, industrial designs, and, to a lesser extent, utility models. It may give rise to difficulties with regard to patent applications, where the decisive factor will be in which application the invention is disclosed for the first time,[3] as specified by Article 4 H. See, below, the commentary on that provision.

(d) This provision, added at the Revision Conference of The Hague in 1925, is self-explanatory.

(e) This provision, added in substance at the Revision Conference of The Hague and improved by the Revision Conference of London in 1934,[4] is also self-explanatory.

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[1] *Actes de La Haye*, pp. 225/32 (proposals), 334/5 (observations), 426/7 (report of Second Sub-Committee), 518 (report of General Committee), 538 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 169, 172; *Actes de Lisbonne*, p. 538.

[3] Cf. in Federal Republic of Germany: Bundesgerichtshof, 6/10/1959, *G.R.U.R. Int.*, 1960, p. 506; see also for the date of filing in case of postdating: U.K. Assistant Comptroller, 3/10/1960, *R.P.C.*, 1961, p. 228.

[4] *Actes de Londres*, pp. 364 (proposal of Netherlands and report of Second Sub-Committee), 452/3 (report of Drafting Committee).

ARTICLE 4, Section C(4)*(a)*

(4) A subsequent application *(b)* **concerning the same subject** *(c)* **as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union, shall be considered as the first application, of which the filing date shall be the starting point of the period of priority** *(d)*, **if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority** *(e)*. **The previous application may not thereafter serve as a basis for claiming a right of priority** *(f)*.

(a) This paragraph, dealing with the exceptional circumstances in which a subsequent application for the subject concerned (patent, registration of utility model, industrial design or trademark) may be considered the *first* application, on which the right of priority is based, was introduced into the Convention at the Revision Conference of Lisbon in 1958.[1]

(b) Why did the Lisbon Conference accept that, under certain circumstances, a subsequent application may serve as a basis for a priority right whereas, in principle, only a *first* application in one of the countries of the Union can serve that purpose (cf., above, observation *(d)* on Article 4, Section A(1))? The reason is that it frequently happens in the case of patents (and possibly also utility models), and may also happen in the case of designs and trademarks, that the first application, made in a hurry because the acquisition of the right concerned, as well as the right of priority, will frequently depend on when the application is filed, does not adequately represent the applicant's intentions. Failing a special provision regulating this matter the applicant would be unable to replace his application by a better one without losing the right of priority, because the said application would not be the *first* concerning the same subject and therefore could not be recognized as a basis for the priority right. In order to eliminate this difficulty the paragraph under consideration allows, *under certain precise conditions*, a subsequent application to replace the first application for the purpose of claiming the priority right.

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[1] *Actes de Lisbonne*, pp. 327/8 (proposal), 329/32 (observations), 332/9 (discussion in Second Committee), 523/4 (report of Second Committee), 99 (adoption in Second Plenary Session), 114/5 (General Report).

(c) See observation *(i)* on Article 4 A(1), above.

(d) The filing date which will be considered the starting point of the period of priority will be the date of *subsequent* application, the first application being disregarded under the conditions indicated in the provision.

(e) In order that the subsequent application may be considered the first application, the following conditions have to be fulfilled with respect to the previous first application filed *for the same subject* in *the same country :*

the previous application must, *before* the subsequent application is filed, have been *withdrawn, abandoned* or *refused* ;
the previous application must *not* have been *laid open to public inspection* ;
the previous application must *not leave any rights outstanding* ;
the previous application must *not yet* have served *as a basis for claiming a right of priority,* either in the same or in any other country.

If any of these conditions is not fulfilled, the country of the Union in which priority is claimed on the basis of the subsequent application will refuse to recognize this priority.

Furthermore, the replacement of a previous application by a subsequent application will not be accepted if in the period between these applications *another* application has been filed for the same subject by the same applicant in the same or another country of the Union.[1] This is so because in such cases the subsequent application, at the time of its filing, cannot be considered as being the first.

(f) After the replacement of a previous application by a subsequent application as a basis for the right of priority, priority may no longer be recognized in any country of the Union on the basis of the previous application.

ARTICLE 4, Section D*(a)*

D(1) Any person desiring to take advantage of the priority of a previous filing shall be required *(b)* to make a declaration *(c)* indicating the date of such filing and the country in which it was made *(d)*. Each country shall determine the latest date on which such declaration must be made *(e)*.

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[1] *Actes de Lisbonne*, p. 333.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto *(f)*.

(3) The countries of the Union may require *(g)* **any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation** *(h)*.

(4) No other formalities may be required *(i)* **for the declaration of priority at the time of filing the application** *(j)*. **Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority** *(k)*.

(5) Subsequently *(l)*, **further proof may be required.**

Any person who avails himself of the priority of a previous application shall be required to specify the number of that application ; this number shall be published as provided for by paragraph (2), above *(m)*.

(a) The original text of the Convention of 1883 did not contain any rules regarding the questions when and how the right of priority may be claimed. This was unsatisfactory because national legislation could then allow priority to be claimed at a late stage, for example, when the nullity of a patent or of a trademark registration was alleged in court. The claim of priority could thus come as a surprise to third parties, who could not have known of its existence and who had acted accordingly. Furthermore, many different systems could and did exist for claiming the right of priority in the countries of the Union.[1]

At the Revision Conference of Washington in 1911 the essence of the provisions regulating when and how the right of priority may be claimed was introduced into the Convention.[2] Relatively minor

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[1] See LADAS: *The International Protection of Industrial Property*, p. 286.

[2] *Actes de Washington*, pp. 45/6, 227 (proposals), 91, 95, 115 (observations), 275/6 (report of Sub-Committee) 307/8 (report to Plenary Committee), 248 (adoption in Third Plenary Session).

improvements were adopted by the following Revision Conferences of The Hague in 1925,[1] of London in 1934[2] and of Lisbon in 1958.[3]

(b) Some of the formal requirements for the claiming of the right of priority are *mandatory* for the member States, because it is necessary that third parties be informed of such claims in time (cf. paragraph (2) of the provision under examination). The member States are therefore not allowed to depart from these requirements. If they are not fulfilled, the priority cannot be considered validly claimed.

(c) The form of the declaration may be prescribed by the national legislation of the country concerned.

(d) The mandatory formal requirements for the claiming of the right of priority are the indication of the *date* of the previous filing on which the claim of priority is based, and of the *country* in which such filing was made. The Revision Conference of Lisbon in 1958 added to these requirements the indication of the *number* of the previous application, but in another context and not necessarily with the same consequences (cf. observation *(m)* below).

In countries where applications, or at least claims of priority, are not examined as to substance, the indication of the above particulars may suffice; they will be noted and published without examining whether they are justified, a question which only the courts can decide later. Other countries may wish to prescribe more formalities—cf. paragraph (3) of the provision under consideration—in order to be able to examine priority claims as to substance, for example, with respect to the question whether the application on which the claim of priority is based was the *first* application for the subject concerned, or as regards the *identity of subject* between the first and the subsequent applications.

(e) It is mandatory for all member States to determine the latest date on which the declaration containing the above particulars

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[1] *Actes de La Haye*, pp. 230/1, 233 (proposal), 336 (observations), 428/9 (report of Second Sub-Committee), 518 (report of General Committee), 538/9 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 251/2 (proposals), 365/6 (report of Second Sub-Committee), 453/4 (report of Drafting Committee), 513 (discussion and adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 460/1 (proposal), 465/70 (observations), 471/79 (discussion in Second Committee), 532/3 (report of Second Committee), 99 (adoption in Second Plenary Session), 115 (General Report).

concerning a previous filing on which a claim of priority is based must be made. They may prescribe that such declaration must be made *together* with the filing of the application for which priority is claimed. They may also allow such declaration to be made later, within a certain period after the filing of the latter application, if they wish thus to facilitate the claiming of the right of priority. However, the period for making the declaration after the filing of the subsequent application must be so fixed that the country concerned can comply with the obligation to publish the particulars contained in the declaration in due time, according to paragraph (2) of the provision under examination.

(f) It is recalled that the right of priority provided by the Convention applies not only to patent applications but also to applications for registration of a utility model, an industrial design or a trademark (Article 4, paragraph A(1)). In all publications regarding these applications issued by the competent authorities of the member States, the required particulars concerning the right of priority must be mentioned, in order that third parties can be informed of them as soon as possible. Lack of such *publication* will not, however, invalidate the right of priority.[1]

(g) As has been pointed out in observation *(d)* above, the member States *may* prescribe for the claiming of the right of priority formalities other than a mere declaration containing certain particulars. These possible additional formalities are enumerated in paragraph (3) of the provision under consideration. They may consist in the *production of a copy* of the previous application on which the claim of priority is based, *certified as correct* by the authority with which this first application was filed, and, if required, also in the production of a *certificate* from the same authority showing the *date of filing*, and a *translation*. Details concerning these requirements may be fixed by national legislation. However, such legislation must respect the further requirements in the provision under consideration, namely, that *no authentication* of the certified copy of the original application shall be required and that a *minimum*[2] *term of three months* after the filing of the subsequent application must be granted for the filing of such copy, *without fee*. For the filing of such copy *after* this minimum term, a fee may be prescribed.[3]

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[1] *Actes de Washington*, p. 307.

[2] *Actes de La Haye*, pp. 429, 538; *Actes de Londres*, p. 513.

[3] *Actes de Londres*, p. 513.

(h) The translation which the national legislation of the country in which priority is claimed may require will naturally be a translation into the official language, or one of the official languages, of that country.

(i) This provision, limiting the formalities which may be required, is again mandatory for the member States, in order to facilitate the claiming of the priority right.

(j) Since paragraphs (1) and (3) of the provision under consideration allow for the filing of documents at a later stage than that of the filing of the application for which the right of priority is claimed, the words " at the time of filing " must be interpreted as meaning during the period of filing when the priority right can be claimed and documentation related to it can be produced. At a later stage—cf. paragraph (5), first sentence, of the provision under examination—for example, when the nullity is alleged of a right or registration already granted with acknowledgement of the right of priority, further proof of the existence of the latter right may be required,[1] for example, regarding the identity of the subject of the first and subsequent applications.

(k) This provision deals only with the consequences of failure to comply with the *formalities* prescribed by the Article under consideration. It must be interpreted as referring not only to the mandatory but also to the permissive formalities. The consequences of failure to comply with these formalities will be determined by national legislation,[2] but may not go beyond the *loss of the right of priority.* Therefore, the absence of compliance with these formalities will not, *as such,* result in the loss of the right to the patent, utility model, industrial design or trademark involved. However, the loss of such right may occur as a *consequence* of the loss of the right of priority, if, for example, without the latter the former has been anticipated by publication of the invention or by registration or use of the trademark by a third party, etc.

The provision under examination does not concern objections to the claiming of priority other than failure to comply with *formalities,* such as, for example, the objection that such claim is not based on a *first* application in one of the countries of the Union or that there is

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[1] *Actes de Washington,* pp. 307/8.

[2] Cf. in France: Cour de Paris, 10/1/1967, *Ann.* 1967, p. 23.

no identity of subject between the applications on the basis of which and for which priority is claimed. Member States are free to determine in their national legislation the consequences of these objections to a claim of priority.[1]

(l) See observation *(j)* above.

(m) The second sentence of paragraph (5) of the provision under consideration was added at the Revision Conference of Lisbon in 1958, in order to supplement the information to be given regarding claims for priority rights.[2] Although the indication of the *number* of the previous application on which the claim for the right of priority is based completes the particulars to be given in the declaration required by paragraph (1) of the provision under discussion and has to be included in the publication prescribed in paragraph (2), the obligation to indicate such number has not been included in paragraph (1). The reason is that such indication is not always possible, and the absence of or an error in the indication of the number should not, under national legislation, automatically lead to a loss of the priority right.[3]

ARTICLE 4, Section E*(a)*

E(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model *(b)***, the period of priority shall be the same as that fixed for industrial designs** *(c)***.**

(2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa *(d)***.**

(a) The Convention did not deal with utility models until the Revision Conference of Washington in 1911, when this notion was introduced in Articles 2, 4 A and C, 11 and 12, while the Final Protocol

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[1] Cf. SCHRICKER: " Fragen der Unionspriorität im Patentrecht, " *G.R.U.R. Int.*, 1967, p. 85 (English translation in *I.P.*, 1967, p. 113).

[2] *Actes de Lisbonne*, pp. 460/1.

[3] *Ibidem*, pp. 465 (observation of Federal Republic of Germany), 471, 478, 532.

contained what is now Article 4 E(1).[1] The entire provision now under E was added to the Convention itself by the Revision Conference of The Hague in 1925.[2] Since then it has been modified only as to form.

(b) It will rarely happen that an industrial design and a utility model concern the same subject because, in principle, the first concerns ornamental aspects of an industrial article whereas the latter relates to its technical novelty. However, since it is a matter for national legislation to define these subjects, cases of overlapping may occur. In such cases, on condition that the identity of the subject is preserved, the right of priority can be claimed to obtain a different form of protection. The provision under consideration deals only with the case where the *first* application is filed for a *utility model* and afterwards, on the basis of this application, priority is claimed for an application in respect of an *industrial design*. The reverse case is not mentioned, but can be taken to be included.[3]

(c) In the case regulated by the provision, the period of priority will be that fixed for industrial designs, which is six months. In view of Section C(1) of the Article under consideration the same period of priority will prevail in the reverse case, where the first application is filed in respect of an industrial design, on the basis of which priority is claimed for a utility model.[4]

(d) This provision is self-explanatory.[5] The period of priority does not present any problem here since it is the same for patents and utility models (twelve months).

ARTICLE 4, Section F[(a)]

F. No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple

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[1] *Actes de Washington*, pp. 42/3, 46, 227 (proposals), 275 (report of Committee), 248/9 (adoption in Third Plenary Session).

[2] *Actes de La Haye*, pp. 231/3 (proposal), 429/30 (report of Second Sub-Committee), 518 (report of General Committee), 539 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[3] *Ibidem*, pp. 231, 233, 429/30, 495, 518. See also in Federal Republic of Germany: Bundespatentgericht 10/11/1967, *G.R.U.R. Int.*, 1968, p. 204.

[4] Cf. in Federal Republic of Germany: Bundespatentgericht 10/11/1967, *G.R.U.R. Int.*, 1968, p. 206.

[5] Cf. for its history: *Actes de La Haye*, pp. 231/2.

priorities *(b)*, even if they originate in different countries *(c)*, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed *(d)*, provided that, in both cases, there is unity of invention within the meaning of the law of the country *(e)*.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions *(f)*.

(a) This Section and also the following Sections G and H do not deal with the right of priority regarding *all* subjects of industrial property enumerated in Section A of the Article under consideration, but only with the priority right regarding applications for *patents.*[1] Section F is concerned with the subjects of *multiple* and *partial* priorities,[2] whereas Section G regulates the question of *dividing applications* for which priority may be claimed. Some parts of these provisions were introduced into the Convention at the Revision Conference of The Hague in 1925.[3] At the following Revision Conferences of London in 1934 and of Lisbon in 1958 the subjects concerned were more clearly separated and their regulation was improved (see, below, observation *(a)* on Section G).

(b) It frequently happens that an invention is not immediately complete, so that, even after a patent application has been filed for it, improvements or additions are found which are made the subject of other patent applications. The Convention makes it possible to claim, *in one and the same later application in other countries of the Union*, separate (multiple) priorities for the different parts of the invention, based on the various first applications made in respect of each of those parts, provided, of course, that these various applications

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[1] This does not mean that the member States may not apply the same principles to other subjects of industrial property, for example, in recognizing multiple or partial priorities in case of collective filings of industrial designs or of the same trademark for different goods, but they are under no obligation to do so.

[2] Cf. SCHRICKER: " Fragen der Unionspriorität im Patentrecht, " *G.R.U.R. Int.*, 1967, p. 85 (English translation in *I.P.*, 1967, p. 113).

[3] *Actes de La Haye*, pp. 337 (proposal of France), 430 (report of Second Sub-Committee), 518/9 (report of General Committee), 539 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

are filed within the term of priority counted from the first application. For the question of unity of invention, see under observation *(e)* below.

(c) According to an addition introduced into the provision at the Revision Conference of Lisbon in 1958,[1] the above procedure is even possible when the first applications in respect of different parts of the invention are filed in different countries.

(d) A second addition made to the provision under examination at the Revision Conference of Lisbon in 1958[2] concerns the possibility of *partial* priorities. It frequently happens that, after a first application for a patent has been filed, subsequent applications in respect of the same invention for which the priority of the first application is claimed contain elements of the invention which were not present in the first application and for which either no separate patent application has been filed in time to claim multiple priorities or no separate patent application will be filed at all (for example, because the added elements do not, in themselves, have an inventive character). Under the Convention, such additions in later applications will not prevent priority from being recognized for those other elements of the invention which were already present in the first application. It is also possible to combine multiple with partial priorities, if multiple priorities are claimed on the basis of separate first applications in respect of different parts of an invention to which, in the later application for which these priorities are claimed, new elements are also added for which no priority is claimed.

The elements added to an invention for which no priority is claimed in a later application, because they were not contained in any first application, may, of course, create a new priority right on the basis of the application in which they were introduced for the first time. The second sentence of the paragraph under examination makes this clear.[3]

(e) Many national patent legislations provide that a patent application may concern only one invention. These provisions must also be observed in the case of multiple and partial priorities. If, according

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[1] *Actes de Lisbonne*, pp. 342/3 (proposals of Belgium and Netherlands), 345/6, 348 (discussion in Second Committee), 524/5 (report of Second Committee), 100 (adoption in Second Plenary Session), 115 (General Report).

[2] *Ibidem*, pp. 340/4 (proposal and observations), 345/8 (discussion in Second Committee), 524/5 (report of Second Committee), 100 (adoption in Second Plenary Session), 115 (General Report).

[3] *Ibidem*, pp. 346/8.

to the law of the country in which priority is claimed, there is no unity of invention in an application for which multiple and/or partial priorities are claimed, the application may be divided according to Section G of the Article under consideration or, if it is not so divided, it may be refused.

(f) See, above, the final observation under *(d)*.

ARTICLE 4, Section G*(a)*

G(1) If the examination *(b)* **reveals that an application for a patent contains more than one invention** *(c)*, **the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any** *(d)*.

(2) The applicant may also, on his own initiative *(e)*, **divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized** *(f)*.

(a) As has been observed already—see observation *(a)* regarding Section F of Article 4—the principle of paragraph (1) of this provision concerning the possibility of *dividing patent applications*[1] was introduced into the Convention at the Revision Conference of The Hague in 1925.[2] At the Revision Conference of London in 1934 the text of this paragraph was separated from what is now Section F, and improved,[3] whereas paragraph (2) was added at the Revision Conference of Lisbon in 1958.[4]

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[1] See, for this subject, PFANNER: "Die Teilung von Patentanmeldungen," *G.R.U.R. Int.*, 1966, p. 262.

[2] *Actes de La Haye*, pp. 337 (proposal of France), 430 (report of Second Sub-Committee), 518/9 (report of General Committee), 539 (report of Drafting Committee), 572 (adoption in Second Plenary Session).

[3] *Actes de Londres*, pp. 170, 173 (proposal), 255 (observations), 367/9 (report of Second Sub-Committee), 454/5 (report of Drafting Committee), 513/4 (adoption in Second Plenary Session).

[4] *Actes de Lisbonne*, pp. 501 (proposal of U.K.), 502/5 (discussion in Second Committee), 534 (report of Second Committee), 100 (adoption in Second Plenary Session), 115 (General Report).

(b) This provision will apply only in countries where the examination of patent applications makes it possible to ascertain whether such applications contain more than one invention. This will probably not be the case in countries where patent applications are examined only as to form.

(c) According to the authentic French text of the Convention, which prevails over translations (Article 29(1)(c)), the provision is applicable in all cases where the examination reveals that an application for a patent is "*complexe.*" In the official English text of the Convention the word "*complexe*" has been translated by "contains more than one invention." This is not quite accurate, because it may happen that, according to the legislation of the country of examination, a patent application is considered "complex" for reasons other than lack of unity of invention,[1] for example, because it contains a forbidden combination of claims for manufacture and use of the same invention. In such cases, the provision under consideration will also apply, although its use in cases where the application contains more than one invention will probably be much more frequent.

(d) When the examination has revealed complexity of the application, the applicant may divide it into a certain number of divisional applications with the consequences attached to such division specified in the provision under examination. The provision is placed in Article 4 concerning the right of priority and normally priority rights will be involved in, and preserved notwithstanding, division of a patent application. However, the words "of the right of priority, if any" show that the provision will also apply if no priority right is claimed.

(e) This provision, concerning the possibility open to the applicant to divide his patent application *on his own initiative*, without previous examination having revealed any complexity in it, was introduced into the Convention at the Revision Conference of Lisbon in 1958. The provision is a broad one: it includes division of patent applications for reasons other than complexity or lack of unity of invention;[2] it also includes cases where no priority is claimed—see, above, under observation *(d)*—and it will also apply in countries where patents are examined only as to form.[3] Of course, after division of a patent

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[1] *Actes de La Haye*, p. 337: the French proposal, which originated the provision, aimed at complexity *within* unity of invention, namely, because of multiple priorities.

[2] *Actes de Lisbonne*, pp. 503/4.

[3] *Ibidem*, p. 504.

application the separated parts must each satisfy the legal conditions for the granting of a patent, in order that such patent may be granted.

(f) The possibility of dividing patent applications on the initiative of the applicant having been accepted by the Convention, the conditions of the exercise of such right—for example, a term within which it must be exercised—are left to be determined by national legislation.[1]

ARTICLE 4, Section H*(a)*

H. Priority may not be refused on the ground that certain elements of the invention *(b)* for which priority is claimed do not appear among the claims *(c)* formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements *(d)*.

(a) This provision was introduced into the Convention at the Revision Conference of London in 1934.[2]

(b) Although the provision under examination does not explicitly state that it applies only to cases where priority is claimed with regard to applications for *patents*, the word " invention " makes it clear that this is nevertheless the scope of the provision. The reasons for special treatment of applications for patents in this respect are the following :

As has been observed above—observation *(i)* regarding Article 4 A(1)—the exercise of the priority right requires *identity of subject* between the first application on which the right of priority is based and the subsequent application for which such right is claimed. Such identity of subject is easy to preserve and to establish with respect to applications for the registration of industrial designs, trademarks, and, to a lesser extent, also utility models. The identity of subject is more difficult to preserve and to establish with respect to patent applications, because domestic laws differ widely concerning what may or may not be patented (for example, products and processes of manufacture or of application in various technological fields), and regarding the drawing up of a description of the invention and claims. It is therefore

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[1] Cf. in Federal Republic of Germany: Bundespatentgericht, 25/7/1967, *G.R.U.R. Int.*, 1968, p. 132.

[2] *Actes de Londres*, pp. 170/3 (proposal), 255/6 (observations), 369/70 (report of Second Sub-Committee), 455 (report of Drafting Committee), 514 (adoption in Second Plenary Session).

frequently necessary, when a first patent application has been filed for an invention and priority is to be claimed for subsequent applications in other countries, to adapt such subsequent applications in those countries to their national requirements. It would be unjust if in such cases the right of priority were lost. Therefore some flexibility is given to the requirement of identity of subject in the case of patent applications.[1]

(c) Most domestic laws require that the subject for which protection by a patent is claimed must be defined in the patent application in one or more claims, but in some countries these claims have to be very specific, whereas in others the indication of the principles of the invention suffices. In view of these differences the right of priority must be recognized even for elements of the invention which do *not* appear in the *claims* of the application on which the right of priority is based.

(d) It will suffice for the claiming of the right of priority in a subsequent patent application if the elements of the invention for which priority is claimed are specifically disclosed in the documents of the previous application *as a whole* (including the description of the invention, drawings (if any), charts, etc.). The administrative or judicial authorities of the country where priority is claimed will determine whether this condition is fulfilled.[2]

The provision under consideration must, however, work in two directions. On the one hand, priority will be recognized on the basis of a previous application for all elements of the invention specifically disclosed in that application *as a whole*. On the other hand, if an even earlier application *as a whole* has already specifically disclosed these elements, that application will be considered the *first* application and priority cannot be recognized on the basis of the application mentioned earlier.

ARTICLE 4, Section I*(a)*

I(1) Applications for inventors' certificates *(b)* **filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate** *(c)* **shall give rise to the**

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[1] *Actes de Londres*, pp. 171, 455.

[2] *Ibidem*, p. 455. See also ZUTRAUEN: " Zur Frage der Identität zwischen Vor- und Nachanmeldung bei Beanspruchung der Unionspriorität," *G.R.U.R. Int.*, 1960, p. 498.

right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents *(d)*.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate *(e)*.

(a) This Section was added to the Convention at the Revision Conference of Stockholm in 1967. The addition was motivated by the fact that the domestic legislations of several member States of the Union [1] have made it possible to obtain, for an invention, at the option of the applicant, *either a patent or an inventor's certificate*, the latter being a legal document under which the right of exploitation of the invention belongs to the State, whereas the inventor obtains a right to a remuneration from the State.

The purpose of the provision is to put applicants for inventors' certificates in those countries of the Union whose laws make provision for the grant of such certificates as an alternative to the grant of patents in the same position in respect of priority rights under Article 4 of the Convention as applicants for patents.[2]

(b) The countries of the Union are free to define in their national legislation what they understand by " inventors' certificates."

(c) It is believed that inventors' certificates are *generally* less useful than patents to non-nationals of a country who are not established or domiciled there,[3] so that countries which granted *only* inventors' certificates, and *not patents*, for inventions would not give sufficient reciprocity of protection to nationals of other countries which, for their part, granted *patents* to the nationals of the countries first mentioned. Therefore, the provision under consideration, granting priority rights to applications for inventors' certificates, applies *only* to such applications filed in a country in which applicants have the

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[1] Cf. BIRPI publication, *Study Group on Certificates of Authorship*, containing surveys of the legislation of Bulgaria, Poland, Rumania and U.S.S.R., 1964.

[2] Cf. Report of Main Committee III of the Intellectual Property Conference of Stockholm, *I.P.*, 1967, p. 217, paragraph 4.

[3] See MAST: " Die Einführung der Erfinderscheine in die Pariser Verbandsübereinkunft, " *G.R.U.R. Int.*, 1967, p. 462.

right to apply *at their own option either* for a patent *or* for an inventor's certificate.

(d) In the above case, applications for inventors' certificates will give rise to a right of priority under the same conditions and with the same effect as applications for patents, which means that on the basis of a first application for an inventor's certificate priority may be claimed for patent applications in respect of the same subject in other countries of the Union. All provisions of Article 4 A, B, C, D, E(2), F, G and H will apply in such a situation.

(e) Paragraph (2) of the provision under consideration considers the reverse situation, namely, the possibility of claiming priority *in* a country where applicants have the right to apply at their own option either for a patent or for an inventor's certificate. If such an applicant applies for a *patent*, claiming priority on the basis of a first application in another country for a patent or an inventor's certificate, the situation is already covered by the foregoing Sections A to I(1). If, however, the application for which priority is claimed is made for an *inventor's certificate*, the provisicn under examination ensures that the applicant may claim priority on the basis of a first application, made in another country of the Union, for a patent, a utility model (cf. Section E(2)) or an inventor's certificate.

With respect to countries which would only grant inventors' certificates, and not patents, for inventions, neither of the provisions of Section I would be applicable : applications for inventors' certificates filed in such countries would enjoy no priority right in other countries of the Union, and it would not be possible to claim for such applications a priority based on a first filing in other countries.

ARTICLE 4*bis*(*a*)

(1) Patents *(b)* **applied for in the various countries of the Union by nationals of countries of the Union** *(c)* **shall be independent of patents obtained for the same invention** *(d)* **in other countries, whether members of the Union or not** *(e)***.**

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority *(f)* **are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration** *(g)***.**

(3) The provision shall apply to all patents existing at the time when it comes into effect *(h)***.**

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession *(i)***.**

(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority *(j)***.**

(a) The principle of the mutual independence of patents obtained for the same invention in the various countries of the Union, as embodied in paragraphs (1), (3) and (4) of this Article, was introduced into the Additional Act to the Convention adopted at the Revision Conference of Brussels in 1900.[1] The Revision Conferences of Washington in 1911 and of London in 1934 added paragraphs (2) and (5), respectively.[2]

(b) A distinction must be made between, on the one hand, "normal" patents, which will include patents of improvement and patents or certificates of addition, and, on the other hand, patents which are "abnormal" in so far as they are *only* granted *on the basis*

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[1] *Actes de Bruxelles*, pp. 41/2 (proposal), 181/3, 311, 331/3 (discussions and adoption in Plenary Session).

[2] *Actes de Washington*, pp. 47, 228 (proposals), 222 (observation), 276/7 (report of Committee), 249/51, 259/60 (discussions and adoption in Third and Fourth Plenary Sessions); *Actes de Londres*, pp. 257/8 (proposals), 370 (Report of Second Sub-Committee), 455/6 (report of Drafting Committee), 514 (discussion and adoption in Second Plenary Session).

of an existing foreign patent. Such patents (see, above, observation *(c)* on Article 1, paragraph (4)) are called "patents of importation," "introduction," "confirmation" or "revalidation." These patents are granted, in the countries which make them available, for inventions which have lost their novelty at the time of the patent application and can therefore no longer be patented normally. They are granted, nevertheless, *on the basis of an existing foreign patent* and in anticipation of the *exploitation of the invention in the country in which the patent of importation is granted.* In such cases, the duration of the patent of importation may be made dependent on the duration of a foreign patent which is the basis of the grant of the patent of importation.[1]

(c) To these nationals are assimilated the persons entitled to the benefits of the Convention by virtue of Article 3.

(d) Independence is prescribed only for patents obtained for "the same invention." However, for patents not obtained for the same invention, independence will of course apply *a fortiori.*

(e) The provision obliges the member States of the Union to consider their patents independent of other patents for the same invention, even if those patents are granted in non-member States.

(f) The sense of this provision is that *even* patents applied for during the period of priority, and for which priority is recognized, will be independent of the patent granted on the application which is the basis of the priority claim. With respect to patents which are not applied for during the period of priority or for which no priority is claimed, the same rule will apply in view of paragraph (1) of the Article under consideration.[2]

(g) The independence of patents granted for the same invention concerns their normal duration as well as the possibilities of earlier termination. Such possibilities exist not only in cases of forfeiture or nullity but also if prescribed fees for the maintenance of a patent are not paid.

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[1] Cf. *Actes de Washington,* pp. 249/51, 259.

[2] Some confusion seems to have existed on this subject during the Revision Conference of Washington in 1911, at which only patents of importation were the real issue.

(h) This provision is a transitory clause which has lost its meaning, because all patents existing at the time when the provision took effect (September 14, 1901)[1] have meanwhile expired.

(i) This provision is self-explanatory.

(j) The purpose of this provision, added to the Article under consideration by the Revision Conference of London in 1934,[2] is to make it clear that the duration of patents granted with the benefit of the right of priority may not be calculated from a different date from that of the starting point for the duration of patents for which no priority is recognized.

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[1] Cf. Article 3 of the Additional Act of Brussels, 1900, and *Actes de Washington*, pp. 13/4.

[2] *Actes de Londres*, pp. 257/8 (proposals of France, Germany, U.S.A. and several other countries), 370 (report of Second Sub-Committee), 455/6 (report of Drafting Committee), 514 (discussion and adoption in Second Plenary Session).

ARTICLE 4*ter*

The inventor shall have the right to be mentioned as such in the patent(*a*)(*b*)**.**

(a) This provision, concerning what is commonly called the " moral right " of the inventor to be named as such in the patents granted for his invention in all countries of the Union, was introduced into the Convention at the Revision Conference of London in 1934.[1]

(b) The procedure for the exercise of this right of the inventor will be regulated by the member States in their national legislation. Since the inventor has only the *right* to be mentioned in the patent, he can waive this right, unless national legislation prescribes otherwise. The original proposals for the provision contained a clause according to which any contract contrary to the provision would be null and void, but this clause was not accepted. This question is therefore a matter for national legislation.

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[1] *Actes de Londres*, pp. 259/60 (proposals of Denmark, Mexico, Netherlands and several other countries), 370/3 (report of Second Sub-Committee), 456 (report of Drafting Committee), 514 (discussion and adoption in Second Plenary Session).

ARTICLE 4*quater*[(a)(b)]

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process *(c)* is subject to restrictions or limitations *(d)* resulting from the domestic law.

(a) This provision was added to the Convention at the Revision Conference of Lisbon in 1958.[1]

(b) The provision was proposed for the following reasons. It sometimes happens that an invention leads to the manufacture of a product which does not conform to the requirements of the national law of a country as to, for example, security or quality. In other cases the manufacture or sale of such product is restricted, because the State concerned has granted a monopoly or an exclusive concession for such manufacture or sale to an organization of public or private law.[2] It would, however, be unjust to refuse or invalidate patents concerning such inventions. In cases of the first category, the invention may show that the requirements of the law prohibiting the sale of certain products are obsolete, in which case the law may be modified or repealed, which will then allow the application of the invention. In the second case, a patent is justified since the holder of the monopoly may obtain a contractual or a compulsory license for the exploitation of the invention. The provision under examination therefore prescribes that patents may not be refused or invalidated in such cases.

(c) The provision refers only to cases where the *sale* of the *patented product* or of a product obtained by means of a patented process is restricted or limited by national legislation, and not to the case where the *manufacture* of such product or the application of a *patented process itself* is subject to analogous restrictions or limitations. It is therefore a matter for national legislation to regulate this latter situation. It would seem reasonable to adopt for these latter cases the same solution as for the cases referred to in the provision.

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[1] *Actes de Lisbonne*, pp. 508/9 (proposals of Denmark, Netherlands and several other countries), 510/3 (discussion in Second and General Committees), 534/5 (report of Second Committee), 100 (adoption in Second Plenary Session), 115 (General Report).

[2] Cf. in Austria: Patentamt (Division of Appeals), 21/10/1960, *Oesterreichisches Patentblatt*, 1961, p. 46; *G.R.U.R. Int.*, 1961, p. 483.

(d) The provision deals with cases where the sale of a product is subject to *restrictions* or *limitations* resulting from the domestic law of the country concerned. The question whether a total *prohibition* of such sale also comes under the provision is left open, but should, in view of the purpose of the provision, be answered affirmatively. In all cases, refusal or invalidation of a patent must remain possible if the invention concerned is *contrary to public order or morality*. This may not, however, be accepted merely because the exploitation of the invention is prohibited or restricted by law or regulation, but only when it is contrary to the basic legal or social concepts of the country concerned.

ARTICLE 5, Section A(a)

A(1) Importation by the patentee *(b)* **into the country where the patent has been granted of articles manufactured** *(c)* **in any of the countries of the Union** *(d)* **shall not entail forfeiture of the patent** *(e)*.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses *(f)* **to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent** *(g)*, **for example, failure to work** *(h)*.

(3) Forfeiture of the patent *(i)* **shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses** *(j)*. **No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license** *(k)*.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working *(l)* **before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last** *(m)*; **it shall be refused if the patentee justifies his inaction by legitimate reasons** *(n)*. **Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license** *(o)*.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models *(p)*.

(a) Paragraph (1) of this Section, concerning *importation of patented articles*, was introduced into the original text of the Convention of 1883.[1] It has not been modified since except for minor changes as to form.

Paragraphs (2), (3) and (4) of the Section deal with *the obligation to work a patent* in the country where it is granted,[2] and more generally with the *abuses* which might result from the exercise of the exclusive

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[1] *Actes de Paris*, I, pp. 27 (proposal for Article 4), 56/8, 64/70, 132 (discussions and adoption).

[2] Cf. for this subject, AKERMAN: *L'obligation d'exploiter et la licence obligatoire en matière de brevets d'invention*, 1936.

right conferred by the patent. The original text of the Convention of 1883 only contained a provision stating that in the case of importation of patented articles (paragraph 1) the patentee remained under the obligation to exploit his patent in accordance with the laws of the country into which he introduced the patented articles. The Revision Conference of Brussels in 1900 added a more general provision concerning the non-working of a patent: Article 2 of the Additional Act adopted in Brussels.[1] This regulation was elaborated further by the following Revision Conferences of Washington (1911), The Hague (1925), London (1934) and Lisbon (1958). At the Conference of The Hague the provision was enlarged to include the regulation of legislative measures intended to prevent the abuses which might result from the exclusive rights conferred by the patent, abuses of which failure to work was cited as an example.[2] On the other hand, that Conference, and also the following Conferences of London and Lisbon, reduced the possibilities of legislative measures and sanctions in these cases.[3]

Originally, doubts existed[4] as to whether the provisions regulating these matters could be considered "self-executing"—in countries which admit such a possibility (see Chapter II.3 and II.4, above)—that is, whether interested parties could directly, even in the absence of or notwithstanding differing national legislation, invoke these provisions before the administrative or judicial authorities of the countries concerned. Paragraph (2) of the Section under consideration is still a provision which merely gives a right to legislate to the member States and therefore has no "self-executing" character. On the other hand, paragraphs (1), (3) and (4), especially after the Revision Conferences of London (1934) and Lisbon (1958), are clearly so worded as to be "self-executing"—in countries which admit such a possibility.[5]

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[1] *Actes de Bruxelles*, pp. 82/7, 316/27, 383/8.

[2] *Actes de La Haye*, pp. 234/7 (proposal), 337/8 (observations), 431/4 (report of Second Sub-Committee), 519 (report of General Committee), 540 (report of Drafting Committee), 573/6 (discussion and adoption in Second Plenary Session).

[3] *Actes de Londres*, pp. 173/5, 179 (proposal), 261/3 (observations), 377/80 (report of Second Sub-Committee), 458/60 (report of Drafting Committee), 515 (adoption in Second Plenary Session); *Actes de Lisbonne*, pp. 389/93 (proposals), 395/407 (observations), 411/25 (discussion in Second Committee), 526/9 (report of Second Committee), 100/1 (adoption in Second Plenary Session), 116 (General Report).

[4] Cf., for example, in France the case law and literature referred to by Chavanne in *Ann.*, 1963, p. 265, and by Roubier, *Ann.*, 1954, p. 257, 1957, p. 367, and finally Cour de Cassation (Chambres réunies), 16/11/1966, *Ann.*, 1967, p. 117; in Belgium: Conseil d'Etat, 9/5/1958, *Ing. Conseil*, 1958, p. 172; in Italy: Court of Appeals of Turin, 15/10/1965, *G.R.U.R. Int.*, 1967, p. 361 (German translation).

[5] Cf. in France: Cour de Cassation, cited in preceding footnote.

Paragraph (5) of the Section under consideration was added at the Revision Conference of London in 1934.[1]

(b) This provision concerning *importation of patented articles by the patentee* into the country where the patent is granted was introduced into the Convention at a time when the question whether such importation could entail forfeiture of the patent was a hotly debated issue. As national legislations have since become less severe on importation of patented articles as such, the issue has lost much of its importance. The provision is rather narrowly worded and leaves the member States free to regulate the importation of patented articles by other means and in other circumstances than those referred to in the provision.

(c) " *Articles manufactured* " must mean " articles manufactured according to the patent " and will include both categories mentioned in Article 4*quater*, namely, articles which are themselves the subject of the patent and articles manufactured by means of a patented process.

(d) The provision applies only in the case of importation of articles *manufactured* in *any of the countries of the Union* and not if these articles are *manufactured elsewhere* and *imported from one of those countries.*

(e) The provision stipulates only that importation as indicated shall not entail *forfeiture of the patent.* However, the expression " forfeiture " is not used in all countries of the Union. In view of the purpose of the provision, it must apply to all measures terminating a patent on the ground of importation of patented articles by the patentee, independently of the question whether such measures are called forfeiture, repeal, revocation or annulment.

(f) It would seem, with respect to the prevention of the abuses indicated in this provision, that national legislation can only take legislative measures providing for the grant of *compulsory licences.* This, however is not true, because paragraph (3) makes it clear that *forfeiture* of the patent is another measure which may be provided for. The order in which those measures may apply is prescribed in paragraphs (3) and (4).

(g) The provision concerning the *abuses which might result from the exercise of the exclusive rights conferred by the patent* relates to a

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[1] *Actes de Londres*, pp. 379/80 (proposal of Poland), 459/60 (report of Drafting Committee), 515 (adoption in Second Plenary Session).

very important question of patent law. Although patents, even apart from their exploitation, are considered beneficial to industry, as they publish inventions which may inspire other inventions, and fall into the public domain after the expiration of their term, it is believed in many countries that, in order to be fully justified, patents should also be *used* for *working the patented invention in the country where the patent is granted*, and not merely as an exclusive right to prevent others from doing so or to control importation. On the other hand, immediate exploitation of the same invention in all countries where patents are granted for the invention is generally impossible, so that the patentee must be given sufficient time to organize exploitation, be it by himself or by licensees, in the countries concerned.

The provision under examination aims at striking a balance between the said considerations. It gives the member States the right to legislate against the *abuses* which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work, but on condition that the provisions of paragraphs (3) and (4) of the Article are respected.

The provision in paragraph (2), and therefore also the provisions of paragraphs (3) and (4) which prescribe rules for its application, do *not* deal with *measures other than those whose purpose is to prevent the abuses referred to.* The member States are therefore free to provide analogous or different measures, for example, compulsory licenses on conditions other than those indicated in paragraph (4), in *other cases* where *the public interest is deemed to require such measures.*[1] This may be the case when patents concern vital interests of the country in the fields of military security or public health or in the case of so-called " dependent patents," [2] etc. In such cases the rules of paragraphs (3) and (4) of the provision under consideration do not apply, so that the member States have freedom to legislate.

In cases where the provision under consideration does apply, namely, when national legislation is aiming at preventing the *abuses which might result from the exercise of the exclusive rights conferred by the patent*, the rules given in paragraphs (3) and (4) are mandatory for the member States and may—in countries which admit this possibility—be directly invoked by interested parties.

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[1] Cf. in United Kingdom: House of Lords, 11/3/1954, 71 *R.P.C.* 169 (1954). Cf. also the discussion of this question in the *Actes de Lisbonne*, pp. 393/5, 407/10, 421/2.

[2] " Dependent patents " are patents which cannot be exploited without applying at the same time an earlier patent, or a patent based on an earlier application or priority.

Among the abuses referred to, *failure to work the patented invention*—which failure, according to paragraph (4), includes *insufficient* working—is cited as an example. Other examples of such abuses may exist in cases where the owner of the patent, although working the patent in the country concerned, refuses to grant licenses on reasonable terms and thereby hampers industrial development, or does not supply the national market with sufficient quantities of the patented product, or demands excessive prices for such product.[1] The member States are free to define these, and other, abuses.[2]

(h) The member States are also free to define what they understand by "*failure to work*." Normally, working a patent will be understood to mean working it *industrially*, namely, by *manufacture* of the patented product, or *industrial application* of a patented process. Thus, importation or sale of the patented article, or of the article manufactured by a patented process, will not normally be regarded as "working" the patent.

The member States are equally free to decide whether legislative measures will be taken already in the case of failure to work a patent in the country concerned, or only if such failure to work occurs in a larger territory comprising one or more other countries.[3]

(i) Paragraph (3) of the Section under consideration is the first of the two paragraphs (3) and (4) which contain *mandatory requirements* concerning the contents of the legislative measures allowed by paragraph (2). Paragraph (3) concerns measures provided to prevent *all abuses* which might result from the exercise of the exclusive rights conferred by the patent; paragraph (4), on the contrary, applies only to compulsory licenses *on the ground of failure to work or insufficient working*.[4]

For the expression "forfeiture," see the observation under *(e)* above; the interpretation given there is confirmed by the second sentence of paragraph (3) of the Section under consideration.

(j) The first mandatory requirement for the *forfeiture* of a patent is that such forfeiture, *on the ground of the said abuses*, may be made

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[1] *Actes de La Haye*, p. 434.

[2] *Actes de Londres*, p. 174.

[3] See, for example, Article 5 of the Treaty between Germany and Switzerland of 13/4/1892, amended 26/5/1902, Blum-Pedrazzini, *Das schweizerische Patentrecht*, II, p. 609, and Article 136 of the Draft Treaty regarding a European Patent.

[4] *Actes de Lisbonne*, pp. 416/7, 527, 116.

possible by the national legislation of member States only in cases where the *grant of compulsory licenses is not sufficient* to prevent the said abuses. In view of the second sentence of the same paragraph, this means that after the grant of one or more compulsory licenses it must be considered whether these, or further, compulsory licenses will not suffice to correct the said abuses.

(k) A second mandatory requirement for the forfeiture of a patent on the ground of the said abuses is that *no proceedings for such forfeiture may be instituted* before the expiration of two years from the *grant* of the *first compulsory license.* Forfeiture of a patent is therefore a subsidiary measure, only possible after at least one compulsory license has been granted and the decision has been made that the grant of compulsory licenses is not sufficient to prevent the said abuses.

These provisions make it clear that, in countries whose legislation does not provide for compulsory licenses, *forfeiture of a patent on the ground of the said abuses* will not be possible.[1]

(l) As has been observed above, this provision applies only to compulsory licenses applied for in cases of *failure to work or insufficient working of a patent* and not in cases of other abuses of the exclusive right.[2]

(m) The periods prescribed take into account the different patent laws of the member States, which may provide for the grant of patents with or without previous examination of the patent application as to substance. In countries without such examination it is quite likely that a patent will be granted within the first year after filing the application. In order to give the applicant more time to organize the exploitation of his patent, a compulsory license can then only be applied for after four years have expired from the filing of the application. However, if, for example, because of the time involved in examining the application as to substance, the patent is granted more than one year after the filing of the application, a compulsory license cannot be applied for until three years have expired from the grant of the patent.

After expiration of the period which expires last, a compulsory license on the ground of failure to work or insufficient working may be allowed ; it may also be allowed later on during the life of the patent and even after a period during which the patent has been

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[1] Cf. in France: Cour de Cassation (Chambres réunies), 16/11/1966, *Ann.*, 1967, p. 117.

[2] *Actes de Lisbonne*, pp. 416/7, 527, 116.

worked in the country, if such working has stopped or has become insufficient.

(n) A compulsory license on the ground of failure to work or insufficient working must be *refused* if the patentee *justifies his inaction by legitimate reasons.* Such reasons may be based on the existence of legal, economic or technical obstacles to exploitation, or more intensive exploitation, of the patent in the country. The competent authorities of the country concerned will decide on this question.[1]

(o) This provision, added at the Revision Conference of Lisbon in 1958, tends to prevent the grantee of a compulsory license on the ground of failure to work or insufficient working from obtaining a stronger position than is warranted by the purpose of the license, namely, to provide the possibility of working the patent in the country concerned. National legislation may determine how a compulsory license may be transferred together with the enterprise or part of the enterprise or goodwill which exploits such license.

(p) This provision, added by the Revision Conference of London in 1934,[2] extends the application of the preceding provisions to utility models. Such application will probably be rare in view of the relatively short duration of utility models and their limited importance.

ARTICLE 5, Section B*(a)*

B. The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture *(b)*, either by reason of failure to work *(c)* or by reason of the importation of articles corresponding to those which are protected *(d)*.

(a) This provision concerns *industrial designs* only. It was introduced into the Convention, as regards forfeiture of protection by reason of importation of articles corresponding to the design, at the Revision Conference of The Hague in 1925.[3] It was completed as regards failure to work, at the Revision Conference of London in 1934.[4]

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[1] Cf. *Actes de Bruxelles*, pp. 316/7, 322/3, 325/6, 387/8.

[2] *Actes de Londres*, pp. 379/80 (proposal of Poland), 459/60 (report of Drafting Committee), 515 (adoption in Second Plenary Session).

[3] *Actes de La Haye*, pp. 339 (proposals of Germany and several other countries), 497/8 (discussion in Sixth Sub-Committee), 519/20 (report of General Committee), 540/1 (report of Drafting Committee), 576 (adoption in Second Plenary Session).

[4] *Actes de Londres*, pp. 175/6, 179 (proposal), 263/4 (observations), 380 (report of Second Sub-Committee), 460 (report of Drafting Committee), 515 (adoption in Second Plenary Session).

(b) As has already been observed above—see observations *(e)* and *(j)* on Article 5 A—the expression "forfeiture" must be deemed to include other measures which would terminate the protection of a design on the grounds referred to whatever their name, such as repeal, revocation or annulment.

(c) *Failure to work* a design in a member State may not cause forfeiture of the protection of the design. Member States are, however, free to provide in their national legislation for compulsory licenses in case of failure to work.[1] They are also free to define what they understand by "failure to work." "Work" will normally be understood as meaning the *manufacture* of products representing or incorporating the design.

(d) With respect to *importation of articles* corresponding to the design in a country where the design is protected, the provision has a wider scope than the corresponding provision concerning patents (Section A(1)). In the case of designs, no such importation whatsoever may cause forfeiture, independently of the questions whether the importation is made by the owner of the right to the design or by others, and whether such importation occurs after manufacture of the articles in one of the countries of the Union or elsewhere.

ARTICLE 5, Section C*(a)*

C(1) If, in any country, use of the registered mark is compulsory *(b)*, the registration may be cancelled *(c)* only after a reasonable period *(d)*, and then only if the person concerned does not justify his inaction *(e)*.

(2) Use of a trademark by the proprietor *(f)* in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union *(g)* shall not entail invalidation of the registration *(h)* and shall not diminish the protection granted to the mark *(i)*.

(3) Concurrent use *(j)* of the same mark on identical or similar goods by industrial or commercial establishments considered as co-proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed *(k)* shall not prevent

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[1] Cf. *Actes de Londres*, pp. 380, 460, 515.

registration or diminish in any way the protection granted to the said mark in any country of the Union *(l)*, **provided that such use does not result in misleading the public and is not contrary to the public interest** *(m)*.

(a) This Section concerns various questions related to the *use of trademarks*. Paragraph (1) of the Section under consideration was introduced into the Convention at the Revision Conference of The Hague in 1925 ;[1] paragraphs (2) and (3) were added at the Revision Conference of London in 1934.[2]

Although it would be reasonable to apply these provisions also to *service marks*, there is no obligation to do so, because the said provisions existed in the Convention before the introduction of service marks by the Revision Conference of Lisbon in 1958, and the latter Conference refused to assimilate service marks to trademarks throughout the Convention.[3]

(b) The *working of a patent* in a country may be in the public interest but this is not necessarily true with respect to the *use of a trademark* in such country, because it is, in principle, a matter of indifference whether goods are sold under a certain trademark or not. Nevertheless, many countries require in their national legislation that trademarks be used, in order to prevent the trademark register becoming clogged with unused marks which preclude the valid registration of identical or similar marks which are used or intended to be used. Thus, *the use of a registered trademark* is often prescribed under national legislation ; use of the mark is then generally understood as meaning the sale of goods bearing such mark.[4]

However, as in the case of patents, the proprietor of the trademark registration must be given reasonable time and opportunity to use his mark in several countries before his registrations of the mark are exposed to sanctions on the ground of non-use. The paragraph under consideration contains provisions to that effect.

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[1] *Actes de La Haye*, pp. 338/9 (proposals of Germany, U.K. and other countries), 439/42 (report of Third Sub-Committee), 520 (report of General Committee), 541 (report of Drafting Committee), 576 (adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 178/9, 281 (proposals), 264/5 (observations), 386/90 (report of Third Sub-Committee), 460/1 (report of Drafting Committee), 515 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 624 (proposal of U.S.A.), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee).

[4] Cf. *Actes de La Haye*, pp. 441/2, 541.

(c) The provision only stipulates the conditions under which, on the ground of non-use of a *registered* mark, the *registration may be cancelled*. It is, therefore, of limited importance in countries where, according to the national legislation, the *right* to a trademark originates from the (first) use of it and is independent of registration. In such cases *this right* could lapse on the ground of non-use, although the provision under examination would prevent the *registration* from being cancelled.[1]

(d) National legislation may define what is meant by a reasonable period, and if this is not done the competent authorities of the country concerned will determine what is a reasonable period in any given case.

(e) Cancellation of a trademark registration on the ground of non-use of the trademark in the country concerned will be possible only if the proprietor of the registration does not justify his inaction. National legislation may define this further, failing which the competent authorities will decide on any alleged justification. Justification will normally be possible if legal or economic conditions have prevented the use of the mark in a given country, for example, if the importation of certain products has been prohibited, or prevented by war, or if there was no market for such products.

(f) This paragraph, which allows the use of a trademark in a *form* that is not essentially different from that in which it has been registered, applies only to such use when it is made by the *proprietor* of the mark. It will be reasonable to apply it also in cases of legitimate use of a mark by persons other than the proprietor, particularly by his licensees.

(g) The provision deals with the use of a mark in a form which is different from that in which it has been registered *in one of the countries of the Union*. The purpose of the provision is to allow for unessential differences between the form of the mark as it is registered and the form in which it is used, for example, in cases of adaptation or translation of certain elements for such use.[2] It applies also to similar differences in the form of the mark as used in the country of its original registration. The differences in form must *not alter the*

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[1] Cf. in Netherlands: Supreme Court, 5/1/1940, *Bijblad bij de Industriële Eigendom*, 1940, p. 124.

[2] Cf. *Actes de Londres*, p. 178.

distinctive character of the mark. The competent authorities of the country in which the mark is used in a different form will determine whether this requirement has been complied with.[1]

(h) The said differences of form will not entail *invalidation of the registration,* which is self-explanatory.

(i) Neither will the said differences of form *diminish the protection granted to the mark,* which means not only that the mark, in the form in which it is registered, cannot be considered as not being used in view of Article 5, Section C(1), but also that, as regards possible infringement by marks of third parties, it must be considered as having been used in its original form. Whether the different form in which the mark is actually used enters also into consideration depends on the national legislation of the country concerned.

(j) This provision unfortunately does not deal with the type of concurrent legitimate use of a mark by several enterprises which in most countries is by far the most important, namely, concurrent use of a mark by licensor and licensee.[2] An attempt to cover this subject, made at the Revision Conference of Lisbon in 1958, failed.[3]

(k) As it stands, the provision has a very narrow scope because it covers only the situation where concurrent use of the same mark on identical or similar goods is made by enterprises which are considered *co-proprietors of the mark* according to the domestic law of the country where protection of the mark is claimed. The provision is intended to eliminate difficulties which have occurred, with regard to this question, under the national legislation of some countries,[4] but it is of little importance to many other countries.

(l) The provision prescribes that, in the case of the concurrent use referred to, the registration of the mark will not be prevented and its protection will not be diminished. This latter stipulation must be deemed to include the requirement that a registration may not be invalidated on the said ground.

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[1] Cf. in France: Tribunal civil de Marseille, 14/12/1954, *Ann.*, 1955, p. 43.

[2] Cf. HEYDT: "Gleichzeitige Benutzung derselben Marke durch mehrere Personen und Marken von Inhabern ohne Geschäftsbetrieb," *G.R.U.R. Int.*, 1958, p. 457; TOTH: "L'emploi simultané de la marque," *P.I.*, 1961, p. 241; BEIER: "Die gemeinschaftliche Benutzung von Warenzeichen in konventionsrechtlicher Sicht," in *Die Warenzeichenlizenz*, 1963, p. 555.

[3] *Actes de Lisbonne*, pp. 544/64, 746/50.

[4] *Actes de Londres*, p. 460.

(m) National legislations are free to define this proviso further, failing which the competent authorities of the country concerned will decide whether the provision will not apply because the concurrent use of a mark results in misleading the public or is contrary to the public interest. Such cases may occur if the concurrent use of the mark would mislead the public as to the source of the goods sold under the same trademark or if the quality of such goods, concurrently sold by co-proprietors of the mark, were different. See also, for a possible conflict with *the public interest*, observation *(i)* on Article 7*bis* below.

ARTICLE 5, Section D*(a)*

D. No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design *(b)*, **shall be required upon the goods as a condition of recognition of the right to protection** *(c)*.

(a) This provision, as far as it concerns industrial designs, was introduced into the Convention by the Revision Conference of The Hague in 1925.[1] It was extended to other industrial property rights by the Revision Conference of London in 1934.[2]

(b) An indication or mention on a product, to the effect that the product is protected by a patent, utility model or the registration of a design, or that a mark which the product carries is protected by registration, may be useful in order to inform third parties of the protection and thereby to warn them against infringement of the right concerned. Several countries, therefore, prescribe such indication or mention, at least for some of the subjects of industrial property referred to.

(c) However, the presence of such indication or mention may not be made a *condition* of the *right to protection*, because this would penalize the owner of the right too severely for the omission of the

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[1] *Actes de La Haye*, pp. 339 (proposal of Germany), 496/7 (report of Sixth Sub-Committee), 520 (report of General Committee), 540/1 (report of Drafting Committee), 576 (discussion and adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 176/8, 179 (proposal), 265 (observations), 380 (report of Second Sub-Committee), 461 (report of Drafting Committee), 515 (adoption in Second Plenary Session).

indication or mention. Member States are free, however, to provide in their national legislation for other consequences of the omission of such indication or mention. They may, for example, make such omission a criminal misdemeanor or prescribe that in the case of such omission—and although recognition of the right to protection still obtains—damages for infringement can be claimed only if it is proved that the infringer was aware of the right, notwithstanding the omission of any indication or mention.[1]

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[1] *Actes de La Haye*, pp. 496/7.

ARTICLE 5*bis*[(a)]

(1) A period of grace of not less than six months *(b)* shall be allowed for the payment of the fees prescribed for the maintenance *(c)* of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.

(2) The countries of the Union shall have the right to provide for the restoration of patents *(d)* which have lapsed by reason of non-payment of fees.

(a) The first paragraph of this Article was introduced into the Convention by the Revision Conference of The Hague in 1925, but the minimum term prescribed for the period of grace was then three months.[1] This minimum term was extended to six months by the Revision Conference of Lisbon in 1958.[2]

The second paragraph of the Article was introduced in a different form by the Revision Conference of The Hague.[3] It was modified by the Revision Conference of Lisbon.[4]

(b) In many countries the *maintenance of certain industrial property rights* is subject to the payment of fees, which are generally annual. In order not to penalize the owner of the right by immediate forfeiture in the event of a delay in the payment of such fees, the provision under consideration grants a period of grace for such payments. This period of grace is of six months' duration, unless the national legislation of the country concerned grants a longer period. During the period of grace the industrial property right concerned must be considered to remain provisionally in force.[5] If the fee is not paid during this period, the right will lapse. National legislations are free to determine that in such case the right will lapse retroactively, namely, as from the date on which the fee was due.

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[1] *Actes de La Haye*, pp. 338, 354 (proposals of U.S.A. and U.K.), 434/5 (report of Second Sub-Committee), 520/1 (report of General Committee), 541 (report of Drafting Committee), 576/7 (discussion and adoption in Second Plenary Session).

[2] *Actes de Lisbonne*, pp. 426/7 (proposal), 427/435 (observations), 436/46 (discussion in Second Committee), 529/531 (report of Second Committee), 101 (adoption in Second Plenary Session), 116 (General Report).

[3] See footnote 1.

[4] See footnote 2.

[5] Cf. *Actes de Lisbonne*, pp. 440/1.

(c) The provision under examination concerns only the payment of fees prescribed for the *maintenance* of industrial property rights. It does not apply to payments due for the *acquisition* of the right.[1] Neither is there any obligation to apply the provision to payments due not for *maintenance* but for *renewal* of an industrial property right.

(d) Whereas paragraph (1) of the Article under consideration regulates the period of grace allowed for the payment of fees for the maintenance of *all* industrial property rights, paragraph (2) concerns *patents* only, in cases where they *have already lapsed* by reason of non-payment of fees (for example, maintenance fees, if these fees have not been paid in time or during the period of grace). According to the text adopted at the Revision Conference of The Hague in 1925, the member States undertook, in the case of patents, either to increase the period of grace—then normally fixed at three months—to six months, or to provide for the *restoration of a patent* which had lapsed by reason of non-payment of fees. The first part of this alternative was superseded by the general extension of the period of grace to six months at the Revision Conference of Lisbon in 1958. In view of profound differences of opinion on the subject,[2] the latter Conference replaced the second part of the alternative by a mere recognition of the *right of the member States to legislate* on the subject of the restoration of patents which have lapsed because of non-payment of fees.

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[1] *Actes de La Haye*, p. 576; *Actes de Lisbonne*, p. 426.

[2] *Actes de Lisbonne*, pp. 427/46.

ARTICLE *5ter(a)*

In any country of the Union the following shall not be considered as infringements of the rights of a patentee *(b)*:

1. **the use *(c)* on board vessels *(d)* of other countries of the Union *(e)* of devices *(f)* forming the subject of his patent in the body of the vessel *(g)*, in the machinery, tackle, gear and other accessories *(h)*, when such vessels temporarily or accidentally *(i)* enter the waters *(j)* of the said country, provided that such devices are used there exclusively for the needs of the vessel *(k)*;**
2. **the use of devices forming the subject of the patent in the construction or operation *(l)* of aircraft or land vehicles *(m)* of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.**

(a) This Article concerns *patents* only. It was introduced into the Convention by the Revision Conference of The Hague in 1925[1] and has not been changed since, except for some minor modifications as to form.

(b) The Article provides for certain limitations on the exclusive rights conferred by a patent in cases where the full exercise of such rights would cause too much prejudice to the public interest in maintaining freedom of transport. Its effect is, in principle, that if ships, aircraft or land vehicles temporarily visit foreign countries, their owners are not required to obtain licenses on patents in force in these countries in order to avoid infringing such patents.

(c) The provision under consideration covers only the *use* of patented devices and will therefore not apply to the *manufacture* of articles on board vessels, etc., nor to the *sale* to the public of patented products or products obtained by a patented process.[2]

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[1] *Actes de La Haye*, pp. 339 (proposal of France), 435/6 (report of Second Sub-Committee), 521 (report of General Committee), 541/2 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[2] *Ibidem*, pp. 435, 541/2.

(d) The national authorities of the member States will be free to interpret the meaning of " vessels, " an expression which will probably not include floating islands for purposes of drilling, etc.

(e) In each country of the Union the provision will apply only to vessels *of other countries of the Union,* that is, vessels carrying the flag of such countries, and not to vessels of the country itself, even if such vessels have a home port elsewhere and enter the country only temporarily or accidentally.

(f) A *device* may be the subject of a patent either because it is patented itself or because a patented process is used to operate it.

(g) Freedom to use patents applies in the first place to such use in the *body of the vessel itself.*

(h) This freedom includes the use of a patented invention in *accessories of the vessel,* of which machinery, tackle and gear are given as examples. These accessories include instruments for navigation, loading and unloading, and possibly many others depending on the character of the vessel. See observation *(k)* below.

(i) Freedom of use applies only if vessels enter the waters of a foreign country *temporarily* or *accidentally.* Temporary entrance will include periodical entrances.[1] Accidental entrance may be caused by inadvertence or shipwreck. In the latter case, a ship will not infringe patents even if its presence in foreign waters is not temporary.

(j) The *waters* of a foreign country include its territorial waters and all inland waterways and harbours, including docks.

(k) Freedom of use is limited to use of patented devices *exclusively for the needs of the vessel.* These needs may vary considerably, because a hospital ship, a ship for scientific exploration, a warship, and a passenger ship have obviously very different needs. The provision would however not apply if, for example, a ship's tackle were used to move goods from one warehouse to another.

(l) The second paragraph of the provision under consideration does not concern vessels but *aircraft* and *land vehicles.* It applies to the use of devices which are the subject of a patent, in the *construction*

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[1] *Actes de La Haye,* p. 435.

or *operation* of such aircraft or land vehicles or their accessories. The use of objects aboard which do not relate to such construction or operation will therefore not be exempted from patent infringement.

(m) The national authorities of the member States will interpret the meaning of aircraft and land vehicles in case any doubt arises on these subjects.

ARTICLE 5*quater*(*a*)

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country *(b)*.

(a) This Article was introduced into the Convention at the Revision Conference of Lisbon in 1958.[1] Before that Conference the Convention left complete freedom to the member States to define in their national legislation the acts of third parties by which a patent would be infringed. At the Conference of Lisbon it was proposed to change this situation rather drastically by stipulating in the Convention that a patent, granted for a process of manufacture, would be infringed by the importation, sale or use of products obtained by such process in another country. This proposal was not accepted and the adopted Article has a considerably narrower scope.

(b) The legislation of several countries stipulates that, if a patent is granted only for a process, such patent extends its effect to products obtained, or directly obtained, by such process, which means that *not only the application of the process* but also, and independently, *the sale and use of its products will constitute patent infringement.* The provision under consideration prescribes that, when a country has adopted this system, all rights granted by its legislation, on the basis of the process patent, with respect to products manufactured according to the patented process in the country itself, must also apply in the case of *importation* of such products if they are manufactured according to the said process in another country, even if that process is not patented in the said other country.

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[1] *Actes de Lisbonne*, pp. 514 (proposal of Switzerland), 515/9 (discussion in Second Committee), 535 (report of Second Committee), 101 (adoption in Second Plenary Session), 116 (General Report).

ARTICLE 5*quinquies*(a)

Industrial designs shall be protected in all the countries of the Union *(b)*.

(a) This Article was introduced into the Convention at the Revision Conference of Lisbon in 1958.[1] The proposals submitted to that Conference in this respect were ambitious, as they contained not only an obligation to protect industrial designs but also a definition of such designs, a provision concerning the appreciation of their novelty and a requirement as to the minimum duration of their protection. The last three proposals were not accepted, so that these questions continue to be left to the national legislations of the member States.

(b) All that was inserted in the Convention was the mere obligation for member States to *protect industrial designs*. Nothing is said about the means of providing such protection, so that countries may comply with the provision not only through special legislation for the protection of designs, but also through the grant of such protection, for example, in their laws on copyright[2] or their provisions against unfair competition. What is necessary, but at the same time sufficient, is that, whenever the competent authorities of a member State define or recognize an object as being an "industrial design," for example, in view of its registration as such in the country itself or internationally,[3] protection in some form be given to it.

In these circumstances, and since the provision under consideration does not (only) oblige the member States to legislate, but can be deemed to be addressed also to the judicial authorities of these States, the provision may be considered "self-executing"[4]—in countries which admit this possibility—with the result that interested parties can directly invoke the provision in court.

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[1] *Actes de Lisbonne*, pp. 865/7 (proposal), 867/74 (observations), 874/9 (discussion in Fifth Committee), 909/10 (report of Fifth Committee), 101 (adoption in Second Plenary Session), 116/7 (General Report).

[2] Cf. in Belgium: Cour de Cassation, 20/12/1954, *Ing. Conseil*, 1955, p. 35.

[3] By virtue of the Hague Agreement concerning the International Deposit of Industrial Designs, concluded at The Hague in 1925, revised at London in 1934.

[4] See Chapter II.4 above.

ARTICLE 6*(a)*

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation *(b)*.

(2) However, an application for the registration of a mark filed by a national of a country of the Union *(c)* **in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin** *(d)*.

(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin *(e)*.

(a) The original Convention of 1883 contained two principles with respect to the registration of trademarks, one—in Article 6—stating that every trademark duly filed in the country of origin, as defined in that Article, had to be accepted for filing and protected in its original form in the other countries of the Union, and the other—in paragraph 4 of the Final Protocol—stating that the above provision was an exception which concerned only the form of the mark, whereas normally each State should apply its domestic law to filings of trademarks.[1] Thus, the general rule of the Convention was *the application of national laws regarding all trademark registrations* in the countries concerned and the Convention did not *oblige* the applicant first to file his trademark in the country of origin in order to have it accepted also in the other countries of the Union. However, if the applicant *had* made such filing, the Convention gave him the *right* to demand acceptance and protection of his mark in its original form in the other countries. These provisions were modified by the Revision Conferences of Washington (1911), The Hague (1925), and London (1934), but it became gradually less clear what the relationship was between the principle of independence of filings and registrations of the same trademark in various countries—independence which was denied by the national legislation of several countries[2]— and the *exceptional situation* in which, on the basis of an existing *registration* in the *country of origin*, acceptance and protection of the mark in its original form may be claimed in the other countries of

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[1] *Actes de Paris*, I, pp. 70/9, 132/5, 138/42; II, pp. 24/33.

[2] Cf. LADAS: *The International Protection of Industrial Property*, p. 541.

the Union. In order put an end to this confusion, the Revision Conference of Lisbon in 1958 decided[1] to spread the above regulations over two articles : Article 6, which would establish the normal situation of independence of trademark filings and registrations in the countries of the Union, and Article 6*quinquies*, which would regulate the exceptional situation referred to above. Consequently, Article 6, which, prior to the Conference of Lisbon, contained a large part of the subject now regulated by Article 6*quinquies*, now concerns only the principle of independence of trademarks and can be compared with Article 4*bis* dealing with the same subject in respect of patents.

(b) The principle stated in paragraph (1) means, in other words, that with respect to the filing and registration of trademarks the applicant may claim " national treatment " according to Articles 2 and 3 of the Convention. The provision speaks only of trademarks and not of service marks but, since in view of Articles 1, 2 and 3 service marks will also come under the rule of national treatment, they will be treated in the same way.

(c) The expression " national of a country of the Union " must, in view of Article 3 of the Convention, be deemed to include also the nationals of countries outside the Union who may claim the application of the Convention according to Article 3.

(d) The filing and registration of a trademark in each country will be independent of analogous acts regarding the same trademark in other countries, even such acts in the country of origin of the trademark as defined in Article 6*quinquies* A(2). This means that no filing, registration or renewal of the mark in any country other than that of the filing concerned may be required, except, of course, for the acknowledgement of a right of priority, on the basis of a first filing, according to Article 4. The exceptional situation, where a *registration* in the country of origin is *invoked* in order to claim application of Article 6*quinquies*, is reserved for that Article.

(e) *Once registered* in a country of the Union a trademark *remains* independent and is unaffected by the fate of similar registrations in other countries, including the country of origin.

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[1] *Actes de Lisbonne*, pp. 578/9, 581/2 (proposals), 582/99 (observations), 601/2, 616/7 (discussion in Third Committee), 750/5 (report of Third Committee), 617/20 (discussion in General Committee), 101, 106 (adoption in Second Plenary Session), 117/8 (General Report).

ARTICLE 6*bis*(*a*)

(1) The countries of the Union undertake *(b)*, **ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark** *(c)* **which constitutes a reproduction, an imitation, or a translation, liable to create confusion** *(d)*, **of a mark** *(e)* **considered by the competent authority of the country of registration or use to be well known** *(f)* **in that country as being already the mark of a person entitled to the benefits of this Convention** *(g)* **and used for identical or similar goods** *(h)*. **These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith** *(i)*.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark *(j)*. **The countries of the Union may provide for a period within which the prohibition of use must be requested** *(k)*.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith *(l)*.

(a) This Article was introduced into the Convention by the Revision Conference of The Hague in 1925.[1] It was modified by the Revision Conferences of London in 1934[2] and of Lisbon in 1958.[3] At the latter Conference the Article was very thoroughly discussed and its application, which formerly concerned only the refusal or cancellation of the *registration* of a mark conflicting with a mark which is well known in the country concerned, was then extended to a prohibition of the *use* of the mark first mentioned.

(b) One of the questions which arises with respect to this Article is whether it may be considered " self-executing "—in countries which

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[1] *Actes de La Haye*, pp. 241/2, 246 (proposal), 341/3 (observations), 453/6 (report of Third Sub-Committee), 523 (report of General Committee), 543/4 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 187 (proposal), 275/6 (observations), 398/400 (report of Third Sub-Committee), 464 (report of Drafting Committee), 516 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 637/40 (proposals), 640/56 (observations), 656/66 (discussion in Third Committee), 757/9 (report of Third Committee), 666/8 (discussion in General Committee), 101/2 (adoption in Second Plenary Session), 117 (General Report).

admit such possibility—with the result that interested parties may directly claim its application by the administrative or judicial authorities of the country concerned. This question gives rise to the following observations:

On the one hand, in stipulating that " the countries of the Union undertake, etc." the Article is drafted differently from many other Articles of the Convention, which directly refer to rights or obligations of interested parties (for example, Articles 2, 3, 4, 4*ter*, 5*bis*, 5*ter*, 5*quater*, 6, 6*septies*, 8), or directly regulate a situation at issue (for example, Articles 4*bis*, 5 A(1), (3) to (5), B, C, D, 6*quater*, 6*quinquies*, 7). Nor, on the other hand, does Article 6*bis* refer only to an undertaking by the countries of the Union to *legislate* on a particular matter, as is the case, for example, with Articles 10*ter* and 11. Therefore, and although the Article leaves certain liberties to national legislations (paragraph (1) : " *if* their legislation so permits " ; paragraph (2) : " a period of *at least* five years... shall be allowed..."; " The countries of the Union *may* provide for a period, etc."), it cannot be deemed *only* to oblige the member States to *legislate* on the subject concerned, but may be considered to contain an undertaking also on behalf of the administrative and judicial authorities of these States, which—if compatible with their constitutional systems—must then give effect to the provisions of the Article at the request of interested parties.

(c) The provision under consideration refers only to *trademarks* and *not to service marks*. The member States are therefore not obliged to apply it to service marks, but are free to do so in analogous situations.

(d) The purpose of the provision under consideration is to avoid the registration and use of a trademark, liable to create *confusion* with *another* mark already *well known in the country of such registration or use*, although the latter well-known mark is not, or not yet, protected in that country by a registration which would normally prevent the registration or use of the conflicting mark.[1] This exceptional protection of a well-known mark has been deemed to be justified because the registration or use of a confusingly similar mark will in most cases amount to an act of unfair competition,[2] and may also be considered

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[1] Cf. LADAS: " International Protection of Well-known Trademarks, " *Trademark Reporter*, 1951, p. 661; TROLLER: " La marque de haute renommée, " *P.I.*, 1953, p. 73; BLUM: " La marque de haute renommée, " *P.I.*, 1954, p. 110.

[2] *Actes de La Haye*, p. 455.

prejudicial to the interests of those who will be misled.[1] *Whether* a trademark will be liable to create confusion with a well-known mark will be determined by the competent authority of the country concerned, and in so doing the said authority will have to consider the question from the viewpoint of the consumers of the goods to which the marks are applied.[2] The provision specifies that such confusion may occur in cases of *reproduction, imitation* or *translation* of the well-known mark, or even—see final sentence of paragraph (1)—if only an *essential part of a mark* constitutes a reproduction or confusing imitation of the well-known mark.

(e) The word "mark" in itself would not exclude the extension of the envisaged protection also to well-known *service marks*, but the words at the end of the first sentence of paragraph (1), "used for identical or similar *goods*," make it clear that only well-known *trademarks* are covered by the provision. The member States are, however, free to apply the same rules also to service marks in analogous circumstances.

(f) A trademark may be *well known* in a country before its registration there and, in view of the possible repercussions of publicity in other countries,[3] even before it is *used* in such country. *Whether* a trademark is well known in a country will be determined by its competent administrative or judical authorities. The Revision Conference of Lisbon in 1958 rejected a proposal according to which *use* of a well-known mark in the country in which its protection is claimed would *not* be necessary for such protection.[4] This means that a member State is not *obliged* to protect well-known trademarks which have not been used on its territory, but it will be free to do so.[5] In view of the vote taken at the Lisbon Conference,[6] the great majority of the member States will probably adopt this attitude.

(g) A well-known trademark will, naturally, only be protected by the Article under consideration if it belongs to a person entitled to the

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[1] *Actes de La Haye*, pp. 453/4.

[2] *Ibidem*, pp. 453/4.

[3] *Actes de Lisbonne*, pp. 659, 667. See in Brazil: Supremo Tribunal Federal, 26/4/1963, *G.R.U.R. Int.*, 1964, p. 318 (German translation).

[4] *Actes de Lisbonne*, pp. 659, 666/7.

[5] *Ibidem*, p. 668.

[6] The above proposal was rejected at the Lisbon Conference by 2 countries only, while 25 approved it: *Actes de Lisbonne*, pp. 666/7.

benefits of the Convention, that is, to a natural or legal person who may claim the application of the Convention according to Articles 2 or 3.[1] The provision under examination, however, goes further than that when it states that, in order to be protected, the mark must be considered *well known* in the country concerned " *as being already the mark of* " *such person.* The history of the provision [2] shows, however, that it will be sufficient if the mark concerned is well known *in commerce* in the country concerned as a mark belonging to a certain enterprise, without its being necessary that it also be known that such enterprise is entitled to the benefits of the Convention. Nor is it necessary—and it is therefore not necessary to prove—that the person who has applied for or obtained a conflicting registration or who uses a conflicting mark possessed such knowledge.

(h) The protection of well-known marks, according to the provision under examination, applies only with respect to other marks filed, registered or used for *identical or similar goods.* Whether this condition is fulfilled will be determined by the administrative or judicial authorities of the country in which protection is claimed.[3]

(i) See observation *(d)* above *in fine.*

(j) In order to give the owner of a well-known trademark sufficient time to react to the registration of a conflicting mark, this provision specifies that he must have a period of at least five years during which he may request the cancellation of such registration. This minimum period was three years until the Revision Conference of Lisbon in 1958. The words " at least " indicate that the fixation of the period is left, on condition that it may not be shorter than five years, to the national legislation or to decisions of the administrative or judicial authorities of the member States.[4]

(k) The member States are free also to provide for a period within which the prohibition of *use* of the conflicting mark must be requested, but no minimum is indicated for this period.

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[1] *Actes de La Haye*, pp. 456, 543; *Actes de Lisbonne*, p. 637.

[2] *Actes de La Haye*, p. 543.

[3] Cf. in France: Cour de Riom, 1/4/57, *Ann.*, 1959, p. 32, Cour de Paris, 8/12/1962, *Ann.*, 1963, p. 147 with note by DUSOLIER. The question whether, at least for a certain category of marks of high renown, protection should not be extended to non-similar goods was discussed at the Revision Conference of Lisbon, but without giving positive results: *Actes de Lisbonne*, pp. 660/4, 705/24; see also MIOSGA: *Internationaler Marken- und Herkunftsschutz*, pp. 49/50, referring to further literature.

[4] *Actes de Lisbonne*, pp.665, 758.

(l) The administrative or judicial authorities of the country in which the protection of a well-known mark is requested will determine whether the conflicting mark is registered or used *in bad faith,* in which case no time limit for action will prevail. Bad faith will normally exist when the person who registers or uses the conflicting mark knew of the well-known mark and presumably intended to profit from the possible confusion between that mark and the one he has registered or used.

ARTICLE 6*ter*, paragraphs (1) and (2)*(a)*

(1)(a) The countries of the Union agree *(b)* **to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities** *(c)*, **either as trademarks or as elements of trademarks** *(d)*, **of armorial bearings, flags, and other State emblems** *(e)*, **of the countries of the Union** *(f)*, **official signs and hallmarks indicating control and warranty** *(g)* **adopted by them** *(h)*, **and any imitation from a heraldic point of view** *(i)*.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations *(j)* **of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection** *(k)*.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention *(l)*. **The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization** *(m)*.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind *(n)*.

(a) Although some parts of what is now paragraph (10) of this Article were introduced into the Final Protocol which formed an integral part of the original Convention of 1883 and were maintained, in amended form, in the Final Protocol by the Revision Conference of Washington in 1911,[1] this was only in the context of what was then

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[1] Cf. the history of the Article in *Actes de Lisbonne*, pp. 127 *et seq.*

Article 6 of the Convention (now, in modified form, Article *6quinquies*). Article *6ter* as such was introduced into the Convention by the Revision Conference of The Hague in 1925.[1] It underwent some minor modifications as to form at the Revision Conference of London in 1934 [2] and was more thoroughly revised by the Revision Conference of Lisbon in 1958,[3] where, inter alia, paragraphs (1)*(b)* and *(c)* were inserted and several other important changes were made.

(b) The Article concerns *trademarks*, but its purpose is not to regulate their *protection as subjects of industrial property* but rather to *exclude them from becoming such subjects* in certain circumstances.

Here, again, the question arises whether this Article may be considered " self-executing "—in countries which admit such possibility—with the result that interested parties (States, international intergovernmental organizations and possibly third parties interested in suppressing trademarks which would violate the provisions of the Article) may directly claim its application by the administrative or judicial authorities of the country concerned, or whether legislation in such country is necessary to implement the Article. Its situation in this respect is analogous to that of Article *6bis*, examined above (see observation *(b)* on that Article) : countries which admit such possibility may be deemed to have agreed to the application of the Article also by their administrative and judicial authorities, so that in these countries the Article is "self-executing."[4]

(c) The competent authorities here referred to are those of the country whose emblems, official signs and hallmarks are involved. These authorities may allow the use of such emblems, signs or hallmarks in certain trademarks, probably of their own nationals. See also, for the effect of such authorization, paragraph (8) of the Article.

(d) The Article under consideration concerns *trademarks* only and not *service marks*. The member States are therefore not obliged

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[1] *Actes de La Haye*, pp. 243/5, 247 (proposals for Article *6quater*), 343/5 (observations), 457/67 (report of Third Sub-Committee), 523/5 (report of General Committee), 544/5 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 188/9 (proposal), 276/7 (observations), 400 (report of Third Sub-Committee), 465/6 (report of Drafting Committee), 516 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 127/33 (proposals), 134/9 (observations), 139/45 (discussion in First Committee), 295/8 (report of First Committee), 145/7 (discussion in General Committee), 102/3 (adoption in Second Plenary Session), 117 (General Report).

[4] Cf. LADAS: *The International Protection of Industrial Property*, p. 566.

to apply the Article also to service marks, but they are free to apply analogous rules to those marks and will probably do so in view of the purpose of the Article.

(e) The objective of the provision under consideration is to exclude the registration and use of trademarks which are identical or present a certain similarity to *State emblems*, an expression which, in view of the word "other," includes[1] *armorial bearings* and *flags* of the State concerned. The reasons for this are[2] that such registration or use would violate the right of the State to control the use of symbols of its sovereignty and furthermore might mislead the public with respect to the origin of goods to which such marks would be applied. It was the intention of the Revision Conference of The Hague in 1925 to include also in the protection of State emblems the escutcheons of reigning Houses,[3] as well as emblems of States included in a Federation which was a member of the Union.[4] Not included, however, are emblems of lower public bodies, such as provinces or municipalities, of member States.[5]

Whether in these conditions an emblem is a State emblem will be determined by the authorities of the country in which its protection is claimed.

(f) The protection given to State emblems is limited to such emblems *of the countries of the Union*.[6] Extension of the application of the Article under consideration to emblems of non-member States is impossible in view of paragraph (3) of the Article, but member States are free to protect such other emblems by other appropriate means, for example, by considering their incorporation in trademarks to be contrary to public order.

(g) Official signs and hallmarks indicating control and warranty exist in several States with respect to precious metals or products such as butter, cheese, meat, etc.

(h) The official signs and hallmarks indicating control and warranty are protected by the provision under consideration only if

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[1] Also when this expression is used alone, for example, in paragraphs (7) and (8 of the Article.

[2] *Actes de La Haye*, pp. 243/4.

[3] *Ibidem*, pp. 459, 464, 544.

[4] *Ibidem*, pp. 343/4, 464, 544.

[5] *Ibidem*, p. 245.

[6] *Actes de Lisbonne*, p. 140.

they are adopted *by a member State itself*, and not in the case of their adoption by a lower public body or an organization of public law in such State.

(i) State emblems and official signs and hallmarks, covered by the provision under examination, are protected not only against registration and use of trademarks which are identical to them or incorporate them as elements thereof, but also against the inclusion in such trademarks of any *imitation of them* " *from a heraldic point of view*." The imitation thus forbidden has a narrower scope than the imitation which would normally be considered unacceptable between trademarks. The reason for this is that State emblems frequently contain symbols which are in themselves common, such as a lion, a bear, the sun, etc., and which it must be possible freely to adopt in trademarks, *unless* the imitation of the emblem concerns the *heraldic characteristics which distinguish one emblem from another*.[1] The member States are however free to grant wider protection to State emblems.[2]

(j) The Revision Conference of Lisbon in 1958 extended—with some limitations which will be commented upon below—the application of the Article under consideration not only to armorial bearings, flags and other emblems but also to names, and abbreviations of such names, of *intergovernmental organizations* of which one or more of the countries of the Union are members.[3] Examples of abbreviations of such names are: ALALC, BIRPI, CERN, EFTA, FAO, ILO, Interfund, OAMPI, UNO, Unesco, WHO, UPU, etc.

(k) The Revision Conference of Lisbon in 1958 excepted from protection under this Article the emblems, names and abbreviations of intergovernmental organizations which are *already the subject of international agreements in force, intended to ensure their protection*. The purpose of this exception was not explained,[4] but it is probably intended to avoid double, and possibly conflicting, protection in cases where the emblems and name of an organization are already protected by a Convention, such as the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces, of August 12,

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[1] *Actes de La Haye*, p. 245. See also *Actes de Lisbonne*, pp. 129/31, 139/40.

[2] Cf. in Austria: Patent Office (Division of Appeals), 8/5/1959, *G.R.U.R. Int.*, 1960, p. 73.

[3] Cf. RONGA: " Der Schutz von Kennzeichen zwischenstaatlicher Organisationen," *G.R.U.R. Int.*, 1966, p. 148.

[4] *Actes de Lisbonne*, pp. 142 (proposal of U.S.A.), 143 (vote in First Committee).

1949, Article 44 of which protects the emblem of the Red Cross on a white ground, the words "Red Cross" or "Geneva Cross," and analogous emblems.

(l) A second exception to the protection of emblems, names and abbreviations of intergovernmental organizations, for which provision is made in this Article, is not mandatory, but member States are free not to grant the said protection to the prejudice of owners of rights in trademarks *acquired in good faith before the entry into force, in the country concerned, of the Convention* containing this provision, that is, the Convention as revised at Lisbon or Stockholm.[1] It will probably be necessary for such rights to have been acquired *in the country concerned*, and not merely elsewhere, for this exception to apply. Further rules regarding entry into force of the protection are given in paragraphs (5), (6) and (7) of the Article under consideration.

(m) A third exception to the protection of emblems, names and abbreviations of intergovernmental organizations is again not mandatory but may be made at the discretion of the member States. No such State shall be required to grant the said protection when the use or registration of the trademark against which the protection is invoked does not suggest a *connection* between the mark which contains the emblem, etc., and the organization concerned, or when such use or registration will probably *not mislead the public* as to the existence of a connection between the user and the organization.[2] It follows *a contrario* from this provision that in the case of incorporation in trademarks of emblems *not* of intergovernmental organizations but of *States* (paragraph (1)*(a)* of the Article) no such limitation of the application of the Article is possible, so that the protection of these latter emblems is *absolute* and may *not* depend on suggestions of any connection between the trademark and the emblem. The protection of State *armorial bearings* is even further enlarged by paragraph (9) of this Article, which will be commented upon below.

(n) This provision contains another limitation with respect to the protection of *official signs and hallmarks* of States, *indicating control and warranty*. Such protection will apply only in cases where the marks in which they are incorporated are intended to be used on goods *of the same kind as or a similar kind to* the goods to which the official

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[1] *Actes de Lisbonne*, p. 142 (proposal of U.S.A.), 143 (vote in First Committee).

[2] *Ibidem.*

signs or hallmarks apply.[1] Whether this is the case is a question which will be determined by the competent authorities of the country in which the protection is claimed.

ARTICLE 6*ter*, paragraphs (3) and (4)*(a)*

(3)(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list *(b)*. **Each country of the Union shall in due course make available to the public the lists so communicated** *(c)*.

Nevertheless, such communication is not obligatory in respect of flags of States *(d)*.

(b) The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau *(e)*.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned *(f)*.

(a) These provisions, in so far as State emblems, official signs and hallmarks are concerned, were introduced into the Convention by the Revision Conference of The Hague in 1925.[2] The Revision Conference of Lisbon in 1958 excepted State *flags* from the obligation of communication and added the provision (3)*(b)* concerning the emblems, etc., of *intergovernmental organizations*.[3]

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[1] *Actes de La Haye*, pp. 245, 247, 460/1.

[2] *Ibidem*, pp. 247 (proposal), 344/5 (observations), 460/2, 464 (report of Third Sub-Comimttee), 523/5 (report of General Committee), 544/5 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 132/3 (proposal), 143/5 (discussion in First Committee), 295/8 (report of First Committee), 102/3 (adoption in Second Plenary Session), 117 (General Report).

(b) The State emblems, official signs and hallmarks for which the member States wish to obtain protection will be communicated to the International Bureau, which will then transmit these communications to the other member States. The same procedure will be followed in the case of modifications of the lists of emblems, etc., so communicated ; for example, when a member State withdraws its claim to the protection of any of these emblems, etc., or replaces one or more by others. The wording of the provision under consideration is less stringent than that of the analogous provision in subparagraph *(b)* regarding the communication of emblems, etc., of *intergovernmental organizations*. In the latter case it is clear that the protection *depends* on such communication, whereas in the former case such communication is only prescribed by agreement between the States. However, the situation in the former case is further regulated by paragraph (6) of this Article.

(c) At one stage during the Revision Conference of The Hague it was intended that the member States should *publish* the lists of emblems, etc., which would be the subject of protection. However, in order to avoid the costs of such publication, this obligation was changed to an obligation to *make these lists available to the public*, that is, to deposit them for public inspection.[1] Several States, nevertheless, do publish these lists. Originally, the International Bureau also intended to publish them [2] but, in fact, apart from communicating them to the member States, it only keeps them available for public inspection.

(d) Since the Revision Conference of Lisbon in 1958, the *flags* of States are *exempt* from any communication, probably because these flags are considered to be sufficiently well known.[3] The member States are, however, free also to communicate their flags if they so desire.

(e) As has already been observed, the protection of emblems, names and abbreviations of *intergovernmental organizations* is *dependent upon their communication*. See, further, paragraph (6) of this Article.

(f) The member States may, within a period of twelve months, notify their objections to the protection claimed. These objections

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[1] *Actes de La Haye*, pp. 523/4.

[2] *Ibidem*, p. 524.

[3] *Actes de Lisbonne*, pp. 141, 143/4, 147.

may, for example, be based on the consideration that the subject for which protection is claimed is not an *emblem* of the *State* or *intergovernmental organization*, or is not an *official sign or hallmark* of the *State* indicating *control and warranty*, or that the emblem is already an *emblem of the country itself* or has been communicated as *that of another country*, or that it has fallen *into the public domain* in the country concerned.

The International Bureau will notify such objections to the State or intergovernmental organization whose emblems, etc., are involved. No special procedure is provided for resolving differences of opinion concerning these objections,[1] but disputes may be settled according to Article 28 of the Convention, if that Article applies between the member States concerned. As long as the objection stands, the State which has made it will not be obliged to protect the emblems, etc., concerned.

ARTICLE 6*ter*, paragraphs (5), (6) and (7)[a][b]

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(a) As to the moment from which the provisions of the Article have to be complied with, the Revision Conference of The Hague in 1925 had introduced a distinction between well-known State emblems and State emblems which are not well known.[2] This distinction was

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[1] Cf. *Actes de La Haye*, pp. 344/5 (proposal of U.K.), 462.

[2] *Ibidem*, pp. 465 (discussion in Third Sub-Committee), 523/5 (report of General Committee), 544/5 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

abolished by the Revision Conference of Lisbon in 1958,[1] but in view of the text established at that time other distinctions have to be observed.

(b) The general principle underlying the provisions now being considered is to avoid retroactivity.[2] In this respect a distinction has to be made between, on the one hand, *flags of States* and, on the other hand, *State emblems* other than flags, *official signs and hallmarks*, and *emblems, including flags, names and abbreviations of intergovernmental organizations.* In the case of the first category, the protection under this provision will apply only to marks registered after November 6, 1925, that is, the date of the signature of the text of the Convention as revised at The Hague. In the case of the second category, the protection will apply only to marks registered more than two months after receipt of the communication of the International Bureau. It is recalled that, according to the first sentence of paragraph (1)*(c)* of this Article, the member States are, moreover, not obliged to grant protection, with respect to emblems, etc., of intergovernmental organizations, to the prejudice of rights acquired in good faith before the entry into force, in the country concerned, of the Lisbon or Stockholm texts of the Convention, even if the trademarks for which these rights were acquired are *registered* more than two months after receipt of the communication of the claim of protection.

A general exception is made in cases of *bad faith*, where the member States even have the right to annul marks registered before November 6, 1925, which incorporate *State emblems, signs* and *hallmarks.* Bad faith will probably be held to exist if the trademark has been registered in the knowledge that it incorporated the emblem, sign or hallmark concerned.

ARTICLE 6*ter*, paragraphs (8), (9) and (10)*(a)*

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country *(b)*.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries

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[1] *Actes de Lisbonne*, pp. 145, 147.

[2] *Actes de La Haye*, pp. 462/3, 465/6, 524, 544. In this respect it was admitted that, if a trademark was already registered before a certain date, its renewal after such date would not be assimilated to a new registration: *ibidem*, p. 544.

of the Union, when the use is of such a nature as to be misleading as to the origin of the goods *(c)*.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6*quinquies*, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above *(d)*.

(a) The last three paragraphs of Article 6*ter* date from the Revision Conference of The Hague in 1928, where the Article was first introduced into the Convention.[1] The Revision Conference of Lisbon in 1958 changed these paragraphs in several respects, in particular by eliminating the word "decorations" from paragraph (10) and adding the signs of intergovernment organizations to that paragraph.[2]

(b) This paragraph is self-explanatory.

(c) This provision extends the protection of the Article to *other uses* of *State armorial bearings than their use in trademarks*, which latter use is the subject of paragraph (1). The provision under consideration prescribes that any *unauthorized use in trade* of State armorial bearings will be prohibited if the use is of such a nature as to be misleading as to the origin of the goods.[3] This gives a wider protection to State armorial bearings: for example, when they are used as mere decorations and not as trademarks.

(d) Paragraph (10) of the Article under consideration maintains a reservation which had already been made in the Final Protocol forming an integral part of the original Convention of 1883. The reservation relates to the application of what was then Article 6 and is now Article 6*quinquies* of the Convention. The provision states that, apart from their *obligations* under Article 6*ter*, the member States *remain free* to refuse or invalidate the registration of marks incorporating the emblems, etc., referred to, in cases where Article 6*quinquies* is invoked, if such marks are considered to be contrary to morality or public order and, in particular, of such a nature as to deceive the public (Article 6*quinquies*, Section B, paragraph (3)).

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[1] *Actes de La Haye*, pp. 247, 344/5, 464, 466, 524/5, 544/5, 577.

[2] *Actes de Lisbonne*, pp. 133, 147.

[3] *Actes de La Haye*, pp. 345 (proposal of Switzerland), 457/60, 463, 466, 524, 544.

ARTICLE *6quater(a)*

(1) When, in accordance with the law of a country of the Union *(b)*, the assignment of a mark *(c)* is valid only if it takes place at the same time as the transfer of the business or goodwill to which the mark belongs, it shall suffice for the recognition of such validity that the portion of the business or goodwill *(d)* located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the goods bearing the mark assigned *(e)*.

(2) The foregoing provision does not impose upon the countries of the Union any obligation to regard as valid the assignment of any mark the use of which by the assignee would, in fact, be of such a nature as to mislead the public, particularly as regards the origin, nature, or essential qualities, of the goods to which the mark is applied *(f)*.

(a) This Article was introduced into the Convention by the Revision Conference of London in 1934.[1] Since then it has undergone only minor changes as to form.

(b) In view of the independence of the rights which may be acquired in the same trademark in different countries, as recognized by Article 6, it is frequently felt desirable that these rights should also be transferred or assigned independently for each country. Such transfers or assignments will be governed by the normal rules of international private law.[2] There are, however, important differences in the national legislation of the various countries regarding the assignment of trademarks in that many of these legislations allow such assignment without simultaneous or corresponding transfer of the enterprise to which the trademark belongs, while others make the validity of the assignment dependent on the simultaneous or corresponding transfer of such enterprise.[3] Some countries have even interpreted the requirement of the corresponding transfer of the enterprise as

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[1] *Actes de Londres*, pp. 189/91 (proposal), 277/9 (observations), 400/5 (report of Third Sub-Committee), 466/7 (report of Drafting Committee), 517 (discussion and adoption in Second Plenary Session).

[2] Cf. in Federal Republic of Germany: Bundesgerichtshof, 21/10/1964, *G.R.U.R. Int.*, 1965, p. 504.

[3] Cf. MARTIN-ACHARD: *La cession libre de la marque*, 1946; D. REIMER: "La cession libre de la marque," *P.I.*, 1954, pp. 162, 181.

necessitating the transfer of the *entire* enterprise, even if parts of it are located in countries other than that for which the assignment of the trademark is envisaged. In these cases it might not be possible to assign independently the same trademark belonging to the enterprise in these other countries because the entire enterprise would have to be transferred with the first assignment.

The provision under consideration refers to the laws of countries of the Union of the latter type. The principle underlying the provision prescribes that the member States will be free to require, for the validity of the assignment of a trademark, the simultaneous transfer of the enterprise to which such trademark belongs, but that such requirement will not extend to parts of the enterprise which are located in other countries.

(c) The word " assignment " may be interpreted as also including other means of transfer if regulated by the national law concerned. The word " mark " in itself would permit the extension of the application of the provision also to service marks, but the final words of paragraph (1), and also of paragraph (2), exclude this interpretation. Member States are therefore not obliged to apply the provision by analogy to service marks, but they are free to do so and will probably adopt this attitude in view of the purpose of the provision.

(d) The words " business or goodwill " refer to a distinction which was made when the Article under consideration was introduced into the Convention.[1] The enterprise which owns a trademark in a given country may have its *business*, in the sense of an industrial or commercial establishment, in that country, or it may have this material basis of its activities elsewhere but possess *goodwill* in the country concerned in the form of a circle of customers. In these respective cases the assignment of the trademark will be valid if the portion of the business *or* the goodwill located in the country concerned is transferred together with the trademark.

(e) The final words of the provision under consideration simply mean that in the envisaged situation the *exclusive right to the trademark* with respect to the goods concerned must be assigned together with the portion of the business or goodwill located in the country, if the assignment is to be considered valid. Thus, the assignor would not be entitled in that country to continue to use the mark himself, in so far as it has been assigned, nor to assign or license it to third parties.

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[1] *Actes de Londres*, p. 190.

(f) Paragraph (2) of this Article leaves the member States free not to regard as valid the assignment of a trademark with the relevant part of the enterprise, if the use of such mark by the assignee would be of such a nature as to mislead the public, particularly as regards important features of the goods to which the mark is applied. This freedom may be exercised, for example,[1] if a trademark is assigned for part only of the goods to which it is applied, and if these goods are similar to other goods for which the mark is not assigned. In such cases the public may be misled as to the origin or essential qualities of similar goods to which the assignor and assignee will apply the same trademark, independently.

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[1] *Actes de Londres*, p. 517.

ARTICLE 6*quinquies*, Section A[(a)]

A(1) Every trademark *(b)* **duly registered** *(c)* **in the country of origin** *(d)* **shall be accepted for filing and protected as is** *(e)* **in the other countries of the Union, subject to the reservations indicated in this Article** *(f)*. **Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate** *(g)*.

(2) Shall be considered the country of origin *(h)* **the country of the Union where the applicant has a real and effective industrial or commercial establishment** *(i)*, **or, if he has no such establishment within the Union, the country of the Union where he has his domicile** *(j)*, **or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national** *(k)*.

(a) Parts of this Article were already included in Article 6 of the original Convention of 1883 and explained under paragraph 4 of the Final Protocol forming part of the Convention.[1] The original Article 6 was modified on various points by the Revision Conferences of Washington (1911),[2] The Hague (1925)[3] and London (1934).[4] As has been observed above—see observation *(a)* regarding Article 6—the Revision Conference of Lisbon (1958)[5] adopted a new Article 6, embodying the principle of the independence of trademark filings and registrations in the countries of the Union, and transferred a considerable part of the former contents of Article 6, with several modifications, to the new Article 6*quinquies*, now under examination.

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[1] *Actes de Paris*, I, pp. 27 (proposal for Article 5), 70/9, 132/5, 138/42; II, pp. 24/7, 31/3.

[2] *Actes de Washington*, pp. 49/51, 229/30 (proposals), 92/3, 95/6, 107, 110/1, 113, 224 (observations), 296/301 (report of Sub-Committee), 308/9 (report to Plenary Committee), 252/3 (discussion and adoption in Third Plenary Session).

[3] *Actes de La Haye*, pp. 237/41, 245/6 (proposal), 340/1 (observations), 442/52 (report of Third Sub-Committee), 521/3 (report of General Committee), 542/3 (report of Drafting Committee), 577 (discussion and adoption in Second Plenary Session).

[4] *Actes de Londres*, pp. 179/87 (proposal), 267/74 (observations), 390/8 (report of Third Sub-Committee), 461/4 (report of Drafting Committee), 516 (discussion and adoption in Second Plenary Session).

[5] *Actes de Lisbonne*, pp. 565/82 (proposals), 582/99 (observations), 600/16 (discussion in Third Committee), 751/5 (report of Third Committee), 617/20 (discussion in General Committee), 106 (adoption in Second Plenary Session), 117/8 (General Report).

(b) As mentioned above—see observation *(a)* regarding Article 6—Article 6*quinquies* concerns *an exceptional situation*. The normal rules of the Convention, embodied in Articles 6, 2 and 3, are that the member States will determine the conditions for filing and registration of trademarks in their domestic legislation (Article 6), and that foreign applicants for registration who are entitled to the benefits of the Convention under Articles 2 or 3 may claim the application of such domestic legislation under the rule of " *national treatment* " (Article 2). However, this simple system would not take sufficient account, on the one hand, of some important differences in the domestic legislation of the member States regarding the registration of trademarks, and, on the other hand, of the interest of both owners of trademarks and the public in having the same trademark apply to the same goods in various countries. Differences in domestic legislation would prevent this uniform application of the same trademark to the extent that the legislation of some countries admits, and that of others does not admit, trademarks consisting of simple numbers or letters, surnames or geographical names, words written or not written in a certain language or script, three-dimensional objects,[1] musical notes indicating tunes,[2] etc. In order to diminish the impact of these differences on the registration of trademarks, the provision under consideration states *the principle* that a trademark *duly registered in the country of origin* shall be accepted for filing and protected *as is* in *the other countries of the Union*, subject to further rules given in the Article. The member States which do not allow the provisions of the Convention to have any " self-executing " character are obliged to embody this principle in their domestic laws. In the other member States, application of this provision may be directly claimed in the—exceptional—cases where normal application of the domestic legislation would *not* allow the registration of a trademark which is already registered in the country of origin. In such cases, the applicant may *avail himself of this latter registration* and may claim *more than national treatment* according to the domestic legislation concerned : he may claim the *application of the special rules* of Article 6*quinquies*.

In view of the fact that the Revision Conference of Lisbon in 1958, which introduced service marks into the Convention, refused to assimilate service marks to trademarks generally throughout the

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[1] To be distinguished from pictures of such objects, which pictures as such, if complying with the conditions of the law concerned, will be registrable in the same way as other pictures.

[2] To be distinguished from such notes in the form of a picture, in which case the picture, and not the tune indicated by the notes, is the subject of the registration.

Convention,[1] the use of the word *trademark* in this Article indicates that the member States are not *obliged* to apply the provision under examination *also to service marks*. They are however free to do so if they so desire.

(c) The first condition for the application of the provision under consideration is that the trademark concerned should be *duly registered* in the country of origin. The mere proper filing—and even less the mere *use*—of the mark in the country of origin is therefore not sufficient: such filing—in any country of the Union—may be sufficient for the claiming of the right of priority according to Article 4 (see the reference to this possibility in Article 6*quinquies*, Section F), but not for the claiming of the application of Article 6*quinquies*. *Evidence* of registration in the country of origin may be required according to the second sentence of the provision under consideration.

(d) The second condition for the application of the provision under consideration is that the trademark concerned must be properly registered *in the country of origin*, as defined in paragraph (2) of the provision. This definition will be examined below, but it may be observed here that, for the application of the Article, previous registration in a *country of origin, as defined*, is prescribed in order to prevent the applicant from freely choosing a country in which such registration would be particularly easy to obtain.

(e) A trademark which fulfills the above conditions will be accepted and protected *as is*—in the authentic French text of the Convention, " *telle quelle* "—in the other countries of the Union, subject to further rules given in the Article under consideration. The meaning of the words " *telle quelle*," considered as indicating the scope within which the provision must be applied, has given rise to abundant legal studies and case law.[2]

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[1] *Actes de Lisbonne*, pp. 624 (proposal of U.S.A.), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee).

[2] Cf., for example: " A propos de l'Article 6 de la Convention d'Union, " *P.I.*, 1950, p. 110; MASSON: *La protection " telle quelle " des marques de fabrique et de commerce selon l'article 6 de la Convention d'Union de Paris du 20 mars 1883*, 1956; FAVART: *La marque " telle quelle " et l'interprétation de l'article 6 de la Convention d'Union; Etudes sur la propriété industrielle, littéraire, artistique, Mélanges Marcel Plaisant*, 1958, p. 71; MUNZINGER: " Rückwirkungen des " telle quelle "-Prinzips auf das nationale Markenrecht, " *G.R.U.R. Int.*, 1958, p. 464; EDRICH: *Die Klausel " telle quelle " und ihre Ausgestaltung in der Rechtsprechung der Vertragsländer der Pariser Union*, 1962; " Les restrictions nationales à l'application de l'article 6*quinquies* de la Convention d'Union de Paris (marque " telle quelle "), " *R.I.P.I.A.*, 1966, p. 220.

The history of the provision shows a clear situation at the start. In the original Convention of 1883 Article 6 was worded : " Every trademark duly filed in the country of origin shall be accepted for filing and protected in its original form (in French, "*telle quelle*") in the other countries of the Union." The Final Protocol, which, according to paragraph 7 thereof, was considered an integral part of the Convention, explained the above provision, in paragraph 4, as follows :

" Paragraph 1 of Article 6 should be understood in the sense that no trademark may be excluded from protection in one of the States of the Union for the sole reason that it does not comply, *with regard to the signs of which it is composed*, with the conditions of the laws of that State, provided it complies on this point with the laws of the country of origin and that it has been properly filed there. Subject to this exception, *which only concerns the form of the mark*, and subject to the provision of the other Articles of the Convention, each State shall apply its domestic law " (emphasis added).

At the Revision Conference of Washington in 1911, the basis for the application of the provision was changed from prior *filing* in the country of origin to prior *registration* in such country, but this does not concern the *scope* of the application of the Article. On this question it was proposed to omit the relevant provision in the Final Protocol and to introduce into the Convention itself the rule that the provision would apply to a trademark " with regard to the signs of which it is composed."[1] No objection was raised to this proposal by the member States and, although finally the provision of the Protocol was omitted without the introduction of a corresponding provision in the Convention itself, it is not possible to conclude from this decision that agreement was reached regarding a different scope of application of the provision.[2] On the contrary, reservations made in the Second Plenary Session of the Washington Conference made it clear that the provision continued to concern only the *signs of which a trademark is composed*—only visual signs were then considered—and that the member States were not obliged to interpret what a " trademark " *is* otherwise than according to their domestic legislation.[3]

This leads to the following conclusions :

Whenever a trademark is duly registered in the country of origin, the other countries of the Union are *obliged to accept and protect it,*

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[1] *Actes de Washington*, pp. 50/1.

[2] *Ibidem*, pp. 92/3, 95/6, 107, 110/1, 113, 224 (observations), 308/9 (report to Plenary Committee), 252/3 (discussion in Third Plenary Session).

[3] *Ibidem*, pp. 252/3. See also *Actes de Lisbonne*, pp. 568, 573/6, 600/1.

even if, as regards *its form*, that is, *with regard to the signs of which it is composed*, such trademark does not comply with the requirements of the domestic legislation, *subject* to the additional rules, *particularly the grounds for refusal or invalidation of any mark, considered on its individual merits*, established in the Article.[1] This rule will therefore apply to trademarks consisting of numbers, letters, surnames,[2] geographical names, words written or not written in a certain language or script, and other signs of which the trademark is composed.

The member States are, however, *not* obliged *to interpret the notion of a trademark* in a manner which differs from that of their national legislation. If therefore a three-dimensional object as such, or a " signature tune," is registered as a trademark in the country of origin but is not considered a " trademark " in another country, this latter country is not obliged to register and protect these subjects.[3] Member States are equally free, regardless of Article 6*quinquies*, to apply to trademark applications other provisions of their domestic law not concerning the signs of which a trademark is composed, such as a requirement of previous use of the mark,[4] or the condition that the applicant must possess an industrial or commercial enterprise.[5]

(f) The obligation to accept a trademark duly registered in the country of origin " as is," that is, with regard to the signs of which it is composed, is subject to the reservations indicated in the Article under consideration (Sections B and C). These reservations consist of grounds for refusal or invalidation, *indicated in a limitative enumeration*. The same grounds—but others also—may apply to a trademark which is *not* covered by the Article, either because it is not found to have been duly registered in the country of origin, or because objections to its registration are not related to the signs of which it is composed.

(g) The last two sentences of the provision under consideration relate to the evidence which countries may require as to the registration

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[1] Cf. in Italy: Corte di Cassazione, 18/3/1958, *G.R.U.R. Int.*, 1958, p. 580 (German translation), holding also that the protection does not apply to trademarks which are merely *used* in the country where protection is claimed.

[2] Cf. in Morocco: Cour de Rabat, 3/6/47, *Ann.*, 1949, pp. 271 (II), 283.

[3] See, for a wider interpretation, in Federal Republic of Germany: Bundespatentgericht, 29/4/1965, *G.R.U.R. Int.*, 1965, p. 508.

[4] Cf. in U.S.A.: Commissioner of Patents, 20/3/1963, 137 *U.S.P.Q.* 69 (1963).

[5] Cf. in opposite sense in Austria: Patent Office (Division of Appeals), 29/11/1961, *G.R.U.R. Int.*, 1963, p. 107. See also, however, with respect to collective marks, Article 7*bis*(1) *in fine*.

of a trademark in the country of origin. They are self-explanatory and may be compared with analogous provisions concerning the claim of a priority right according to Article 4 D(3) of the Convention.

(h) The definition of the *country of origin* is important because *only* trademarks duly registered *in such country* are covered by the Article under consideration. The reason is that the exceptional protection provided for trademarks by this Article has been considered justified only when the registration on which the protection is based is made in a country to which the owner of the trademark is in some way related and not in a country freely chosen by him because its legislation has made such registration particularly easy. The original text of the Convention of 1883 even defined the country of origin as being primarily the country in which the applicant has his *principal* establishment. The Revision Conferences of Washington in 1911 and The Hague in 1925 enlarged this provision so that it is now possible for all persons who are entitled to invoke the benefits of the Convention under Articles 2 and 3 also to claim the application of the Article under consideration. The provision, as it now stands, applies the same criteria of nationality, domicile, or establishment, as adopted in Articles 2 and 3, but it establishes a different order of priority among these criteria.

(i) Primarily, the country of origin is considered to be the country where the applicant has a *real and effective industrial or commercial establishment*. It is no longer necessary for this establishment to be his *principal* establishment. The expressions used in the provision are identical to those used in Article 3 of the Convention and must be interpreted in the same way (see, above, observation *(d)* on Article 3).

(j) Only when the applicant has no establishment as above *in a country of the Union* (he may have it elsewhere) will the country of origin be the country where the applicant has his *domicile*. This expression is again the same as that used in Article 3 and must be interpreted in the same way (see, above, observation *(c)* on Article 3).

(k) Only if the applicant has *neither* an establishment as aforesaid *nor* a domicile in one of the countries of the Union will the country of origin be the country of which he is a *national* (see, for the criterion of nationality, observation *(b)* on Article 2, paragraph (1)).

The effect of the order of priority of the criteria for the country of origin is that, if the applicant has an establishment in a country of the

Union, he cannot claim application of the Article under consideration for a trademark registered in a country where he has no such establishment. Similary, if a person has no establishment in a country of the Union, but is domiciled in such country, he can claim the application of the Article only for trademarks registered in the latter country. And if he has neither establishment nor domicile in the territory of the Union, only a trademark registration in the country of which he is a national will entitle him to the application of the Article.

ARTICLE *6quinquies*, Sections B and C*(a)*

B. Trademarks covered by this Article *(b)* may be neither denied registration nor invalidated except in the following cases *(c)*:

1. **when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed *(d)*;**
2. **when they are devoid of any distinctive character *(e)*, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production *(f)*, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed *(g)*;**
3. **when they are contrary to morality or public order *(h)* and, in particular, of such a nature as to deceive the public *(i)*. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order *(j)*.**

This provision is subject, however, to the application of Article 10*bis* *(k)*.

C(1) In determining whether a mark is eligible for protection *(l)*, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use *(m)*.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin *(n)*.

(a) In the original Convention of 1883, the only ground for refusal or invalidation of the registration of trademarks covered by the Article under consideration was contained in the rule (then paragraph 4 of Article 6) that filing may be refused if the object for which it is requested is considered contrary to morality or public order.[1] The Revision Conference of Washington (1911) considerably extended the grounds for refusal or invalidation [2] and the following Revision Conferences of The Hague (1925), London (1934) and Lisbon (1958) further developed these grounds.[3]

(b) "*Trademarks covered by this Article*" are those trademarks which are *duly registered* in the *country of origin* and which, *with regard to the signs of which they are composed*, must be accepted for filing and protected, subject to the provisions now to be examined.

(c) The revision of this provision at the Lisbon Conference in 1958 made it even clearer than before that the grounds for refusal or invalidation of registration, indicated in the provision, are *limitative* [4] (on the understanding, of course, that other provisions of the Convention, such as Articles 5 C(1), 6*bis*, 6*ter*, and 6*septies*, must be applied as well). The member States are therefore not free to apply *other* grounds for refusal or invalidation of the registration of *trademarks covered by the Article*. The sole task of the competent authorities of these States is to determine whether any of the given grounds for refusal or invalidation applies.

(d) The first permitted ground for refusal or invalidation of a trademark covered by the Article exists when such mark infringes *rights of third parties* acquired *in the country where protection is claimed.*

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[1] *Actes de Paris*, I. pp. 73/4, 138.

[2] *Actes de Washington*, pp. 50/1, 230 (proposals), 93, 96, 107, 113, 224 (observations), 297/300 (report of Sub-Committee), 308/9 (report to Plenary Committee), 252/3 (discussion and adoption in Third Plenary Session).

[3] *Actes de La Haye*, pp. 241, 245/6 (proposal), 340/1 (observations), 445/50 (report of Third Sub-Committee), 521/2 (report of General Committee), 542/3 (report of Drafting Committee), 577 (discussion and adoption in Second Plenary Session); *Actes de Londres*, pp. 183/6 (proposal), 269/72 (observations,) 393/6 (report of Third Sub-Committee), 462/3 (report of Drafting Committee), 516 (adoption in Second Plenary Session); *Actes de Lisbonne*, pp. 569/71, 576/8, 580/1 (proposal), 582/99 (observations), 601/2, 603/6 (discussion in Third Committee), 752/5 (report of Third Committee), 618 (discussion in General Committee), 106 (adoption in Second Plenary Session), 118 (General Report).

[4] *Actes de Lisbonne*, pp. 603, 610, 614, 618, 619.

These rights can be either rights in *trademarks* already protected in the country concerned, or other rights, for example, the right to a *trade name* or a *copyright*, if a trademark consisting of a picture or of invented words would infringe such right. The provision under consideration may also be applied if a trademark would infringe a person's *right of privacy*, for example, when it contains, without his authorization, his name or portrait.

(e) The second permitted ground for refusal or invalidation of trademarks covered by the Article consists of three possibilities : it applies to any trademark which, in the country where protection is claimed, is (1) *devoid of any distinctive character*, or (2) *descriptive*, or (3) a *generic name*. That these three possibilities have to be considered separately was shown by the Revision Conferences of The Hague (1925) and London (1934), where proposals to merge them to a certain extent failed.[1]

In all three possibilities the trademark has to be considered *on its individual merits :* in view of the main rule of the Article it is not possible, if a trademark is duly registered in the country of origin, to refuse its registration or protection merely because it consists of a surname, or a geographical name, or numbers or letters, as such, but it may still be found that such mark, *considered on its individual merits*, is devoid of distinctive character, or is purely descriptive, for example, of geographical origin, or is a generic name, or—see observation *(i)* below—is misdescriptive or misleading and therefore contrary to public order.

In these circumstances registration or protection of a trademark may, in the first place, be refused, if such mark, considered on its individual merits, is *devoid of any distinctive character*, for example, when it is too simple (a single star, crown or letter) or too complicated (giving the impression of being an adornment or decoration of the goods concerned, or of being merely a slogan consisting of a recommendation to buy or use such goods), or when the sign in question is already in general use, or when it does not consist *exclusively* of a description or a generic name but, even with the addition of other elements, cannot distinguish the goods of one enterprise from those of other enterprises.

(f) Registration may also be refused or invalidated if the trademark concerned is *purely descriptive*, that is, consists *exclusively* of

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[1] *Actes de La Haye*, pp. 241, 246, 446/7; *Actes de Londres*, pp. 183/4, 186, 393/4.

indications which may serve, in the country where protection is claimed, *to designate particulars of the goods concerned* as indicated in the provision. Even where a description as such is not known to the general public, and therefore the trademark is not devoid of any distinctive character, its registration may be refused or invalidated because descriptions must remain in the public domain. It should be observed that signs and indications under this provision may include not only written descriptions but also descriptions in the form of pictures.

(g) Registration may also be refused or invalidated if the trademark concerned consists of a *generic name*, that is, a *customary designation of the goods concerned*, in the country where protection is claimed. This has to be determined according to the bona fide and established practices of the trade in such country.

(h) The third permissible ground for refusal or invalidation of trademarks covered by the Article exists when such mark, considered on its individual merits, is *contrary to morality or public order*, again as considered in the country where protection is claimed.[1] A mark contrary to morality would, for example, be a mark containing an obscene picture. A mark contrary to public order would be a mark contrary to the basic legal or social concepts of the country concerned. Examples of such marks could be a mark containing a religious symbol, or a mark containing the emblem of a forbidden political party, or the emblem of a public body, even if such latter emblem were not protected by Article 6*ter* of the Convention (see paragraph (10) of that Article and, above, observation *(d)* regarding that paragraph).

(i) The Revision Conference of London in 1934 added to this provision, as a special category of trademarks contrary to morality or public order, those trademarks which are *of such a nature as to deceive the public.* The purpose of this addition[2] was to enable the member States to refuse or invalidate trademarks containing suggestions that the goods concerned possessed non-existing qualities, or unjustified references to rewards or to protection by a patent, etc. The provision will also apply to trademarks containing misleading indications of geographical origin.[3]

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[1] Cf. EGGER: " La protection de la marque ' telle quelle ' et l'ordre public," *Schw. Mitt.*, 1960, p. 38.

[2] *Actes de Londres*, pp. 184/5.

[3] Cf. in Switzerland: Bundesgericht, 11/2/1963, *G.R.U.R. Int.*, 1963, p. 609.

(j) The Final Protocol which formed an integral part of the Convention as revised by the Conference of Washington in 1911 had already specified that the mere fact that a trademark *does not conform to a provision of the law* of the country where its protection is claimed is not sufficient reason to consider it *contrary to public order*, except if such provision itself relates to public order.[1] This provision was transferred to the Convention itself by the Revision Conference of The Hague in 1925.[2] The need for such a provision is evident, because if a member State could refuse or invalidate a trademark registration on the ground of public order, merely because it did not conform to its domestic legislation, the purpose of the Article under consideration, which is to enable applicants to claim, if necessary, more than normal national treatment (see, above, observation *(b)* on Section A(1) of the Article), would be entirely defeated.

(k) The last sentence of the provision under discussion was added by the Revision Conference of Lisbon in 1958[3] after analogous proposals had failed at the preceding Revision Conferences of the Hague (1925) and London (1934). The sentence enables member States to refuse or invalidate the registration of a trademark if, for reasons other than those already mentioned in the Article—for example, infringement of the rights of third parties or deceptive character of the mark—its registration would *constitute an act of unfair competition*. This, for example, could be the case if the mark, in reproducing the picture of a well-known building which is the seat of a competitor, would be liable to cause confusion with that establishment, or if the mark contained a discrediting comparison with the goods of one or more competitors.[4]

(l) After the Revision Conference of The Hague in 1925 and until the Revision Conference of Lisbon in 1958, the Article under consideration contained a provision whereby, *in order to determine the distinctive character of a mark*, all factual circumstances, particularly the length of time the mark has been in use, must be taken into account. The Revision Conference of Lisbon gave a more general scope to this principle by applying it to *the determination of the question whether*

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[1] *Actes de Washington*, pp. 297/8, 253.

[2] *Actes de La Haye*, pp. 246, 447, 542.

[3] *Actes de Lisbonne*, pp. 590, 594 (proposals of Netherlands and Switzerland), 604/5, 610, 613, 614, 618/20 (discussions in Third Committee and General Committee), 753, 755 (report of Third Committee), 106 (adoption in Second Plenary Session), 118 (General Report).

[4] *Actes de Londres*, p. 185.

a mark is eligible for protection, that is, to all possibilities of refusal or invalidation of marks covered by Article *6quinquies*, Section B.[1]

(m) The *factual circumstances* may, for example, show that, during a long period of simultaneous use, two not very dissimilar trademarks have nevertheless not caused any confusion, so that registration of one of them will not infringe the rights in the other. Or the circumstances may show that a trademark which originally was not distinctive has, in the long run, through use, acquired a "*secondary meaning*" which makes it distinctive. Or, again, the circumstances may show that a mark which seems to contain a deceptive suggestion has not, in fact, led to any deception and may therefore be held not to be of such a nature as to deceive the public.

The competent authorities of the country in which protection of the mark is claimed may draw conclusions of this kind also from circumstances which have arisen in other countries.[2]

(n) Paragraph (2) of the provision under consideration was added to the Convention by the Revision Conference of London in 1934.[3] The provision presents an analogy with Article 5, Section C(2), examined above (see, in particular, observation *(g)* on that paragraph). This latter provision states that the *use* of a trademark by the proprietor in a form which is not essentially different from that in which it has been *registered* in *one of the countries of the Union* shall not diminish the *protection* of the mark. The provision now being considered applies the same principle to the situation where, *on the basis of a prior registration in the country of origin, registration* of the trademark *as is* is sought in *other countries of the Union*. Unessential differences between the trademark as registered in the country of origin and as filed in the country where protection is claimed will not diminish the obligation of registration in the latter country. Nor may such differences lead to invalidation of the registration, although this is not explicitly stated in the provision. Unessential differences in this respect are those which consist of elements that do not alter the distinctive character of the mark and do not affect its identity in the form in

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[1] *Actes de Lisbonne*, pp. 577, 581, 605/6, 610, 614, 618, 620, 753, 755, 106, 118.

[2] *Ibidem*, pp. 606, 753. See in Switzerland: Bundesgericht, 15/6/1955, *G.R.U.R. Int.* 1956, p. 58.

[3] *Actes de Londres*, pp. 393 (proposal of Poland and discussion in Third Sub-Committee), 462/3 (report of Drafting Committee), 516 (discussion and adoption in Second Plenary Session).

which it has been registered in the country of origin. Examples of such differences could be the adaptation or translation of certain elements of a trademark with a view to its registration in countries other than the country of origin. The competent authorities of the country in which protection of the mark is claimed will determine whether such differences are unessential.

ARTICLE *6quinquies*, Sections D, E and F*(a)*

D. No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin *(b)*.

E. However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered *(c)*.

F. The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period *(d)*.

(a) The first two of these Sections concern the dependence of trademark registrations obtained under this Article on the registration in the country of origin. Section D was introduced by the Revision Conference of Lisbon (1958),[1] to replace another provision adopted by the Revision Conference of London (1934).[2] Section E dates from the Revision Conference of The Hague (1925).[3] Section F, also introduced into the Convention by the Revision Conference of The Hague,[4]

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[1] *Actes de Lisbonne*, pp. 578/9, 581 (proposal), 602/3,610, 613, 614/6 (discussion in Third Committee), 750, 753/5 (report of Third Committee), 617/8 (discussion in General Committee), 106 (adoption in Second Plenary Session), 118 (General Report).

[2] *Actes de Londres*, pp. 179/83, 186 (proposal), 272/3 (observations), 396/8 (report of Third Sub-Committee), 463 (report of Drafting Committee), 516 (adoption in Second Plenary Session).

[3] *Actes de La Haye*, pp. 340 (proposal of U.K.), 450/1 (report of Third Sub-Committee), 522/3 (report of General Committee), 542/3 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[4] *Ibidem*, pp. 451 (proposal of Belgium), 451/2 (report of Third Committee), 522 (report of General Committee), 542 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

concerns the relationship between the rules of Article 6*quinquies* and those of Article 4, regarding the right of priority.

(b) There has frequently been regrettable confusion with respect to the question of the *dependence or independence* of registrations of the same trademark in various countries of the Union. The reason for this confusion is that insufficient distinction has been made between the situation, on the one hand, where such a trademark is registered in various countries *under the normal rule of " national treatment "* of applications, and the *exceptional situation*, on the other hand, where a trademark, *duly registered in the country of origin*, has to be accepted *as is* in the other countries of the Union if it does not comply, with regard to the signs of which it is composed, with the domestic legislation of such countries. The Revision Conference of Lisbon in 1958 arrived at a clear distinction between these situations, for the first of which the *complete independence* of trademark registrations was then recognized in Article 6, whereas for the second, exceptional situation, regulated in Article 6*quinquies*, the opposite rule was adopted,[1] providing for the *complete dependence* of registrations upon the registration in the country of origin. This means that if, on the basis of a registration in the country of origin, protection is claimed for a trademark, with respect to the signs of which it is composed, notwithstanding the domestic legislation of the country concerned, such registration may *still be refused*, or *cancelled*, or that *protection* may be refused, if the *registration in the country of origin has meanwhile been cancelled, annulled, withdrawn, or has lapsed for any other reason.*

(c) Section E refers to the situation where the registration of a trademark in the country of origin and another registration based on the former, in application of the Article under consideration, do not have the same duration.[2] If the duration in the country of origin is shorter, and the registration in that country is not renewed, the registration based on it in another country may be cancelled (see, above, observation *(b)*). If, however, the registration in the country of origin is renewed in time, that fact will not necessitate renewal of a corresponding registration in another country if the normal duration of the latter registration has not yet expired. If, on the contrary, the registration in the country of origin expires later than the corresponding registrations

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[1] *Actes de Lisbonne*, pp. 602/3, 613, 614/6, 617/8, 750, 753/5, 106, 118.

[2] *Ibidem*, p. 608.

in other countries, these latter registrations will have to be renewed independently before renewal in the country of origin.

(d) The application of Article *6quinquies* does not affect the right of priority recognized by Article 4. The relationship between these Articles is the following :

On the basis of the *first filing* of an application for the registration of a trademark in *any* country of the Union, *a right of priority* is recognized by Article 4 for the purpose of similar filings, within six months, in the other countries. For that right of priority, it is immaterial whether or not the first filing leads to a registration in the country where it has been effected (Article 4 A(3)).

If, however, a first, *or any other*, filing in the *country of origin* as defined in Article *6quinquies* A(2) leads to *registration* in such country, the trademark *must, without any limit of time, be accepted for filing and protected* as is in the other countries of the Union, but the recognition of a right of priority for its registration depends on Article 4.

These rules will normally operate separately but may be combined if a *first* filing *in the country of origin* is followed, *within six months*, by one or more similar filings in other countries of the Union, and if the first filing leads to a *proper registration* in the country of origin *before* a decision is taken about acceptance of the filings in the other countries. In such cases, the trademark has to be accepted *as is*, in view of Article *6quinquies*, and a *right of priority, as of the date of first filing*, will be recognized for its registration, by virtue of Article 4.

ARTICLE 6*sexies*(*a*)

The countries of the Union undertake to protect service marks *(b)*. **They shall not be required to provide for the registration of such marks** *(c)*.

(a) This Article was introduced into the Convention by the Revision Conference of Lisbon in 1958.[1] As observed above, that Conference did not accept a more ambitious proposal to assimilate service marks to trademarks throughout the Convention.[2] What has been adopted is an obligation to protect service marks but not also to register them.

(b) According to the provision under consideration, the member States " undertake to protect service marks." [3] This raises the question whether the member States are obliged to *legislate* on the matter or whether the provision introduces a direct obligation to protect the subject concerned, with the result that—in countries which admit such possibility—the provision may be considered " self-executing " and therefore interested parties may directly claim its application by the competent authorities of the country concerned. (See, above, with respect to analogous questions, observation *(b)* on Article 5*quinquies*, observation *(b)* on Article 6*bis*, and observation *(b)* on Article 6*ter*.)

In the case of Article 6*sexies*, the discussions at the Lisbon Conference made it clear that the provision would *not* oblige the member States to legislate expressly on the subject of service marks, so that these States would comply with the provision not only when they introduce special measures for the protection of service marks into their legislation, but also when they grant such protection by other means, for example, in their laws against unfair competition.[4]

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[1] *Actes de Lisbonne*, pp. 624, 626/7 (proposals of U.S.A. and Sweden), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee), 634/6 (discussion in General Committee), 99, 103 (adoption in Second Plenary Session), 114, 118 (General Report).

[2] *Ibidem*, pp. 624 (proposal of U.S.A.), 628/33 (discussion in Third Committee), 755/7 (report of Third Committee).

[3] See, for the notion of service marks, observation *(g)* on Article 1, paragraph (2), above, and further, MASCAREÑAS: " La marque de service," *P.I.*, 1959, p. 137 (English translation in *I.P.Q.*, July 1960, p. 10); FROSCHMAIER: *Der Schutz von Dienstleistungszeichen*, 1959; DUSOLIER: " La marque de service, " *R.I.P.I.A.*, 1965, p. 181.

[4] *Actes de Lisbonne*, pp. 633, 634, 635, 756/7, 118.

Thus, the provision under consideration does not contain an obligation to legislate, but it does contain an *obligation to protect*, which must be deemed to be an obligation to be complied with by the competent authorities of the member States. Therefore the provision must be considered " self-executing "—in countries which admit this possibility—with the result that interested parties may directly claim the protection of service marks by the competent authorities of the country concerned by all legal means available.

(c) Since the member States will not be obliged to legislate on the protection of service marks, it is logical that they should not have to provide for the registration of such marks, particularly as registration may only be possible on the basis of special legislation.

ARTICLE 6*septies*(*a*)

(1) If the agent or representative *(b)* **of the person who is the proprietor of a mark in one of the countries of the Union** *(c)* **applies, without such proprietor's authorization** *(d)*, **for the registration of the mark in his own name, in one or more countries of the Union** *(e)*, **the proprietor shall be entitled to oppose the registration applied for** *(f)* **or demand its cancellation** *(g)* **or, if the law of the country so allows, the assignment in his favor of the said registration** *(h)*, **unless such agent or representative justifies his action** *(i)*.

(2) The proprietor of the mark shall, subject to the provisions of paragraph (1), above *(j)*, **be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use** *(k)*.

(3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article *(l)*.

(a) This Article was introduced into the Convention by the Revision Conference of Lisbon in 1958.[1]

(b) The Article under consideration deals with a special situation, namely, the relationship between the *proprietor of a mark* and *his agent or representative* regarding *registration or use of the mark by the latter*. In many cases such relationship will be adequately regulated by contract, but in other cases a contract will not exist or it will be silent or inadequate on the subject. It will sometimes be in the interest also of the proprietor of the mark if his agent or representative in a given country, on his own initiative, takes the necessary measures to protect the mark by registration and by using it in view of possible user requirements, but grave difficulties may then arise with respect to the exclusive right to use the mark, or once the relationship between the parties is terminated.

If the application of the provision under consideration is requested in a country of the Union, the competent authorities of such country will first have to determine whether the person who has applied for registration of the mark in his own name in that country *can be*

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[1] *Actes de Lisbonne*, pp. 680/2 (proposal), 682/6 (observations), 687/92 (discussion in Third Committee), 760/1 (report of Third Committee), 692/3 (discussion in General Committee), 103/4 (adoption in Second Plenary Session), 118 (General Report).

considered to be the agent or representative of the proprietor of the mark in one of the countries of the Union. In view of the purpose of the provision the above wording will probably not be interpreted in a narrow legal sense, so that the provision will also be applied to those who have acted as distributors of goods bearing the mark and who have applied for registration of that mark in their own name.[1]

Although there is no reference to service marks in the history of the provision, the adoption of the word " mark, " at the time when service marks were introduced into the Convention, will allow the provision to be applied not only to *trademarks* but also to *service marks.*

(c) A second question to be examined by the authorities of the country in which application of the provision under consideration is requested is whether registration of the mark has been applied for by an agent or representative " *of the person who is the proprietor of a mark in one of the countries of the Union.*"

Since there is no reference to any country of origin, as defined, for example, in Article 6*quinquies*, Section A(2), the provision applies when the person concerned is the proprietor of the mark in *any* country of the Union, including the country in which the agent or representative has applied for or obtained the registration of the mark.[2] The latter situation may arise if the country concerned does not carry out an examination of applications for registration as to possible conflicts with existing registrations, or if such country allows the property in a mark to be acquired merely by first use.

A person who is the proprietor of a mark in one of the countries of the Union may request application of the provision even if somebody else, and not he, is the proprietor of the mark in other countries, on condition, however, that it is *his* agent or representative who has applied for registration of the mark.

The question *whether* a person is the *proprietor* of the mark in a country of the Union will have to be decided according to the domestic legislation of that country.

(d) The provision under consideration applies only when the agent or representative has applied for registration of the mark *without*

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[1] *Actes de Lisbonne*, p. 690. However, the introduction of the words " or client " after " representative " was rejected by the Conference of Lisbon, because the expression " client " was considered too vague: *Actes de Lisbonne*, pp. 690/1, 760.

[2] *Ibidem*, pp. 688/9, 760.

the authorization of the proprietor. In the event of authorization, the relevant contract will have to regulate the situation, particularly regarding the case of termination of the relationship between the parties.

(e) The provision under consideration is applicable when the agent or representative of the proprietor of the mark in a country of the Union *applies for the registration of the mark, in his own name,* in one of *the countries of the Union.* In view of the purpose of the provision, it may be applied also when the mark in respect of which registration is applied for by the agent or representative is *not identical* but *similar* to the mark of the proprietor concerned.[1]

(f) It depends on the domestic legislation of the country where the application of the provision under examination is sought whether the registration of the mark applied for by the agent or representative may be *opposed* by the proprietor or whether the latter may only—or also—demand its *cancellation* after registration.

(g) Since the possibility of *opposing* an application for registration under the conditions referred to in the provision may be limited to the period before registration, it is particularly important that the proprietor be allowed to *demand the cancellation of such registration.*

(h) A third possibility open to the proprietor of the mark, if the law of the country concerned so allows, is to demand the *assignment in his favor* of the registration obtained by the agent or representative. Such assignment may place the proprietor of the mark in a better position than if he has first to obtain the cancellation of the registration by the agent or representative and then replace that registration by one in his own name, because by means of an assignment he acquires a registration on the basis of an earlier application, which may be important with respect to rights of third parties.

(i) The Lisbon Conference intended to make the rule in this provision not too rigid[2] by allowing for the possibility that the *agent or representative may justify his application for registration of the mark.* Such justification would, for example, be possible if the proprietor of the mark had caused his agent or representative to

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[1] *Actes de Lisbonne,* p. 681.

[2] *Ibidem,* pp. 689, 691, 760.

believe that he, the proprietor, had abandoned the mark or was not interested in obtaining rights in it in the country concerned.

(j) One of the further rights conferred on the proprietor of a mark in a country of the Union is the right to oppose the unauthorized *use* of the mark by his agent or representative. This right is given subject to the provisions of paragraph (1) of the Article under consideration: the right exists only in the same conditions as the rights given to the proprietor in paragraph (1) and with a similar possibility for the agent or representative to justify his unauthorized use of the mark.

(k) The right to *oppose* the *unauthorized use* of the mark by the agent or representative is *independent* of the question whether such agent or representative has applied for *registration* of such mark or has obtained such registration.

(l) In order to avoid unduly prolonging situations which are legally uncertain, the member States may provide *an equitable time limit* within which the proprietor of a mark must exercise the rights provided for in the Article under consideration. There is no such time limit in countries which do not prescribe any.

It was understood during the Lisbon Conference[1] that, when a mark registered or used by an agent or representative is *well known* in the country concerned, Article 6*bis* of the Convention may also be applied.

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[1] *Actes de Lisbonne*, pp. 691, 761.

ARTICLE 7(a)

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark *(b)*.

(a) This Article already appeared in the original text of the Convention of 1883, although it then referred to the filing and not to the registration of a trademark.[1] The provision was modified in this latter respect by the Revision Conference of The Hague.[2]

(b) The Article under consideration can be compared, to a certain extent, to Article 4*quater* of the Convention regarding patents. The purpose of these Articles is to make the protection of industrial property independent of the question whether goods in respect of which such protection would apply may or may not be sold in the country concerned. For example, the situation in which a trademark is intended to be used on a pharmaceutical product which has not as such been approved by the competent authorities of a country, and whose sale is consequently not allowed, must not lead to a refusal to register the trademark, because it is of interest to the proprietor to secure his rights in the eventuality that the sale of his product may be permitted later on.[3] The Article under consideration would also apply when the use of trademarks is prohibited for any category of goods or when the sale of goods is subject to a monopoly or a concession.

The Article under consideration has a rather narrow scope, as became clear when attempts failed at the Revision Conference of Lisbon in 1958 to give it a wider application, namely, to extend it to *renewals* of registrations and to the *duration of the exclusive right to use* the trademark.[4]

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[1] *Actes de Paris*, I, pp. 27 (proposal), 89 (explanation of motives), 97, 143 (discussion and adoption).

[2] *Actes de La Haye*, pp. 525 (report of General Committee), 545 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[3] *Actes de Paris*, I, p. 89.

[4] *Actes de Lisbonne*, pp. 694/704, 761/3.

ARTICLE 7*bis*[(a)]

(1) The countries of the Union undertake *(b)* **to accept for filing and to protect collective marks** *(c)* **belonging to associations** *(d)* **the existence of which is not contrary to the law of the country of origin** *(e)*, **even if such associations do not possess an industrial or commercial establishment** *(f)*.

(2) Each country shall be the judge of the particular conditions *(g)* **under which a collective mark shall be protected and may refuse protection** *(h)* **if the mark is contrary to the public interest** *(i)*.

(3) Nevertheless, the protection *(j)* **of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin** *(k)*, **on the ground that such association is not established in the country where protection is sought** *(l)* **or is not constituted according to the law of the latter country** *(m)*.

(a) The main parts of this Article concerning collective marks were introduced into the Convention by the Revision Conference of Washington in 1911.[1] The Article was further elaborated by the Revision Conference of London in 1934.[2]

(b) In view of the wording of the Article, which refers to an "*undertaking of the countries of the Union*," the question again arises whether this Article may be considered "self-executing"—in countries which admit such possibility—with the result that interested parties may directly claim its application by the administrative or judicial authorities of the country concerned. The position of the Article in this respect is analogous to that of Article 6*bis* and reference may therefore be made to observation *(b)* regarding that Article. Here again the conclusion must be that the Article contains an undertaking also on the part of the administrative and judicial authorities of member States which admit this possibility, so that these authorities must directly give effect to the provisions of the Article at the request of interested parties.

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[1] *Actes de Washington*, pp. 51/2, 230/1 (proposals), 93, 96, 107, 223 (observations), 304/5 (report of Sub-Committee), 309 (report to Plenary Committee), 253/4 (discussion and adoption in Third Plenary Session).

[2] *Actes de Londres*, pp. 193/5 (proposal), 281/3 (observations), 407/9 (report of Third Sub-Committee), 467 (report of Drafting Committee), 517 (discussion and adoption in Second Plenary Session).

This means, for example, that when the domestic legislation of such countries does not contain special provisions on the registration and protection of collective marks the authorities of those countries are, nevertheless, obliged to register and protect such marks. If, on the other hand, a member State has such special legislation, it will be applied to foreign collective marks by virtue of Articles 2 and 3 of the Convention, taking into account the further regulation given in the Article under consideration.

(c) The Article under consideration concerns "*collective marks.*"[1] These marks are not defined in the same way by the various national legislations, but they can roughly be said to be signs which serve not to distinguish the goods or services of one enterprise from those of other enterprises, but to distinguish the *geographical origin* or *other common characteristics* of goods or services of *different enterprises* which *use the collective mark under the control of its owner.* These marks generally imply a certain guarantee of quality.

The member States are obliged to accept such marks for registration and to grant protection to them according to the rules given in the Article under consideration.

(d) The Article covers only collective marks "*belonging to associations,*" which will generally be associations of manufacturers or sellers of goods produced in a certain country or region or having certain common characteristics or qualities. Collective marks of States or other public bodies are not covered by the provision. A proposal to enlarge it in this respect was not accepted by the Revision Conference of London in 1934.[2] However, collective marks of States and other public bodies will frequently be protected by virtue of the rule of "national treatment" embodied in Article 2 of the Convention, and those of States—if these marks are at the same time official State signs or hallmarks indicating control and warranty—also by Article 6*ter.*

(e) Collective marks of associations will be covered by the provision under consideration only when the existence of such associations is "*not contrary to the law of the country of origin.*" What is to be understood by the country of origin is not clear. Since there is no reference, in this respect, to the definition of country of origin in Article 6*quinquies*, Section A(2), and since in view of the final words of

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[1] Cf. PAHUD: *La marque collective en Suisse et à l'étranger,* 1938; EGGER: "A propos de la marque collective," *Schw. Mitt.*, 1962, p. 100.

[2] *Actes de Londres*, pp. 193/4, 409, 467, 517.

Article 7*bis*(1) the first criterion in that definition would not necessarily apply, it is probable that "country of origin" in Article 7*bis* does not mean the country of origin *of the mark* according to Article 6*quinquies*, Section A(2), but means the country of origin of the *association concerned*.[1]

In order that the provision be applicable, *the existence* of the association to which the collective mark belongs must *not be contrary to the law of the country of origin*. This provision again is not very clear, but it probably means that the association concerned does not have to *prove* that it *conforms* to the legislation of its country of origin, but that registration and protection of its collective mark may be *refused* if the *existence* of such association is found to be *contrary* to such legislation.

(f) It follows already from Article 2(2) of the Convention that, with respect to the rule of "national treatment," no *domicile or establishment in the country where protection is claimed* may be required. The last words of the provision under consideration add the further stipulation that, for the registration and protection of *collective marks belonging to associations*, such associations may not even be required to possess an industrial or commercial establishment *anywhere*. In other words, these associations, without possessing any industrial or commercial establishment themselves, may only *control* the *use* of a collective mark *by others*. These other parties will then possess the establishments for the goods or services of which the collective mark will be used.

(g) The member States are free to establish or apply the *particular conditions under which they will agree to protect collective marks*, which conditions will then apply both to national marks and to those covered by the Convention. This may be done either by the adoption of general regulations on the matter or by decisions regarding each collective mark whose protection is sought.[2] The conditions for protection may relate to the character of the associations which claim protection [3] and may, for example, preclude that such associations themselves possess an industrial or commercial establishment; [4] the

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[1] Cf. TROLLER: *Die mehrseitigen völkerrechtlichen Verträge im internationalen gewerblichen Rechtsschutz und Urheberrecht*, p. 55.

[2] *Actes de Washington*, p. 309.

[3] See in Federal Republic of Germany: Bundespatentgericht, 4/8/1966, *G.R.U.R. Int.*, 1967, p. 72.

[4] *Actes de Londres*, pp. 408, 517.

conditions may also relate to the character of the collective mark and the guarantee given by the association concerned as to the proper use of the mark.[1] Member States are, for example, also free to prohibit the assignment of collective marks.[2]

(h) The words " protected " and " protection " must, in view of the opening words of the preceding paragraph, be deemed to include also the *acceptance of a collective mark for filing* and its registration.[3]

(i) The member States may, in particular, refuse protection of a collective mark if it is *contrary to the public interest.* The *public interest* (see also Article 5 C(3) *in fine*) should not be confused with *public order* as referred to in Article 6*quinquies*, Section B(3). The latter expression refers to basic legal or social concepts of the country concerned. The public interest is a much wider notion and relates to the interest of the public in finding the common characteristics of certain goods or services indicated by a collective mark,[4] generally suggesting a guarantee of quality. If acceptance of the mark would be against such public interest, its registration and protection may be refused.

(j) Here, again, the word " protection " must be deemed to include acceptance for filing and registration.

(k) This part of paragraph (3) merely repeats what has already been said in paragraph (1), but the words which follow give more precision to the provision.

(l) If the existence of the association claiming protection of a collective mark is not contrary to the law of the country of origin, refusal of registration and protection of such mark will not be possible on the *ground that the association is not established in the country where protection is sought.* This rule is in conformity with the general rule given in Article 2(2) of the Convention.

(m) Nor will refusal of a collective mark be possible on the ground that the association claiming protection is not constituted *according to the law of the country where protection is sought.*

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[1] *Actes de Washington*, pp. 304, 309, 254.

[2] *Actes de Londres*, p. 194.

[3] *Actes de Washington*, p. 309.

[4] *Actes de Washington*, pp. 107, 304; *Actes de Londres*, pp. 282, 409.

ARTICLE 8[(a)]

A trade name *(b)* shall be protected *(c)* in all the countries of the Union without the obligation of filing or registration *(d)*, whether or not it forms part of a trademark *(e)*.

(a) This Article was already included in the original text of the Convention of 1883.[1] The Revision Conference of The Hague in 1925 modified the wording on one point in order to achieve more conformity with other provisions of the Convention.[2]

(b) As has been observed above—see observation *(h)* on Article 1, paragraph (2)—the conception of what a "trade name" is varies in the different countries of the Union.[3] Whether a name for which protection is sought is or is not a "trade name" is a question of qualification which has to be resolved in the country where such protection is sought.

Although the Article under consideration is generally worded, the protection of a trade name, by virtue of this Article, can be claimed only by a person who is entitled to the benefits of the Convention according to Articles 2 or 3.[4]

(c) The Article under consideration prescribes that a trade name should be *protected*,[5] but it does not specify how such protection must be given (see also, however, Articles 9 and 10*ter*). The member States are free to regulate such protection either by special legislation or by legislation against unfair competition or by other appropriate means. The protection will generally be given against unlawful acts of third parties consisting, for example, of use of the same or a confusingly similar trade name or of a mark similar to the trade name, if such use is liable to cause confusion among the public. Countries are free to

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[1] *Actes de Paris*, I, pp. 27 (proposal), 97/100, 143 (discussions and adoption).

[2] *Actes de La Haye*, pp. 525 (report of General Committee), 545 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

[3] See "Protection du nom commercial en France et en divers autres pays," *R.I.P.I.A.*, 1962, p. 145.

[4] *Actes de Paris*, I, pp. 98/100, 143.

[5] Cf. CONTE: "La protection du nom commercial et l'article 8 de la Convention d'Union," *P.I.*, 1931, p. 200; SAINT-GAL: "Protection du nom commercial sur le plan international," *R.I.P.I.A.*, 1962, p. 189; 1964, p. 92; and "Der internationale Schutz des Handelsnamens," *G.R.U.R. Int.*, 1964, p. 289.

prescribe special measures in cases of use of homonymous surnames as trade names.

The protection given to a foreign trade name must, in view of the principle of national treatment embodied in Article 2 of the Convention, be equal to the protection afforded to national trade names.[1] If, however, a country grants different protection to trade names which are registered in the country and to other national trade names not so registered, it will not be obliged to grant to foreign trade names, not registered in the country concerned, more protection than to unregistered national trade names.[2] If, in any country, the likelihood of confusion among the public is a criterion for the protection of a trade name against other trade names or marks, such a country may require that a foreign trade name, in order to be protected, should be used or have become known to some extent in the country, because otherwise the likelihood of confusion would not exist.[3]

(d) A trade name will be protected, according to the Article under consideration, *without any obligation of filing or registration,* which means that, in the country where its protection is claimed, filing or registration of the trade name may be required neither in that country nor in any other country, particularly in the country of origin of the trade name, even if registration is mandatory there.

If the legislation of a country subjects the protection of *national* trade names to registration, the provision under discussion will mean a derogation from such obligation in favor of *foreign* trade names. This is a situation similar to that which may exist with respect to Article 2(2) (see, above, observation *(b)* on that provision).

(e) The protection of a trade name, according to the Article under consideration, must be independent of the questions whether the trade name serves also as, or is part of, a *trademark,* and whether such trademark is also protected. If, for example, a trademark containing a trade name is abandoned and falls into the public domain, the protection of the trade name will not be affected.[4]

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[1] Cf. in France: Cour de Paris, 13/6/1961, *Ann.*, 1962, p. 54; *id.*, 8/12/1962, *Ann.*, 1963, p. 147.

[2] Cf. in Austria: Oberster Gerichtshof, 2/9/1958, *G.R.U.R. Int.*, 1959, p. 300; *id.*, 21/11/1961, *G.R.U.R. Int.*, 1962, p. 251 ; in Switzerland : Bundesgericht, 4/5/1964, *G.R.U.R. Int.*, 1966, p. 95; *id.*, 6/10/1964, *ibidem*, 1965, p. 513.

[3] Cf. in Federal Republic of Germany: Bundesgerichtshof, 4/11/1966, *G.R.U.R. Int.*, 1967, p. 396, and in Austria and Switzerland the decisions referred to in the preceding footnote.

[4] *Actes de Paris*, I, p.97.

ARTICLE 9[(a)]

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection *(b)*.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported *(c)*.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country *(d)*.

(4) The authorities shall not be bound to effect seizure of goods in transit *(e)*.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country *(f)*.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly *(g)*, **these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.**

(a) Parts of this Article were already included in the original text of the Convention of 1883.[1] Additional paragraphs were introduced by the Additional Act, adopted by the Revision Conference of Brussels in 1900[2] and, with further modifications, by the Revision Conference of Washington in 1911.[3] The Revision Conference of The Hague in 1925 adopted several further modifications.[4]

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[1] *Actes de Paris*, I, pp. 27 (proposal for Article 6), 79/89, 91/7, 142/3 (discussions and adoption).

[2] *Actes de Bruxelles*, pp. 45/6 (proposal), 246/9, 255/6, 311/2 (discussions and adoption).

[3] *Actes de Washington*, pp. 97 (proposal of France), 302/3 (report of Committee), 309 (report to Plenary Committee), 254/5 (discussion and adoption in Third Plenary Session).

[4] *Actes de La Haye*, pp. 249/50 (proposal), 346 (observations), 469/70 (report of Fourth Sub-Committee), 525 (report of General Committee), 545/6 (report of Drafting Committee), 577 (adoption in Second Plenary Session).

(b) Although in some cases the Convention prescribes measures to be taken in the event of certain infringements of industrial property rights (see Articles 5*quater*, 6*bis*, 6*septies*), it generally leaves the question of the *sanctions or remedies to be provided against infringements* to the domestic legislation of the member States. Attempts made to *prescribe* in the Convention certain sanctions in the case of *importation* of goods unlawfully bearing a *trademark* or a *trade name* protected in the country of importation have proved to be too ambitious. The present wording of the Article under examination, although in appearance very stringent in paragraphs (1), (2), (3) and (5), adds in reality little to the general rule embodied in Articles 2 and 3 of the Convention which ensures to persons entitled to the benefits of the Convention " *national treatment* " in all member States, including sanctions and remedies in the case of infringement of their industrial property rights.

This is the effect of the Article under consideration, because, after prescribing, in cases of violation of rights in a trademark or a trade name, *seizure on importation* of goods bearing such trademark or trade name, or *prohibition* of such importation, or *seizure inside the country,* it adds in paragraph (6) that countries which do not permit such measures may *replace* them *by the actions or remedies available in such cases to nationals under the law of such country.* Thus, the rule of national treatment will apply to sanctions and remedies with respect to infringement of rights in trademarks and trade names, and will be considered sufficient.

In these circumstances, the importance of the Article under consideration lies solely in the fact that it suggests a series of measures considered desirable in order to protect rights in trademarks and trade names, and that, *if* national legislations adopt such measures, the Article underlines their mandatory application in cases where the Convention applies.[1]

The implementation of paragraph (1) of the Article is left entirely to the national legislation and administrative or legal procedures of the country concerned.

(c) Paragraph (2) of the Article indicates that, if the national legislations concerned so provide, seizure of goods unlawfully bearing a trademark or a trade name will be effected in the country where these signs are affixed on such goods as well as in the country of importation.

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[1] *Actes de Washington.* pp. 302/3, 309. See also in France: Cour de Paris, 29/6/1962, *Ann.*, 1965, p. 201.

(d) The domestic legislation of the country concerned will determine at whose request seizure will take place. The words " a natural person or a legal entity " do not by themselves imply an obligation to admit requests by federations or associations of interested persons [1] (see, for this question, Article 10*ter*(2)).

(e) This provision is self-explanatory.

(f) This provision is also self-explanatory.

(g) The words " until such time as the legislation is modified accordingly " were added to this provision by the Revision Conference of The Hague in 1925. It was expressly understood that these words were to be interpreted as a *mere invitation* to member States to adopt legislation according to the preceding paragraphs of the Article under examination, but that this invitation would not create any obligation, not even a moral one.[2]

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[1] *Actes de La Haye*, pp. 470, 545.

[2] *Ibidem*, pp. 470, 525, 545.

ARTICLE 10*(a)*

(1) The provisions of the preceding Article shall apply *(b)* **in cases of direct or indirect use** *(c)* **of a false indication of the source of the goods** *(d)* **or the identity of the producer, manufacturer, or merchant** *(e)*.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party *(f)*.

(a) The principal elements of this Article were already included in the original text of the Convention of 1883,[1] but then the provision applied only to goods which falsely bore, as an indication of source, the name of a specified locality and when such indication was joined to a trade name of a fictitious character or used with fraudulent intention. The second paragraph of the Article also had a more limited scope than it has now. The Revision Conferences of Brussels (1900),[2] Washington (1910),[3] The Hague (1925),[4] London (1934),[5] and Lisbon (1958),[6] all modified the Article on several points, but only the Lisbon Conference succeeded in giving it a much wider scope than it had before. It now applies to *all direct or indirect uses* of a *false indication of the source of goods*, irrespective of whether such indication is the name of a specified locality or country or is joined to a

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[1] *Actes de Paris*, I, pp. 27 (proposal for Article 6), 91, 100/4, 144/5 (discussions and adoption).

[2] *Actes de Bruxelles*, pp. 46 (proposal), 100, 167 (observations), 249/50 (discussion and adoption).

[3] *Actes de Washington*, pp. 97, 104 (proposals of France and U.K.), 302/3 (report of Committee), 310 (report to Plenary Committee), 254/5 (adoption in Third Plenary Session).

[4] *Actes de La Haye*, pp. 250/2 (proposal), 347/8 (observations), 470/2 (report of Fourth Sub-Committee), 525 (report of General Committee), 546 (report of Drafting Committee), 577/8 (discussion and adoption in Second Plenary Session).

[5] *Actes de Londres*, pp. 195/7 (proposal), 283/7 (observations), 411/7 (report of Fourth Sub-Committee), 468/9 (report of Drafting Committee), 517/9 (discussion and adoption in Second Plenary Session).

[6] *Actes de Lisbonne*, pp. 776/9 (proposal), 779/84 (observations), 784/7 (discussion in Fourth Committee), 850/2 (report of Fourth Committee), 788 (discussion in General Committee), 104 (adoption in Second Plenary Session), 118 (General Report).

trade name of a fictitious character or used with fraudulent intention. The provision also extends to any direct or indirect use of a *false indication of the identity of the producer, manufacturer or merchant of goods* and is in this respect of the same kind as the provisions of Article 10*bis* concerning the repression of unfair competition.[1]

(b) As has been observed above—see observation *(b)* on Article 9—application of the provisions of the preceding Article 9 means that also in the case of false indications of source or of the identity of the producer, etc., *the domestic legislation of the country where protection is sought will apply,* and *if* such legislation provides for seizure on importation of goods bearing such false indications, or other measures as indicated in Article 9, application of such measures will be mandatory in cases covered by the Article under consideration.

(c) *Direct* use of a false indication of source is made when such indication is made in so many words; *indirect* use of such indication is made, for example, when goods are delivered without any indication of source after false publicity has been made as to such source, or when the indication of source is made by a picture suggesting such source.

(d) Since the revision of the Article under examination by the Conference of Lisbon in 1958, it no longer applies *only* to the false indication, as the source of goods, *of the name of a specified locality or country,* that is, to a false indication of *geographical source.* The provision will therefore also apply in cases where the source of goods is falsely indicated otherwise than geographically, for example, as handicraft products (see also Article 10*bis*(3), subparagraph 3). However, the provision will probably continue to be applied mainly to *false indications of geographical source,* including *appellations of origin.* See, for these notions, observations *(i)* and *(j)* on Article 1, paragraph (2), above, and the Special Agreements of Madrid (1891) and Lisbon (1958) referred to in those observations.

One of the difficulties with indications of source and appellations of origin is that what is considered to be an indication of source or appellation of origin in one or more countries is sometimes considered in other countries to be a generic name, not limited to products of a certain source or origin.[2] It was explained at the Lisbon

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[1] See BEIER: "Täuschende Reklame und Schutz der geographischen Herkunftsangaben," *G.R.U.R. Int.*, 1966, p. 197.

[2] Examples given at the Conference of Paris in 1880 were "*eau de Cologne,*" "*cuir de Russie*" and "*velours d'Utrecht*"; cf: *Actes de Paris*, I, p. 88.

Conference[1] that legislation or judicial decisions in the country where protection is sought would have to solve the said difficulty.

(e) Since the revision of this provision at the Lisbon Conference in 1958, the provision is also applicable to cases of direct or indirect use of a false indication *of the identity of the producer, manufacturer or merchant.* As has been observed above—see observation *(b)*—this means that also in such cases the domestic legislation of the member States will apply, and *if* such legislation prescribes seizure on importation of goods bearing such false indications, or other measures as indicated in Article 9, application of the said measures will be mandatory in cases covered by the Article under consideration.

The domestic legislation of the member States will probably deal with the prohibition of false indications of the identity of the producer, manufacturer or merchant as particular cases of the repression of unfair competition. It may give special attention to cases of homonymous surnames.[2]

(f) Paragraph (2) of the Article under consideration relates to cases where a *locality,* a *region* or a *country* is falsely indicated as the source of goods, and therefore applies only to false *geographical* indications. The difficulty in these cases is that a geographical indication is generally not privately owned, so that, contrary to the situation which prevails regarding trademarks, trade names and false indications of identity, there is no owner or other person obviously competent to object to the use of false geographical indications. The provision under examination establishes such competence by recognizing as interested parties any producer, manufacturer or merchant engaged in the production or manufacture of or trade in the goods concerned and established *either* in the locality or country *falsely indicated* or in the region where such locality is situated, *or* in the country where the false indication of source is *used.* It is clear that the first category of such producers, etc., is directly interested because they may be harmed by the false indication of the locality, region or country where they are established ; the second category of producers, etc., can be deemed to be indirectly interested because the use of a false indication of source in any country can be considered an act of unfair competition.

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[1] *Actes de Lisbonne,* p. 778.

[2] *Ibidem,* p. 786.

It has been felt that producers, etc., of the latter category could probably intervene more rapidly.[1]

The provision of paragraph (2) of this Article is so worded that it must, in countries which admit this possibility, be directly applied by the competent administrative and judicial authorities ; in other words, it is " self-executing."

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[1] *Actes de Londres*, pp. 416/7 (proposal of Cuba), 468/9.

ARTICLE 10*bis*(*a*)

(1) The countries of the Union are bound *(b)* **to assure to nationals of such countries effective protection against unfair competition** *(c)*.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition *(d)*.

(3) The following in particular shall be prohibited *(e)* **:**

1. **all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor** *(f)* **;**
2. **false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor** *(g)* **;**
3. **indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods** *(h)*.

(a) The original Convention of 1883 did not contain any specific provision concerning the repression of unfair competition. In view of the fact that such repression was not even enumerated amongst the subjects of industrial property concerning which "national treatment" must be granted to persons entitled to the benefits of the Convention, the Additional Act, adopted by the Revision Conference of Brussels in 1900, introduced the latter principle with respect to unfair competition in a newly inserted Article 10*bis*.[1] The Revision Conference of Washington in 1911 went a step further, in introducing into the said Article the obligation for all member States to assure to nationals of the Union effective protection against unfair competition.[2] This obligation was strengthened, and a definition and examples of acts of unfair competition were included in the Article by the Revision

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[1] *Actes de Bruxelles*, pp. 164 (proposal of France), 187/8, 310; 382/3 (discussions and adoption).

[2] *Actes de Washington*, pp. 53 (proposal), 105, 224 (observations), 305 (report of Committee), 310 (report to Plenary Committee), 255 (discussion and adoption in Third Plenary Session).

Conference of The Hague in 1925.[1] The Revision Conference of London in 1934 improved these provisions,[2] and the Revision Conference of Lisbon in 1958 added a further example of acts of unfair competition (paragraph (3)3).[3]

(b) Paragraph (1) of the Article under consideration, on the one hand, and paragraphs (2) and (3), on the other hand, are of a different character.

Paragraph (1) merely contains an *obligation for the member States* by virtue of which they are bound to assure to nationals of the (other) countries of the Union—and those assimilated to them under Article 3—effective protection against unfair competition.

In most countries, it will hardly be possible to assure *effective* protection against unfair competition by means other than *legislation*, but it was admitted at several Revision Conferences[4] that member States are not obliged to introduce *special* legislation to this effect if their existing general legislation—for example, provisions of civil law directed against torts, or principles of common law—suffices to assure effective protection against unfair competition.

On the other hand, paragraphs (2) and (3) of the Article under consideration contain, *in a directly applicable form*, a *definition* of what an act of unfair competition *is* and *examples* of such acts which *must, in particular, be prohibited.* These provisions are so worded that they must be considered " self-executing," in countries which admit this possibility, and must therefore be directly applied by the judicial or administrative authorities of the country where protection against unfair competition is sought.[5] Further observations on these subjects follow below.

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[1] *Actes de La Haye*, pp. 252/5 (proposal), 348/51 (observations), 472/8 (report of Fourth Sub-Committee), 525 (report of General Committee), 546/7 (report of Drafting Committee), 578/81 (discussion and adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 197/8 (proposal), 287/90 (observations), 417/22 (report of Fourth Sub-Committee), 469/70 (report of Drafting Committee), 519 (adoption in Second Plenary Session).

[3] *Actes de Lisbonne*, pp. 725, 784 (proposal of Austria), 725/6 (discussion in Third Committee), 789/90 (discussion in Fourth Committee), 852 (report of Fourth Committee), 726/7, 790 (discussion in General Committee), 106 (adoption in Second Plenary Session), 118 (General Report).

[4] *Actes de Washington*, pp. 305, 255; *Actes de La Haye*, pp. 472, 578.

[5] Cf. in Mexico: Juez Primero de Distrito en Materia Administrativa en el Distrito Federal, 28/8/1963, *Rev. Mex. P.I.*, 1963, p. 340, *G.R.U.R. Int.*, 1967, p. 29 (German translation).

(c) The various countries of the Union have different concepts of what is to be understood by "*unfair competition.*" Several acts are considered to be acts of unfair competition in one or more countries, but not—or only in special circumstances—in other countries.[1] In giving effective protection against unfair competition, each country may itself determine which acts come under this category, provided, however, that paragraphs (2) and (3) of the Article under consideration are complied with.

(d) The provision defines acts of unfair competition as *any act of competition contrary to honest practices in industrial or commercial matters.*

What is to be understood by "*competition*" will be determined in each country according to its own concepts : countries may extend the notion of acts of unfair competition to acts which are not competitive in a narrow sense, that is, within the same branch of industry or trade, but which unduly profit from a reputation established in another branch of industry or trade and thereby weaken such reputation.[2]

Any act of competition will have to be considered unfair if it is contrary to *honest practices in industrial or commercial matters.*[3] This criterion is not limited to honest practices existing in the country where protection against unfair competition is sought. The judicial or administrative authorities of such country will therefore also have to take into account honest practices established in international trade.

If a judicial or administrative authority of the country where protection is sought finds that an act complained of is contrary to honest practices in industrial or commercial matters, it will be obliged to hold such act to be an act of unfair competition and to apply the sanctions and remedies provided by its national law. A wide variety of acts may correspond to the above criterion.[4]

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[1] See, for example, ULMER c.s.: *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft*, 1965, and for other countries, *G.R.U.R. Int.*, 1959, p. 517 (U.S.A.); 1964, pp. 233 (Norway), 300 (Denmark), 358 (Finland) and 493 (U.K.).

[2] Cf. SAINT-GAL: " Concurrence déloyale et concurrence parasitaire, " *R.I.P.I.A.*, 1956, p. 19; and "Unlauterer und parasitärer Wettbewerb," *G.R.U.R. Int.*, 1956, p. 202; 1957, pp. 7, 410; 1958, p. 399.

[3] Cf. in Italy: Corte di Cassazione, 31/7/1957, *G.R.U.R. Int.*, 1958, p. 535 (No. 1837) (German abstract).

[4] Cf. the literature cited in footnote 1, above, and, further, BIRPI's *Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition*, 1967, p.78. See also, for example, in Austria: Oberster Gerichtshof, 9/10/1957, *G.R.U.R. Int.*, 1959, p. 397.

(e) Paragraph (3) of the Article under consideration gives *examples* of acts which are particularly to be regarded as acts of unfair competition and must therefore be prohibited. This provision again contains *common legislation* for all countries of the Union [1] and must either be accepted as part of their domestic legislation or be directly applied by their judicial or administrative authorities. The enumeration of examples given of acts of unfair competition is not limitative and constitutes only a minimum.[2]

(f) The first example given of acts which must be regarded as acts of unfair competition relates to all acts of such a nature as to create *confusion* by any means whatever with the *establishment*, the *goods*, or the *industrial or commercial activities*, of a *competitor*. Such confusion can be created by the use of identical or similar trademarks or trade names and will then frequently be prohibited by special legislation concerning those subjects. If this is not the case, acts creating confusion by those means must be prohibited as acts of unfair competition. This is also true for other means by which similar confusion can be created, such as the form of packages, titles of publicity,[3] references to the seat or other particulars of an enterprise,[4] etc. It is immaterial whether those acts are committed in good faith, although good faith may have an influence on the sanctions to be applied.[5]

(g) The second example of acts which must be regarded as acts of unfair competition relates to *false allegations* in the *course of trade* of such a nature as to *discredit* the *establishment*, the *goods*, or the *industrial or commercial activities*, of a *competitor*. The mere fact of discrediting a competitor by untrue allegations which would discredit his business, goods or services, even without injurious intention on the part of the person making the allegations, is sufficient for the application of this provision.[6] It has been left to the domestic legislation or case law of each country to decide whether, and under what circumstances, discrediting allegations which are not strictly *untrue* may also constitute acts of unfair competition.[7]

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[1] *Actes de La Haye*, pp. 472, 475/7, 546/7.

[2] *Ibidem*, p. 547.

[3] *Ibidem*, p. 476.

[4] *Actes de Londres*, p. 198.

[5] *Actes de La Haye*, pp. 476/7, 581.

[6] *Ibidem*, p. 477

[7] *Actes de Londres*, p. 418.

(h) The third example of acts of unfair competition concerns *misleading allegations* but, this time, not particularly regarding the goods *of a competitor*—such allegations being generally covered by the preceding item 2—but concerning the *goods of the person who makes the allegations.* The provision under examination applies to all *indications or allegations* the use of which, *in the course of trade,* is liable to *mislead the public* as to the *nature,* the *manufacturing process,* the *characteristics,* the *suitability for their purpose,* or the *quantity,* of the goods concerned. It does not relate to similar indications or allegations as to the *origin* or *source* of the goods[1] or the *identity of the producer,* his *establishment* or his *industrial or commercial activities.* As to such acts, in so far as they are not covered by Article 10 of the Convention,[2] national legislations or case law will determine whether they are acts contrary to honest practices in industrial or commercial matters and for that reason must be deemed to be acts of unfair competition.

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[1] *Actes de Lisbonne,* pp. 726, 790.

[2] *Ibidem,* p. 789.

ARTICLE 10*ter*(a)

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*(b).

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10*bis*, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country *(c)*.

(a) This Article was introduced into the Convention by the Revision Conference of The Hague in 1925.[1] Its wording was slightly modified by the Revision Conference of London in 1934.[2]

(b) Paragraph (1) of the Article contains an *obligation for the member States* to assure to nationals of the other countries of the Union—and those assimilated to such nationals by Article 3—appropriate *legal remedies* effectively to repress all the acts referred to in Articles 9, 10 and 10*bis*.. This can only be understood as an obligation for member States to introduce, complete or maintain *legislation* effectively repressing *(i)* the trade in goods unlawfully bearing a trademark or a trade name which is entitled to protection in the country concerned, *(ii)* the use of false indications of the source of goods or of the identity of the producer, manufacturer or merchant, and *(iii)* acts of unfair competition. The last obligation (under *(iii)*) is also expressed in Article 10*bis*(1), to which provision the paragraph under consideration only adds that *appropriate legal remedies* must be provided. With respect to the first two obligations (under *(i)* and *(ii)*), the paragraph under consideration reinforces Article 9(6), which is

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[1] *Actes de La Haye*, pp. 252/5 (proposal concerning Article 10*bis*), 349/51 (observations), 478/80 (report of Fourth Sub-Committee), 525/6 (report of General Committee), 547 (report of Drafting Committee), 581 (discussion and adoption in Second Plenary Session).

[2] *Actes de Londres*, pp. 422 (proposal of U.K. and report of Fourth Sub-Committee), 470 (report of Drafting Committee), 519 (adoption in Second Plenary Session).

applicable also to Article 10, because it specifies that the actions and remedies available in these cases must be *effective.*

At the Revision Conference of The Hague it was understood that national legislation, in providing for effective repression of the acts referred to, may make a difference between provisions allowing claims for damages and those providing for injunctions against the incriminated acts. Whereas it would be possible not to grant damages with respect to acts committed in good faith, the same would not apply to injunctions.[1]

(c) Paragraph (2) of the Article under consideration again contains an "*undertaking*" *by the member States.* Although this word is also used in Articles 6*bis*, 6*sexies* and 7*bis* of the Convention, the context in which it is used here is different. According to the Articles referred to in the previous sentence, the member States undertake to refuse, cancel, protect, or accept certain things, which may be interpreted in countries which admit such a possibility as imposing direct obligations upon the administrative or judicial authorities of such countries. According to the paragraph under consideration, however, the member States undertake *to provide measures to permit,* etc., which can only be understood as referring to *legislation.*

The object of such legislation must be to permit *federations and associations,* representing *interested industrialists, producers or merchants,* to take action when acts referred to in Articles 9, 10 and 10*bis* are committed. Two provisos are attached to the admission of such competence on the part of federations and associations: first, their existence must not be contrary to the laws of their countries (cf. observation *(e)* on Article 7*bis*,[2] and, secondly, their action may be permitted only to the extent to which the law of the country in which protection is sought allows such action by federations and associations of that country.

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[1] *Actes de La Haye,* p. 581.

[2] Cf. in Italy: Tribunale di Milano, 11/1/1964, *G.R.U.R. Int.,* 1965, p. 253 (German translation).

ARTICLE 11*(a)*

(1) The countries of the Union shall, in conformity with their lomestic legislation *(b)*, **grant temporary protection** *(c)* **to patentable nventions, utility models, industrial designs, and trademarks** *(d)*, **in espect of goods exhibited at official or officially recognized interna-ional exhibitions** *(e)* **held in the territory of any of them** *(f)*.

(2) Such temporary protection shall not extend the periods rovided by Article 4. If, later, the right of priority is invoked, the uthorities of any country may provide that the period shall start rom the date of introduction of the goods into the exhibition *(g)*.

(3) Each country may require, as proof of the identity of the rticle exhibited and of the date of its introduction, such documentary vidence as it considers necessary *(h)*.

(a) Since lack or inadequacy of protection of industrial property t international exhibitions was one of the reasons which promoted e conclusion of the Convention,[1] it is natural that the principle of uch protection should already have been included in the original text f the Convention of 1883.[2] It was then the intention to oblige the ember States to take the necessary legislative measures to that effect ut to leave them free in determining the ways and means of achieving is end.[3] These principles were confirmed at the Revision Conference f Brussels in 1900,[4] where the words " in conformity with the domestic w of each country " were introduced into the Article by the Addi-onal Protocol adopted at that Conference. At the Revision Confer-nce of The Hague in 1925 ambitious proposals were made to insert much more detailed regulation of the subject in the Article, but it nly proved possible to add the provisions of paragraphs (2) and (3).[5]

(b) The Article under consideration still contains only an *obligation r the member States* to *establish and maintain legislation* in order

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[1] Cf. LADAS: *The International Protection of Industrial Property*, pp. 73 *et seq.*, 17/8.

[2] *Actes de Paris*, I, pp. 27 (proposal for Article 9), 104/8 (discussion), 145 (adop-on); II, pp. 22, 31, 33/4 (discussion).

[3] *Ibidem*, I, pp. 105/7.

[4] *Actes de Bruxelles*, pp. 47/8 (proposal), 185/6 (discussion), 312 (adoption).

[5] *Actes de La Haye*, pp. 255/62 (proposal), 351/2 (observations), 436/7 (report of cond Sub-Committee), 526 (report of General Committee), 547 (report of Drafting ommittee), 581 (adoption in Second Plenary Session).

temporarily to protect the enumerated subjects of industrial property in respect of goods exhibited at certain exhibitions. It leaves the domestic legislation of a member State free to choose the means for offering such protection.

(c) Temporary protection, by domestic legislation, of the enumerated subjects of industrial property may be provided by various means. Such legislation may, for example, grant *a right of priority,* more or less similar to that recognized in Article 4 of the Convention, to applications for protection of exhibited subjects. Such right will apply during a certain period from the day on which the subject concerned was introduced at the exhibition. Such protection by a right of priority is temporary because it will expire if, or in so far as, the right is not exercised within the prescribed period. It is also possible, for example, in the case of exhibited patentable inventions, to make provision for temporary protection by other means, namely, by prescribing that, during a certain period, such exhibition will not *destroy the novelty of the invention* and that the person who exhibits the invention will also be protected against *usurpation* of his invention by *third parties.* Still another possibility of protection consists in the recognition of a right of prior use in favor of the exhibitor as against possible rights acquired by third parties.

(d) The subjects of industrial property which, according to the provision under consideration, are to be protected are *patentable inventions, utility models, industrial designs and trademarks.* The provision is silent on other subjects of industrial property, such as service marks and trade names. There is therefore no *obligation* for member States to grant temporary protection to these subjects also, but they are free to do so if they wish.

(e) The provision under examination applies only to temporary protection of inventions, etc., in respect of goods exhibited at *official or officially recognized exhibitions.*[1] The question whether this condition is fulfilled will be determined by the administrative or judicial

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[1] A definition of an "official or officially recognized exhibition" is given in the Convention concerning International Exhibitions, signed in Paris on November 22, 1928. This definition, however, cannot be applied to the Article under consideration because the purpose of this Article, on the one hand, and that of the Convention referred to, on the other hand, are quite different.

authorities of the country where temporary protection is sought. As will be observed under *(f)*, below, this is not necessarily the same country as that in which the exhibition is held.

The authorities referred to above will probably deem an exhibition to be *official* if it is *organized* by a State or other public authority, and will consider it *officially recognized* if it has been *recognized* as such by a State or other public authority. Moreover, the exhibition has to be *international*, which means that it must include the exhibition of goods coming from foreign countries.

Since these definitions leave a certain amount of uncertainty, some member States notify the International Bureau of the exhibitions in respect of which they desire the provision to be applied, after which the Bureau publishes these notifications. Other countries advertise their official or officially recognized international exhibitions in an official Gazette. Such notifications and publications, although not binding upon the authorities of a country where protection according to the provision is sought, provide a basis for their decisions.

Member States are, of course, free to grant in their domestic legislation temporary protection with respect also to exhibitions other than those envisaged in the provision under consideration.

(f) In their domestic legislation the member States must not only grant temporary protection with respect to international exhibitions *in their own territory* but must extend such protection to *all exhibitions, as defined, held in the territory of any other member State.* This means that the temporary protection provided by such legislation may be claimed by persons entitled to the benefits of the Convention, not only with regard to goods exhibited, under the conditions prescribed, in the country itself but also regarding goods exhibited, under the conditions prescribed, in other countries of the Union.

(g) Paragraph (2) of the Article under consideration deals with the relationship between the temporary protection to be granted according to this Article and the *right of priority granted by Article 4 of the Convention.* Particularly if the temporary protection envisaged is given in the form of another right of priority—see observation *(c)* above—the question arises whether such right and the right of priority granted by Article 4 of the Convention may be cumulated. Such cumulation would mean, for example, that an interested party could first, within the period of priority starting from the date of exhibition, file an application for protection of the subject concerned with priority in one country of the Union and then, on the basis of this first applica-

tion, apply, within a new period of priority granted under Article 4, for protection in the other countries, with *priority as from the exhibition.*

The first sentence of the provision now being considered implies that such cumulation of priorities cannot be claimed, in that it states that the periods of priority provided by Article 4 shall not be extended. However, the second sentence of this provision leaves a certain amount of freedom[1] to the authorities of the country where protection and priority are claimed. If the exhibition of a subject precedes a first application for protection of such subject, the period of priority under Article 4 *may, without being extended,* be counted as *starting* from the date of introduction of the goods into the exhibition.

(h) In order to apply its domestic legislation regarding temporary protection of certain subjects exhibited at international exhibitions as described, each country may require proof, both as to the *identity of the article exhibited* and as to the *date of its introduction at the exhibition,*[2] in whatever form of documentary evidence it considers necessary. Such documentary evidence may, for example, consist of a certificate relating to both of the points referred to above and issued by the competent authorities of the exhibition concerned or of the country where it was held.

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[1] *Actes de La Haye,* p. 526.

[2] *Ibidem,* p. 437.

ARTICLE 12*(a)*

(1) Each country of the Union undertakes to establish a special industrial property service and a central office *(b)* for the communication to the public of patents, utility models, industrial designs, and trademarks *(c)*.

(2) This service shall publish an official periodical journal *(d)*. It shall publish regularly:

- **(a) the names of the proprietors of patents granted, with a brief designation of the inventions patented;**
- **(b) the reproductions of registered trademarks *(e)*.**

(a) The first paragraph of this Article was already included in essence in the original text of the Convention of 1883.[1] The Final Protocol, which formed an integral part of that Convention, made an addition to this, under paragraph 5, to the effect that the activities of the special industrial property service would include, as far as possible, the publication, in each member State, of an official periodical journal.[2] The Revision Conference of Washington in 1911 added utility models to the subjects to be communicated to the public and transferred the provision from the Protocol to the Convention itself.[3] The Revision Conference of The Hague in 1925 rendered the publication of an official periodical journal mandatory,[4] and the Revision Conference of London in 1934 specified the subjects which are to be published regularly.[5]

(b) As the protection of industrial property, and particularly its international protection, can obviously not operate without *national administrations* which *register* the rights concerned and *communicate these rights to the public*, the Convention obliges each member State to establish such administration *in a central office*. As is shown by

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[1] *Actes de Paris*, I, pp. 27/8 (proposal), 108, 145 (adoption).

[2] *Ibidem*, pp. 151/2.

[3] *Actes de Washington*, pp. 55 (proposal), 97, 224 (observations), 310 (report to Plenary Committee), 255 (adoption in Third Plenary Session).

[4] *Actes de La Haye*, p. 263 (proposal), 353 (observation), 415/6 (report of First Sub-Committee), 526 (report of General Committee), 547/8 (report of Drafting Committee), 581 (adoption in Second Plenary Session).

[5] *Actes de Londres*, pp. 198/9 (proposal), 344/5 (report of First Sub-Committee), 470/1 (report of Drafting Committee), 519 (adoption in Second Plenary Session).

Article 13(3)*(b)* of the Convention, member States may also conclude special agreements establishing a *common* office possessing for each of them the character of a special national service of industrial property. An example of such common office is the *African and Malagasy Industrial Property Office*, established at Yaoundé (Cameroon) by virtue of an Agreement between the participating States, dated September 13, 1962.

(c) The administration envisaged by the Article under consideration must be established for the *communication to the public* of *patents, utility models, industrial designs* and *trademarks.* No mention is made of other subjects of industrial property so that member States are free to decide whether, and how, those subjects should also be communicated to the public.

(d) The publication of an *official periodical journal* by each national administration, made mandatory by the Revision Conference of The Hague in 1925, provides the most practical way of communicating to the public the granting of industrial property rights.

(e) Each national administration must, in particular, publish regularly the *essential data* concerning the most important subjects of industrial property, namely, *patents* and *trademarks.* These data are the names of proprietors of patents granted, with a brief designation of the inventions patented, and reproductions of registered trademarks. It must also publish data concerning any right of priority claimed (cf. Article 4 D(2) and (5)).

The administrations may, and usually do, publish many more data, such as *dates* of grant or registration, dates of applications, analogous data with respect to *utility models, industrial designs, service marks,* and application of Article 6*ter* of the Convention (cf. Article 6*ter* (3)*(a)*), etc.

ARTICLE 13(a)

(1)(a) The Union shall have an Assembly *(b)* consisting of those countries of the Union which are bound by Articles 13 to 17(c).

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2)(a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention *(d)*;

(ii) give directions concerning the preparation for conferences of revision *(e)* to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau" referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as "the Organization" *(f)*), due account being taken of any comments made by those countries of the Union which are not bound by Articles 13 to 17 *(g)*;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union *(h)*;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the triennial budget of the Union, and approve its final accounts *(i)*;

(vii) adopt the financial regulations of the Union *(j)*;

(viii) establish such committees of experts and working groups as it deems appropriate to achieve the objectives of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 13 to 17 *(k)*;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) perform such other functions as are appropriate under this Convention *(l)*;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization *(m)*.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization *(n)*.

(3)(a) Subject to the provisions of subparagraph (b), a delegate may represent one country only.

(b) Countries of the Union grouped under the terms of a special agreement in a common office possessing for each of them the character of a special national service of industrial property as referred to in Article 12 may be jointly represented during discussions by one of their number *(o)*.

(4)(a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains *(p)*.

(d) Subject to the provisions of Article 17(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(5)(a) Subject to the provisions of subparagraph (b), a delegate may vote in the name of one country only.

(b) The countries of the Union referred to in paragraph (3)(b) shall, as a general rule, endeavor to send their own delegations to the sessions of the Assembly. If, however, for exceptional reasons, any such country cannot send its own delegation, it may give to the delegation of another such country the power to vote in its name, provided that each delegation may vote by proxy for one country only. Such power to vote shall be granted in a document signed by the Head of State or the competent Minister *(q)*.

(6) Countries of the Union not members of the Assembly shall be admitted to the meetings of the latter as observers.

(7)(a) The Assembly shall meet once in every third calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization *(r)*.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(8) The Assembly shall adopt its own rules of procedure.

(a) As has been observed above in Chapter II.1, Article 13 and the following Articles are among those Articles of the Convention which contain provisions of international public law regulating rights and obligations of the member States and establishing the organs of the Union created by the Convention, as well as provisions of an administrative character. Although parts of these Articles and even some of them in their entirety existed already in former texts of the Convention,[1] this latter part of the Convention was entirely rearranged at the Revision Conference of Stockholm in 1967, while many important new provisions were added on the same occasion.

This part of the Convention, which can be considered of an administrative character in a very broad sense, differs from the preceding part in other respects as well. In the first place, the latter

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[1] See, for a comparison between the Lisbon text of the Convention and the proposals for the Stockholm Conference, proposals which were to a large extent accepted: document S/3 prepared for the Stockholm Conference, pp. 14/6.

part of the Convention contains very detailed rules and therefore necessitates fewer comments; many of its provisions are self-explanatory. Secondly, the administrative part of the Convention cannot be fully understood without considering at the same time another Convention, concluded simultaneously with the revision of the Paris Convention at Stockholm in 1967, namely, the Convention of July 14, 1967, establishing the *World Intellectual Property Organization*.[1]

This new Convention and the Paris Convention are to a large extent independent of each other, and States may—with one important exception: see Article 14(2) of the WIPO Convention—accede to or withdraw from one of these Conventions without acceding to or withdrawing from the other. Nevertheless, both Conventions refer to each other on several points and are destined to complete each other. It is therefore necessary to explain briefly the *objectives and structure of the World Intellectual Property Organization* before commenting upon the administrative provisions of the Paris Convention.[2]

The objectives of the World Intellectual Property Organization are (see Articles 3 and 2 of the WIPO Convention):

(i) to promote the protection of *intellectual property* throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization (*intellectual property* includes *industrial property as defined in Article 1 of the Paris Convention* as well as copyright and related subjects);

(ii) to ensure administrative cooperation *among the Unions* (these Unions being *the Union established by the Paris Convention*, the Unions and Agreements established in relation with that Union (cf. Article 19 of the Paris Convention), the Berne Union, established by the Convention of September 9, 1886, for the Protection of Literary and Artistic Works, and any other international agreement designed to promote the protection of intellectual property and administered by WIPO).

Membership in WIPO is open to any State which is a *member of any of those Unions*, and also to any State not a member of any of those Unions, provided that:

(i) it is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the

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[1] Hereinafter frequently referred to as " WIPO. " See the text of this Convention in *I.P.*, 1967, p. 155.

[2] Cf. KRIEGER and ROGGE: " Die neue Verwaltungsstruktur der Pariser und Berner Union und die neue Weltorganisation für geistiges Eigentum, " *G.R.U.R. Int.*, 1967, pp. 462 *et seq.*

International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice, or

(ii) it is invited by the General Assembly of WIPO to become a party to the Convention establishing that Organization.

WIPO has several organs : in the first place, a *General Assembly* consisting of the States party to the WIPO Convention *which are also members of any of the Unions*, for example, the *Paris Union*, and, furthermore, a *Conference* consisting of all States party to the WIPO Convention *whether or not they are members of any of the Unions.*

The *General Assembly* is the supreme organ of the Organization, the *Conference* having a more limited task, confined principally to discussing matters of general interest in the field of intellectual property, in view of which it may adopt recommendations, having regard to the competence and autonomy of the Unions, and to establishing a program of legal-technical assistance in the field of intellectual property to States or organizations.

WIPO also has a *Coordination Committee* consisting of the States party to the WIPO Convention which are members of the *Executive Committee of the Paris Union* (see, below, Article 14 of the Paris Convention), or of the Executive Committee of the Berne Union, or both. One of the tasks of the Coordination Committee is to give advice to the *organs of the Unions*, the General Assembly, the Conference, etc., on all administrative, financial and other matters of *common interest either to two or more of the Unions*, or to *one or more of the Unions and the Organization*, and in particular on the budget of *expenses common to the Unions* (see, below, observation *(d)* on Article 16).

In order to attain its objectives, WIPO will have to fulfil several functions, for example, the promotion of measures designed to *facilitate the efficient protection of intellectual property throughout the world* and to *harmonize national legislation in this field*, and the *performance of the administrative tasks of the Paris Union and other Unions.* To this end the Organization will have a *Secretariat* which is called the *International Bureau of Intellectual Property* and which is a continuation of the United Bureaux of the Paris and Berne Unions, known under the name of BIRPI. The International Bureau will be directed by a Director General.

WIPO will have *two separate budgets* : the budget of expenses *common to the Unions*, and the budget of the *Conference*. The *budget of expenses common to the Unions* will include provision for expenses of interest to several Unions ; it will be financed, inter alia, from *contributions of the Unions* which will be fixed *by the Assembly of* *each Union*, having regard to the interest the Union has in the common expenses. The *budget of the Conference* will include provision for the expenses of the Conference and for the cost of the legal-technical assistance program; it will be financed, inter alia, from contributions of Member States of WIPO who are not members of any Union and from sums made available to that budget *by the Unions*, according to autonomous decisions taken by the *Assembly of each Union*.

Under transitional provisions in the WIPO Convention it is provided that, until the first Director General of the Organization assumes office, references made in that Convention to the International Bureau or to its Director General shall be deemed to be references to BIRPI, or its Director, respectively.

It will be clear from the foregoing observations that the Paris Convention and the WIPO Convention are, in several respects, interrelated. Further references to this relationship will be made in the following comments on the administrative provisions of the Paris Convention.

(b) Until the Revision Conference of Lisbon in 1958 the Paris Convention had no organ in which the member States were represented, except in the form of the Revision Conferences (Article 14(1),(2), (3) and (4) of the Act of Washington (1911), already partly in existence in earlier texts and unchanged by the Revision Conferences of The Hague (1925), London (1934) and Lisbon (1958)). Such Revision Conferences were comparatively rare and were held at irregular intervals. The Revision Conference of Lisbon provided in Article 14(5) that, during the interval between Revision Conferences, *Conferences of Representatives of all the countries of the Union* would meet every three years, or more frequently. Only limited powers, however, were given to these Conferences of Representatives, as they could only *(i)* "*draw up a report* on the foreseeable expenditure of the International Bureau for each three-year period to come," *(ii)* "*consider* questions relating to the protection and development of the Union," and *(iii)* modify, by unanimous decision and on condition that they meet as Conferences of Plenipotentiaries, the maximum annual amount of the expenditure of the International Bureau. Apart from this latter point, no powers of *decision* were given to the Conference of Representatives, because control of the organization, operation and expenditure of the International Bureau was entrusted to the Government of the Swiss Confederation (Article 13(1) and (10) of the Lisbon Act of the Convention, provisions which had already been substantially included in all earlier Acts).

The Revision Conference of Stockholm in 1967 entirely changed this system by establishing an *Assembly* of the Union as its supreme organ in which are vested all policy-making and controlling powers (see Articles 13(2), 14(2)*(a)*, 16(6), 17(1) and (2)).[1]

(c) As the Revision Conference of Stockholm dealt with two entirely different subjects, namely, on the one hand, the introduction into the Convention of provisions (Article 4 I(1) and (2)) concerning the right of priority with respect to inventors' certificates and, on the other hand, a thorough revision of the administrative provisions of the Convention, it decided to give the member States the opportunity to accept only one of these parts of the revision, or one of these parts earlier than the other. This was done because the acceptance of each of these parts in any member State could depend on different considerations and might require different legal procedures. In view of this fact, Article 20(1) of the Stockholm Act specifies that any country which is already a member of the Union may, when ratifying the Stockholm Act or acceding to it, declare in the relevant diplomatic instrument that its ratification or accession will *not* apply :

(*i*) to Articles 1 to 12 (including the newly introduced Article 4 I(1) and (2)), or

(*ii*) to Articles 13 to 17 (containing the revised administrative system).

Only member States which have *not* excluded *Articles 13 to 17* from their acceptance of the Stockholm Act and which therefore are *bound* by the revised administrative provisions will be *members of the newly created Assembly*. The other member States of the Union which are *not* (yet) bound by the revised administrative provisions will be admitted to the meetings of the Assembly as observers (Article 13(6)), whereas States not members of the Union *may* only be admitted as observers (Article 13(2)*(a)*(ix)) . However, a transitional provision (Article 30(2)) attenuates this system by allowing member States of the Union, not (yet) bound by the administrative provisions of Articles 13 to 17 of the Stockholm Act, to exercise, if they so desire and until five years after the entry into force of the WIPO Convention, the rights provided under the said Articles 13 to 17 as if they were bound by those Articles, which means, inter alia, that under those conditions and during that period they are deemed to be members of the Assembly.

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[1] Cf. also Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 220, paragraph 7.

It should be observed that, according to Article 21, States *which have not yet been members of the Union until they accede to the Stockholm Act* may *not* exclude any part of that Act from their accession. Those States will therefore, upon accession, always be bound by the revised administrative provisions and automatically become members of the Assembly.

(d) This provision vests all policy-making powers concerning the Union in the Assembly. The reference to " implementation " of the Convention is not intended to refer to its application by the legislature, government, or courts of a member State, because the Assembly cannot have any jurisdiction on these subjects with regard to sovereign States, but rather to its implementation by the Secretariat and other organs of the Union.[1]

(e) One of the aims of the Paris Convention is continuously to improve its system of international protection of industrial property by submitting the Convention, from time to time, to revision (see Article 18). Since the Revision Conference of Washington in 1911, and until the Stockholm Conference of 1967, the preparation of such revision conferences was entrusted to the Administration of the country in which the Conference was to be held, with the assistance of the International Bureau (paragraph (3) of Article 14 of the texts of Washington, The Hague, London and Lisbon). This system placed a heavy burden on the Administration of the host country of a revision conference and did not give all member States an equal influence on the preparation of a revision conference. Moreover, it made agreement between the member States at a revision conference difficult to achieve as the program of revision was submitted to member States only for written comments and was not further discussed before the opening of the Conference.[2]

The Revision Conference of Stockholm in 1967 changed this system and entrusted the *Assembly of the Union* with the task of giving *directions* concerning the preparation for conferences of revision *to the Secretariat.* Thus, the preparations for conferences of revision will be directed collectively by the member States. Cooperation between the Secretariat and the Executive Committee (Article 15(7)*(a)*) and committees of experts or working groups of delegates of member

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[1] Cf. document S/3 prepared for the Stockholm Conference, p. 20, paragraph 56.

[2] Cf. document S/3 prepared for the Stockholm Conference, pp. 10/11, paragraph 28, p. 20, paragraph 57.

States and interested international organizations may further contribute to the adequate preparation of conferences of revision (see Article 13(2)*(a)*(viii) and Article 15(7)*(a)* and *(b)*).

(f) The original text of the Paris Convention of 1883 had already established an international office under the name of International Bureau of the Union for the Protection of Industrial Property, which was entrusted with administrative tasks concerning the Union (Article 13 of the Paris Convention and Article 6 of its Final Protocol). This Bureau was later united with the corresponding Bureau of the Union for the Protection of Literary and Artistic Works and these united Bureaux were known under the common designation of BIRPI.

The Revision Conference of Stockholm in 1967 replaced the said organ by a newly created *International Bureau of Intellectual Property,* which will be the Secretariat of WIPO. As has been observed already, this International Bureau will be a continuation of BIRPI (Article 15(1)*(a)*). See also the transitional provisions of Article 30(1), (3) and (4).

(g) Since revisions of the Convention concern *all* its member States, and not only those which, having accepted the new administrative provisions, are bound by Articles 13 to 17, it is prescribed that in the preparation of revision conferences *due account must be taken* of any *comments made by member States which are not (yet) bound* by these Articles.

It has been observed already that the International Bureau, in making preparations for revision conferences will cooperate with the Executive Committee and may also consult with intergovernmental and international non-governmental organizations (Article 15(7)*(b)*). This will no doubt happen frequently since past experience has shown that collaboration with international organizations, especially of private interested circles, may have considerable influence on the development of the international protection of industrial property.

(h) This provision entrusts the Assembly with control over the Secretariat as far as its activities relate to the Paris Union.

(i) According to this provision, the Assembly has the power to determine and control the program, budget and final accounts of the Union. Since the Assembly will normally meet only once in every third calendar year (Article 13(7)*(a)*), the budget to be approved by it will be triennial. Within the limits of the program and this triennial budget, yearly budgets and programs will be prepared by the Secretariat and

approved by the Executive Committe, and the latter will also report on the yearly accounts (Article 14(6)(iii) and (iv)). This Committee will be controlled by the Assembly, by virtue of Article 13(2)*(a)*(v).

(j) Financial regulations adopted by the Assembly may contain details regarding the budget, reports and accounts, and all other matters concerning the financial administration of the Union.

(k) Prior to the Revision Conference of Stockholm, only *revision conferences* could modify the provisions of the Convention and, according to established practice, only by *unanimous vote* of the member States participating in such conference (see, below, ad Article 18). This system was considered too cumbersome for the revision of *administrative provisions* which would not affect private interests and only to a limited extent the interests of the member States.[1] In view of this, the Revision Conference of Stockholm introduced a distinction between, on the one hand, *revisions* of the Convention with respect to provisions of substantive law and regarding acceptance or denunciation of the Convention by States, its entry into force, disputes between States, etc., and, on the other hand, *amendments* of the *administrative provisions of Articles 13 to 17. Revisions* continue to be within the exclusive competence of *revision conferences* specially convened to that effect (Article 18), whereas *amendments* may be adopted by a simplified procedure for which competence is given to the *Assembly* (Article 17).

(l) This provision indicates that the Assembly may also exercise functions other than those expressly referred to in the preceding subparagraphs. For example, according to Article 14(5)*(c)* the Assembly will establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(m) As has already been mentioned above under observation *(b)*, the Revision Conference of Stockholm envisaged a close relationship between the Paris Convention and the WIPO Convention, both of which Conventions are destined to complement each other. One of the aspects of this relationship is that *in the WIPO Convention* certain rights have been given to *the Assembly of the Paris Union* (see, for example, Article 6(3)*(g)*, Article 11(2)*(b)*(i), (3)*(b)*(ii) and (8)*(b)*, and

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[1] See document S/3 prepared for the Stockholm Conference, p. 40, paragraph 119.

Article 17(2), of the WIPO Convention). The provision under consideration refers to these regulations.

(n) Several matters to be dealt with by organs of the Paris Union will be of interest also to other Unions, since the Secretariat, headquarters and items of expenditure will be common (see, below, Article 16). In those cases, the Assembly will make its decisions after having taken the advice of the *Coordination Committee,* which has been referred to above as one of the organs of WIPO. After this advice is taken, the decision remains with the Assembly, as the sovereign organ of the Union.

(o) This provision takes into account the special situation of member States which have concluded an agreement by virtue of which a *common office* replaces the *national* offices or services of industrial property, as referred to in Article 12. An example of such common office exists in the *African and Malagasy Industrial Property Office,* established at Yaoundé (Cameroon) by virtue of an Agreement between the participating States, dated September 13, 1962 (see, above, observation *(b)* on Article 12).

States party to such agreement may, in derogation of the general rule that a delegate may represent only one State (Article 13(1)*(b)* and (3)*(a)*), be jointly represented, during *discussions* in the *Assembly,* by one and the same delegate. With respect to *voting,* however, a stricter rule is given in Article 13(5)*(b)* (see observation *(q)* below).

(p) Although one-half of the countries members of the Assembly (and which have voting powers according to Article 13(5)*(a)* and *(b)*) will constitute the quorum necessary for making decisions, special rules are given for reaching decisions in cases where this quorum is not attained. These rules, although complicated, seem nevertheless self-explanatory. If necessary, they will be further elaborated in the rules of procedure which the Assembly will establish according to Article 13(8).[1]

(q) This provision contains a special rule for *voting* by member States grouped under a special agreement in a *common office* possessing for each of them the character of a national office or service of industrial property, a situation which was referred to above

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[1] Cf. Report of Main Committee IV of the Stockholm Conference, *I.P.,* 1967, p. 220, paragraph 9.

under observation *(o)*. Each delegation of such State may vote by proxy for *one* other such State. This system was adopted as a compromise in view, on the one hand, of the generally accepted practice that each delegation to an Assembly may vote only for its own country and, on the other hand, of the difficulty for member States which do not have national offices of industrial property, but only a common office, to be always adequately represented at the meetings of the Assembly.

(r) This provision again derives from the intention that the administrative operations of the Paris Union and of WIPO will complement each other.

ARTICLE 14*(a)*

(1) The Assembly shall have an Executive Committee *(b)*.

(2)(a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly *(c)*. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 16(7)(b), have an ex officio seat on the Committee *(d)*.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements established in relation with the Union to be among the countries constituting the Executive Committee *(e)*.

(5)(a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected but only up to a maximum of two-thirds of such members *(f)*.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee *(g)*.

(6)(a) The Executive Committee shall *(h)*:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly in respect of the draft program and triennial budget of the Union prepared by the Director General;

(iii) approve, within the limits of the program and the triennial budget, the specific yearly budgets and programs prepared by the Director General ;

(iv) submit, with appropriate comments, to the Assembly, the periodical reports of the Director General and the yearly audit reports on the accounts ;

(v) take all necessary measures to ensure the execution of the program of the Union by the Director General, in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly ;

(vi) perform such other functions as are allocated to it under this Convention *(i)*.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization *(j)*.

(7)(a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization *(k)*.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8)(a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum *(l)*.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only *(m)*.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers *(n)*.

(10) The Executive Committee shall adopt its own rules of procedure.

(a) This Article was introduced into the Convention by the Revision Conference of Stockholm in 1967.

(b) Until the Revision Conference of Stockholm the Paris Convention did not contain any provision concerning an Executive Committee. The Conference of Representatives of all countries of the Paris Union, referred to above under observation *(b)* on Article 13, had set up an Executive Committee, according to rules of procedure which it had established, but since no powers were given to that Committee in the Convention and the powers of the Conference of Representatives itself were very limited, the said Committee could only exercise advisory functions.

The Revision Conference of Stockholm established an Executive Committee and described its functions in the Convention. Since the Assembly of the Union is too large a body to be convened frequently, the Executive Committee is envisaged as a smaller organ of the Union, which will *prepare meetings of the Assembly* (Article 14(6)*(a)*(i) and (ii)), establish, within the limits of the program and triennial budget set up by the Assembly, *yearly budgets and programs*, and *report on the yearly accounts* (Article 14(6)*(a)*(iii) and (iv)) and take all necessary *measures to ensure the execution of the program* (Article 14(6)*(a)*(v)). As has been observed already, the Executive Committee will be controlled by the Assembly, by virtue of Article 13(2)*(a)*(v).

(c) The Executive Committee will consist of countries elected *by the Assembly* from among *countries members of the Assembly*. These countries will include countries which have not yet accepted the new administrative system set up by the Stockholm Conference in Articles 13 to 17 of the Convention, but which have given the notification provided for in Article 30(2) and are therefore deemed to be members of the Assembly. However, these latter countries are deemed to be members of the Assembly only until the expiration of a period of five years after the entry into force of the WIPO Convention. If after the expiration of this period they are still not bound by Articles 13 to 17 of the Stockholm text, these countries will cease to be members of the Executive Committee.[1] This will, of course, also be the case for countries which denounce the Convention, when such denunciation takes effect according to Article 26(3).

(d) Article 15 of the Stockholm text of the Convention provides that administrative tasks concerning the Union will be performed by the *International Bureau*, which is the *Secretariat of WIPO* (see Article 13(2)*(a)*(ii) of the Paris Convention and Article 9 of the WIPO Conven-

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[1] See document S/3 prepared for the Stockholm Conference, p. 58, paragraph 175.

tion). According to Article 10 of the WIPO Convention, the headquarters of the Organization, and therefore of the International Bureau, will be in Geneva (Switzerland), unless transferred to another city. The WIPO Convention also prescribes that a headquarters agreement will be concluded with the State on the territory of which the Organization has its headquarters and that such agreement will provide that, when the envisaged working capital fund of the Organization is insufficient, that State will grant advances to the Organization. Parallel provisions have been included in Article 16(7) of the Paris Convention with respect to possible *advances to the Union.* It is logical that a country which undertakes to grant *advances* to the Union, if necessary, should be permitted, as long as this obligation stands, to *participate permanently in the Executive Committee of the Union,* the Committee which deals with *budget and financial management.*[1] This is assured by the second sentence of Article 14(2)*(a),* now under consideration, in relation with Article 16(7)*(a)* and *(b).*

(e) This provision prescribes that the Assembly, in *electing the members of the Executive Committee,* must have due regard to two requirements. One is that those members should represent an *equitable geographical distribution,* which is self-explanatory. The other requirement is that *countries party to the Special Agreements* established in relation with the Union should be among the countries constituting the Executive Committee.

With respect to this latter requirement, reference must be made to Article 19 of the Paris Convention, which allows the member States " to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention."

Such agreements have been concluded but it is necessary to distinguish between different categories.

One category consists of the Agreements *prepared by the International Bureau of the Paris Union,* which have been concluded and revised in the same way, and frequently at the same Conferences, as the Paris Convention itself, and which are *administered by the International Bureau.* Several of these Agreements have already been referred to above. They are respectively: the Madrid Agreement, of 1891, concerning the International Registration of Marks, revised at Brussels (1900), Washington (1911), The Hague (1925), London

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[1] See document S/3 prepared for the Stockholm Conference, p. 38, paragraph 114.

(1934), Nice (1957) and Stockholm (1967); the Madrid Agreement, of 1891, for the Repression of False or Deceptive Indications of Source on Goods, revised at Washington (1911), The Hague (1925), London (1934) and Lisbon (1958), with its Additional Act of Stockholm (1967); the Hague Agreement, of 1925, concerning the International Deposit of Industrial Designs, revised at London (1934) and The Hague (1960),[1] with its Additional Act of Monaco (1961) and Complementary Act of Stockholm (1967); the Nice Agreement, of 1957, concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, revised at Stockholm (1967); and the Lisbon Agreement, of 1958, for the Protection of Appellations of Origin and their International Registration,[2] revised at Stockholm (1967).

A second category of the special agreements referred to above consists of agreements made under the auspices of and administered by international organizations other than the Paris Union and its Bureau. Agreements of this type have been elaborated, for example, by the Council of Europe in the form of a European Convention, dated December 13, 1953, relating to the Formalities Required for Patent Applications, a European Convention, dated December 19, 1954, on the International Classification of Patents for Invention, and a Convention, dated November 27, 1963, on the Unification of Certain Points of Substantive Law on Patents for Invention,[3] all of which Conventions expressly refer to what was then Article 15 and is now Article 19 of the Paris Convention, cited above.

Other examples of this type of agreement are the Agreement of June 6, 1947, establishing the International Patent Institute in The Hague (Netherlands), and the Agreement of September 13, 1962, regarding the creation of an African and Malagasy Industrial Property Office, which has already been referred to several times above. Although at the time of the signature of this latter Agreement the participating States were not yet members or had not yet confirmed their membership of the Paris Union, they undertook in the Agreement to adhere to that Union and, in view of this, express reference was made to Article 15 (now 19) of the Paris Convention.

A third category of the special agreements referred to in Article 19 of the Paris Convention consists of bilateral agreements between States regarding or including subjects of industrial property. Such agreements

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[1] The revised text of The Hague (1960) has not yet entered into force.

[2] See, for the texts revised or established at Stockholm in 1967, *I.P.*, 1967, pp. 290, 291, 298, 335, 339.

[3] This Convention has not yet entered into force.

are frequent. They may form part of general treaties of commerce or concern special subjects, such as the protection of appellations of origin.[1]

There can be no doubt that the provision of Article 14(4) of the Paris Convention, now under consideration and providing for representation in the Executive Committee of *countries party to the Special Agreements established in relation with the Union*, refers only to the first category of such agreements, because the administration of the others is entirely independent of the organs of the Paris Union.

(f) Article 14(5)*(a)* prescribes that each member of the Executive Committee will serve—unless, of course, it withdraws from the Committee, or in cases as described above under observation *(c) in fine*—for the period between the close of two successive ordinary sessions of the Assembly, that is, for a period of roughly three years. According to Article 14(5)*(b)*, all members of the Executive Committee may be re-elected, but only up to a maximum of two-thirds of such members. This rule assures a minimum rotation in the membership of the Executive Committee and is intended to afford an opportunity to every member of the Assembly to serve on the Executive Committee. The Assembly is not bound to renew more than one-third of the Executive Committee, but it may wish to do so. On the other hand, the rule which specifies that members of the Executive Committee may be re-elected up to the given maximum of two-thirds of the members means that re-election of a country is possible not only once but any number of times, so that countries whose presence on the Executive Committee is considered particularly desirable may serve for any appropriate period of time.

(g) The Assembly will establish the details of the rules governing the election and possible re-election of the members of the Executive Committee. The possible contents of such rules were indicated during the Stockholm Conference.[2]

(h) The main tasks of the Executive Committee have already been summarized above under observation *(b)*. They are self-explanatory.

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[1] Cf. DEVLÉTIAN: *I.P.*, 1968, pp. 110/1; KRIEGER: "Zur Auslegung der zweiseitigen Abkommen über den Schutz geographischer Bezeichnungen," *G.R.U.R. Int.*, 1964, p. 499, and "Der deutsch-schweizerische Vertrag über den Schutz von Herkunftsangaben und anderen geographischen Bezeichnungen," *G.R.U.R. Int.*, 1967, p. 334.

[2] See document S/3 prepared for the Stockholm Conference, p. 26, paragraph 83*(c)*.

(i) Other functions allocated to the Executive Committee are, for example, cooperation with the International Bureau in the preparation for revision conferences (Article 15(7)*(a)*), and the right to propose amendments to Articles 13 to 17 (Article 17(1)).

(j) This provision parallels Article 13(2)*(b)* regarding the Assembly. See observation *(n)* on that Article.

(k) This provision parallels Article 13(7)*(a)* regarding the Assembly. See observation *(r)* on that Article.

(l) The quorum necessary for making valid decisions is the same as that of the Assembly, namely, one-half of the members. Since the Executive Committee is much smaller than the Assembly it is considered more probable that this quorum will be reached in every meeting of the Committee. Special rules for obtaining decisions in cases where the quorum is not reached, like those given for the Assembly (Article 13(4)*(c)*), are therefore not provided for the Executive Committee.

(m) For the same reasons, namely, that the Executive Committee is much smaller than the Assembly, no special rules are given, regarding meetings of the Committee, for representation or voting in the name of more than one country by one delegation (see, for the Assembly, Article 13(3)*(b)* and (5)*(b)*).

(n) All countries of the Union, even if they are not (yet) members of the Assembly, will be admitted to the meetings of the Executive Committee as observers. There is no provision for the admittance to those meetings of countries which are not members of the Union or of intergovernmental or international non-governmental organizations (see, for the Assembly, Article 13(2)*(a)*(ix)).

ARTICLE 15*(a)*

(1)(a) Administrative tasks *(b)* concerning the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Literary and Artistic Works.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union *(c)*.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union *(d)*.

(2) The International Bureau shall assemble and publish information concerning the protection of industrial property *(e)*. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of industrial property. Furthermore, it shall furnish the International Bureau with all the publications of its industrial property service of direct concern to the protection of industrial property which the International Bureau may find useful in its work *(f)*.

(3) The International Bureau shall publish a monthly periodical *(g)*.

(4) The International Bureau shall, on request, furnish any country of the Union with information on matters concerning the protection of industrial property *(h)*.

(5) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of industrial property *(i)*.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee, and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7)(a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee, make the preparations for the conferences of revision of the provisions of the Convention other than Articles 13 to 17 *(j)*.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision *(k)*.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences *(l)*.

(8) The International Bureau shall carry out any other tasks assigned to it.

(a) As has been observed above—see observation *(f)* on Article 13—the original Convention of 1883 had already established an international office under the name of *International Bureau of the Union for the Protection of Industrial Property,* which was entrusted with *administrative tasks concerning the Union.* This Bureau was later united with the corresponding Bureau of the Union for the Protection of Literary and Artistic Works, and these united Bureaux became known under the common designation of BIRPI.

The Revision Conference of Stockholm in 1967 replaced the said organ by a newly created *International Bureau of Intellectual Property,* which will be the *Secretariat of WIPO,* the said International Bureau being a continuation of BIRPI (see Article 15(1)*(a)* and Article 13(2)*(a)*(ii), and also the transitional provisions in Article 30(1), (3) and (4) of the Paris Convention as revised at Stockholm).

(b) The *administrative tasks* to be carried out by the International Bureau are specified in the Convention. They do not substantially differ from the tasks which BIRPI had to perform under former Acts of the Convention.[1] However, several provisions have been made more precise, while the question of languages to be used by the International Bureau, which was formerly regulated in the Convention (see Article 13(2)*(a)* and *(b)* of the Lisbon text as compared with Article 13(2) of the London text), is now left to be decided by the *General Assembly of WIPO,* which will take into consideration the practice of the United Nations (Article 6(2)(vii) of the WIPO Convention).

(c) The International Bureau will act, in particular, as a *secretariat,* not only of WIPO (Article 9(1) of the WIPO Convention) but also of the *various organs of the Paris Union.* These organs are the Assembly,

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[1] See Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 221, paragraph 11.

the Executive Committee, and all committees of experts and working groups which may be established by the Assembly according to Article 13(2)*(a)*(viii).

(d) Since the International Bureau will be the Secretariat of the Union, its head, namely, the Director General of WIPO, will also be the chief executive of the Union and have competence to represent it.

(e) Already, under the original Convention of 1883, the International Bureau was entrusted with the task of *centralizing information* of every kind relating to the protection of industrial property. Originally, the Bureau was obliged only to *distribute* this information, in the form of general statistics, to the *national Administrations*, but the Revision Conference of The Hague in 1925 replaced this obligation by one to *publish* such information. This obligation was maintained in later texts and was not changed by the Revision Conference of Stockholm in 1967.

(f) The Revision Conference of Stockholm, however, complemented the obligations of the International Bureau by placing the member States under *corresponding obligations*. These latter obligations are twofold : in the first place, each member State will have to communicate to the International Bureau all its *new laws* and *official texts* concerning the protection of industrial property. Secondly, it will furnish the International Bureau with *all the publications of its industrial property service*, but only in so far as these publications are of direct concern to the *protection of industrial property* and if the *International Bureau finds them useful in its work*. Thus, for example, a guide for visitors to a national office, or information as to the availability of inventions, furnished by that office to the domestic industry of the country concerned, would not come under this provision. The International Bureau may, however, always indicate its interest in receiving publications of the national offices of direct concern to *the protection of industrial property*.

(g) The International Bureau at present publishes similar monthly periodicals in English and French : *Industrial Property* and *La Propriété industrielle ;* and also a quarterly periodical in Spanish : *La Propiedad Intelectual*.

Originally, and until the Revision Conference of Stockholm in 1967, the Convention provided for the furnishing of free copies of the periodicals and other publications of the International Bureau to each member State, in proportion to its financial contribution to the Union (see Article 13(4) of the Lisbon text of 1958). The Revision Conference of Stockholm has left this question to be decided by the Assembly.

(h) This provision obliges the International Bureau to give, on request, *information to member States*, that is, to their Governments or industrial property Offices, on *matters concerning the protection of industrial property*. Such information may, for example, concern legislation or administrative practices in other member States. It may also concern the application of the Convention in the States concerned. It may not, however, take a position in controversies regarding the interpretation or application of the Convention in other member States, unless on their request, because the International Bureau is not qualified to pronounce on such questions. *Disputes between member States* concerning the interpretation or application of the Convention may be brought before the *International Court of Justice*, according to Article 28.

The International Bureau will not be obliged to give information other than to member States.

(i) Studies of this type are made with a view to improving the international protection of industrial property, for example, by establishing a Patent Cooperation Treaty (PCT).[1] They are also made with a view to examining and, if possible, improving the protection of industrial property in various parts of the world and are in that case frequently organized in congresses, seminars, symposia or committees of experts.[2]

Services, as referred to, are provided by putting at the disposal of the public a library specializing in the field of industrial property and related subjects. They may, for example, also be organized in the form of a "World Patent Index."[3] Other services are performed by the International Bureau by virtue of a number of Special Agreements as referred to above under observation *(e)* on Article 14.

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[1] See *I.P.*, 1967, pp. 58, 161, 301.

[2] *Ibidem*, 1963, pp. 191 (African Seminar on Industrial Property), 234 (Committee of Experts to Study Industrial Property Problems of Industrially Less Developed Countries); 1964, pp. 164 (Industrial Property Congress for Latin America), 235 (Committee of Experts to Study a Model Law for Developing Countries on Inventions and Technical Know-How); 1966, pp. 54 (Asian Seminar on Industrial Property), 271 (BIRPI East-West Industrial Property Symposium), 274 (Committee of Experts to Study a Model Law for Developing Countries on Marks, Trade Names, Indications of Source, and Unfair Competition).

[3] *Ibidem*, 1964, p. 209; 1965, p. 75; 1966, p. 58.

(j) One of the important tasks of the International Bureau is the *preparation of conferences for the revision of the Convention* (Article 18). As has been observed above—see observation *(e)* on Article 13—the Bureau will carry out this task *in accordance with the directions of the Assembly* and *in cooperation with the Executive Committee.*

(k) In carrying out the above task, the International Bureau may also consult *with intergovernmental and international non-governmental organizations.* As has already been observed, such consultations have been of great value in the past and will, no doubt, therefore be frequent.

(l) This provision was already introduced in substance into the Convention by the Revision Conference of Washington in 1911. The Revision Conference of Stockholm in 1967 enlarged its scope by including the possibility for the Director General to designate other persons to take part in revision conferences ; such persons will generally be members of the staff of the International Bureau (see also Article 15(6)) but may also be advisors from outside that Bureau.

ARTICLE 16(a)

(1)(a) The Union shall have a budget *(b)*.

(b) The budget of the Union shall include the income *(c)* and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization *(d)*.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization *(e)*.

(3) The budget of the Union shall be financed from the following sources *(f)*:

(i) contributions of the countries of the Union ;
(ii) fees and charges due for services rendered by the International Bureau in relation to the Union ;
(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union ;
(iv) gifts, bequests, and subventions ;
(v) rents, interests, and other miscellaneous income.

(4)(a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class *(g)*, and shall pay its annual contributions on the basis of a number of units fixed as follows :

Class I	25
Class II	20
Class III	15
Class IV	10
Class V	5
Class VI	3
Class VII	1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce such change to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the said session *(h)*.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries *(i)*.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions may not exercise its right to vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its right to vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances *(j)*.

(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, as provided in the financial regulations *(k)*.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General *(l)*.

(6)(a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, the Assembly shall decide to increase it *(m)*.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the decision to increase it is made.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7)(a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it

shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee *(n)*.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly *(o)*.

(a) This Article, introduced into the Convention by the Revision Conference of Stockholm, has established provisions regarding the *finances of the Union* which differ from the former provisions, although it has maintained, in a modified form, some parts of the Article 13 of former texts.

The old provisions prescribed (see Article 13(6) and (7) of the Lisbon text) that the expenditure of the Union would be borne by the countries of the Union in common, according to certain rules (*ibidem*, paragraphs (8) and (9)). It was then provided that this expenditure would *not exceed certain fixed sums* (Article 13(6) and (7) and Article 14(5)*(b)* of the Lisbon text; the sum indicated in Article 13(6) of the Lisbon text was modified by a unanimous decision of the Conference of Representatives of the countries of the Paris Union, made in Stockholm in 1967).[1] It was further provided (Article 13(10) and (11) of the Lisbon text) that the Government of the Swiss Confederation would supervise the expenditure of the International Bureau and its accounts, and that the annual account of that Bureau would merely be communicated to the other national Administrations.

The establishment of a budget was not prescribed in the former system, although a budget was, in fact, prepared in order to facilitate the supervision of the expenditure by the Swiss Government and also (Article 14(5)*(a)* of the Lisbon text) in order to enable the Conference

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[1] Cf. *I.P.*, 1968, p. 21.

of Representatives, in its three-yearly meetings, to draw up a report on the foreseeable expenditure of the International Bureau for each three-year period to come.

This system was replaced at the Revision Conference of Stockholm in 1967 by a more flexible one, under which *no fixed ceiling for expenses* that can be changed only by a unanimous vote of a Conference of Plenipotentiaries of the member States is established, *but triennial and yearly budgets* will be adopted by *organs formed by the member States* (Assembly: Article 13(2)*(a)*(vi), and Executive Committee: Article 14(6)*(a)*(iii) of the Stockholm text). This important change in the financial system of the Union has been supplemented by many other new provisions, some of which are again closely related to WIPO, established by the Stockholm Conference simultaneously with the revision of the Paris Convention.

(b) It is now prescribed in the Convention that the Paris Union *will have a budget* which, as already observed, is *triennial* and *yearly*. The Convention also indicates the *sources* from which the budget will be *financed* (Article 16(3)) and the *items of expenditure* which will be included in the budget (Article 16(1)*(b)*). The budget of the Union will be fixed autonomously by its organs,[1] but due regard must be given to the requirements of coordination with the budgets of the other Unions administered by WIPO (see observations *(d)* and *(e)*, below).

(c) The *income of the Union*, to be included in the budget, will derive from sources indicated in Article 16(3).

(d) The *expenses* to be included in the budget are of three different categories, owing to the envisaged relationship between the Paris Union and WIPO (see also, above, observation *(a)* on Article 13):

first, the budget will include the *expenses proper to the Union*;

secondly, it will include a contribution by the Union to *the budget of expenses common to the Unions* (see Article 11(2), particularly *(b)*(i) of the WIPO Convention);

thirdly, it *may* also include a sum made available to the budget of the *Conference of WIPO* (see Article 11(3), particularly *(b)*(ii) of the WIPO Convention).

Expenses proper to the Union will be the expenses involved in the performance by the Secretariat of tasks exclusively related to the Paris

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[1] Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 221, paragraph 12.

Union, for example, studies and services regarding the Union, the preparation of revision conferences, etc.

Expenses common to the Unions are defined in Article 16(1)*(c)*. These are expenses incurred by the Secretariat not only in the sole interest of the Paris Union but also in the interest of other Unions administered by it, such as the salary of the Director General and several other staff members, expenses relating to common services, such as those regarding finances, personnel, translation, typing, etc., and the maintenance of the headquarters building. The share of the Union in such common expenses will be in proportion to the interest the Union has in them. This share will be fixed according to a procedure prescribed in the WIPO Convention, which provides that a *triennial budget of expenses common to the Unions* will be established by the General Assembly (Article 6(2)(iv) of the WIPO Convention) and *annual budgets* by the Coordination Committee (*ibidem*, Article 8(3)(iv)), whereas the Coordination Committee will give advice to the organs of the Unions on all administrative, financial or other matters of common interest either to two or more Unions or to one or more of the Unions and the Organization, and *in particular on the budget of expenses common to the Unions* (*ibidem*, Article 8(3)(i)). Since the members of the Executive Committee of the Paris Union are ex officio members of the Coordination Committee (Article 8(1)*(a)* of the WIPO Convention) no difficulties can be expected regarding these questions. However, the WIPO Convention also prescribes (Article 11(2)*(a)*(i)) that the contributions of the Unions, and consequently also those of the Paris Union, can only be *fixed* by the *Assembly of that Union*, having regard to the interest the Union has in the common expenses (see also Article 16(1)*(c)*, second sentence, of the Paris Convention).

A contribution by the Paris Union *to the budget of the Conference* of WIPO will also be included in the budget of the Paris Union, *if and when the Assembly of the Paris Union so decides* (Article 11(3)*(b)*(ii) of the WIPO Convention corresponding to the final part of Article 16(1)*(b)* of the Paris Convention).

(e) As has been observed above, the Assembly of the Union is autonomous in establishing its triennial budget and the share in the common expenses of the Unions to be included in it. Within the limits of this triennial budget and under the control of the Assembly (Article 13(2)*(a)*(v)), the Executive Committee has a similar competence with respect to the yearly budgets (Article 14(6)*(a)*(ii)). Article 16(2), now under consideration, contains the instruction that the budget of the Union must be established with due regard to the requirements of

coordination with the budgets of the other Unions administered by WIPO. The advice of the Coordination Committee of WIPO, referred to above, will be necessary to achieve this end.

(f) The sources of income of the Union are largely self-explanatory. See, for the contributions of the member States, the following remarks under *(g)*, *(h)* and *(i)*. See further, for the fees and charges for services rendered by the International Bureau in relation to the Union, Article 16(5), which should be compared to Article 11(2)*(b)*(ii) of the WIPO Convention.

(g) The system whereby, in order to determine the contribution of each member State towards the expenses of the Union, *the member States are divided into classes* was already included in the original Convention of 1883 (paragraph 6 of the Final Protocol which formed an integral part of the Convention). Newly acceding countries therefore had to choose the class in which they wished to be placed and the rule was incorporated in the Convention by the Revision Conference of Washington in 1911.

That system was maintained until the Revision Conference of Stockholm in 1967, which modified it to some extent.

The principal modification is that the number of classes is no longer six but seven, which means that a seventh class has been added. This was done in order to give a fairer representation of the relative contributive power of more and less developed countries: under the texts in force from Washington (1911) to Lisbon (1958), the highest contribution was only 8 1/3 times larger than the lowest contribution; by virtue of the Stockholm revision, it will be 25 times larger.[1]

(h) The Revision Conference of Stockholm maintained the system allowing complete freedom to each member State to choose the class in which it wishes to be placed, and, if it so desires, to modify its choice later. In addition, however, the Stockholm Act provides that, if a member State wishes to choose a *lower* class for its contributions than it has chosen before, it must announce such change to the Assembly at one of its ordinary, three-yearly, sessions, in which case the change will not take effect until the beginning of the calendar year following the said session. This provision has been made because otherwise the other member States would be obliged to pay a higher share (since each lowering of class by a member State automatically leads to an

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[1] See document S/3 prepared for the Stockholm Conference, p. 36, paragraph 107.

increase in the share of the other member States) than contemplated when the last three-yearly budget was adopted.[1]

(i) This provision contains the rule for the calculation of the proportion of the contribution of each member State to the total of the contributions of all of those States. Although the rule is different in wording, it maintains the former system (Article 13(8) of the Lisbon text).

(j) This provision, introduced by the Revision Conference of Stockholm in 1967, establishes a rule under which certain *arrears in the payment of contributions* (arrears to the amount of the contributions due for the preceding two full years or more) will deprive *a member State of its voting rights* in any of the organs of the Union of which it is a member. This incentive to make prompt payment of contributions was considered necessary because it would be unfair to rely on advances payable under Article 16(7)*(a)* in order to make up for deficiencies in payment by other States. Naturally, once the arrears are paid, the right of the State concerned to vote will automatically revive.

However, the provision adds that the organ concerned (Assembly, Executive Committee) may make exceptions to the rule if, and so long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(k) Especially with regard to the Assembly, where the quorum or the required majority of votes (Article 13(4)*(b)*, *(c)* and *(d)*) may not always be reached, difficulties may arise when the budget is not adopted before the beginning of the period to which it must be applied. Since in such case the operations of the Union cannot be allowed to be interrupted, the Revision Conference of Stockholm adopted a rule whereby, in those circumstances, the level of the budget will be the same as that of the year immediately preceding. The financial regulations of the Union (Article 13(2)*(a)*(vii)) will elaborate further on this provision.

(l) One of the Union's possible sources of income will be the *fees and charges due for services* rendered by the International Bureau in relation to the Union (see observation *(f)* above). The Director General of the International Bureau will establish the amount of such fees and

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[1] See document S/3 prepared for the Stockholm Conference, p. 36, paragraph 108.

charges but will report on them to the Assembly and the Executive Committee, so that these bodies, if they so desire, may express an opinion or give instructions (Article 13(2)*(a)*(iii) and Article 14(6)*(a)*(iv)).

(m) Another of the innovations made by the Revision Conference of Stockholm in 1967 is a provision for establishing a *working capital fund* (see also Article 11(8) of the WIPO Convention). This is a fund, constituted in principle by one-time contributions of the member States and intended to enable the International Bureau to operate during the short period between the time when the normal contributions are due (Article 16(4)*(d)*) and that at which their payment is, in fact, received. The provisions relating to this working capital fund are self-explanatory.

(n) Since the working capital fund may, in certain circumstances, be insufficient to enable the International Bureau to continue its operations within the limits of the established budgets and program, the Revision Conference of Stockholm also adopted provisions which continue, in a modified form, the former system (see Article 13(10) of the Lisbon text) under which the member State in whose territory the International Bureau is established will grant the necessary advances to the latter. The provision to this effect parallels Article 11(9) of the WIPO Convention. As already observed—see observation *(d)* on Article 14—the above State, which agrees to grant advances to the Union, must be in a position to be fully informed of all financial matters concerning the Union, and will therefore have an ex officio seat on the Executive Committe (Article 14(2)*(a)*). As follows from the following subparagraph *(b)* of the provision under consideration, the obligation to grant advances may be denounced, but such denunciation will not take effect until three years after the end of the year in which it has been notified. This means that during the latter period the Assembly will meet in ordinary session and may take the necessary measures—for example, deciding to increase the working capital fund.

(o) Under the texts preceding the Revision Conference of Stockholm in 1967, the auditing of the accounts of the International Bureau was organized by the Swiss Government, which supervised those accounts (Article 13(10) of the Lisbon text). Since, under the Stockholm text, the Swiss Government will no longer perform this task of supervision, provision is made for the auditing of the accounts to be effected either by one or more member States, willing to do so,

or by external auditors (a professional accountant firm), designated by the Assembly.[1] The details of this procedure will be regulated by the financial regulations of the Union (see also Article 11(10) of the WIPO Convention).

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[1] See document S/3 prepared for the Stockholm Conference, p. 38, paragraph 115.

ARTICLE 17*(a)*

(1) Proposals for the amendment of Articles 13, 14, 15, 16, and the present Article *(b)*, **may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.**

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly *(c)*. **Adoption shall require three-fourths of the votes cast, provided that any amendment to Article 13, and to the present paragraph, shall require four-fifths of the votes cast** *(d)*.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment *(e)*. **Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment** *(f)*.

(a) This Article was introduced into the Convention by the Revision Conference of Stockholm in 1967. As has been observed above—see observation *(k)* on Article 13—prior to the Stockholm Conference all modifications of the Convention depended on unanimous decisions of revision conferences, expressly convened to that end (Article 14 of the Lisbon text, which was, in part, already included in the original text of the Convention of 1883). The Stockholm Conference changed this system by establishing a distinction between, on the one hand, *amendments* to the *administrative provisions of Articles 13 to 17 of the Convention* and *revisions* of the Convention with respect to all its *other provisions*. Article 17, now under consideration, deals with the first subject; Article 18, with the second. The differences are mainly the following :[1]

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[1] See document S/3 prepared for the Stockholm Conference, p. 40, paragraph 118.

Amendments are discussed in and adopted by the *Assembly*, which consists *only of the States bound by Articles 13 to 17 of the Convention or deemed to be members of the Assembly* under Article 30(2); the adoption of amendments requires a *qualified majority*, but after such adoption and acceptance they will *bind all members of the Assembly*, except that amendments increasing financial obligations will bind only States which have accepted these amendments.

Revisions, on the other hand, are discussed in and adopted by *revision conferences consisting of all countries of the Union*, even if they are not yet bound by the most recent text of the Convention which is the subject of the revision; their adoption requires *unanimity* and they will bind *only States which have ratified* the revised Convention or have *acceded to it*.

The reason for having a special procedure for amendments is that the system regarding revision has been considered too cumbersome for the modification of purely administrative provisions of the Convention.

(b) The special procedure for amendments applies only to Articles 13 to 17 of the Convention, which are, indeed, of a purely administrative character. The procedure for the initiation of amendments is self-explanatory.

(c) The *Assembly* is competent to adopt amendments and it is not even required to take account of the views of member States of the Unions which are not members of the Assembly (cf., on the contrary, for revisions, Article 13(2)*(a)*(ii) *in fine*); this is because these latter States have no direct interest in administrative provisions by which they are not bound. However, since the said States are admitted as observers to the Assembly (Article 13(6)), their views may be heard nevertheless.

(d) Whereas the decisions of the Assembly will normally require a *majority of two-thirds* of the votes cast (Article 13(4)*(d)*), more substantial qualified majorities are required for the adoption of amendments. Article 13, regulating the powers of the Assembly, has been considered the cornerstone of the administrative system of the Convention. Amendments to that Article therefore require four-fifths of the votes cast. In order that amendment of the Article concerning amendments may not too easily change this majority, the same majority is required for amendments to Article 17(2). Amendments to Articles 14, 15, 16 and 17(1) and (3) will require a three-fourths majority.

(e) Once adopted by the required majority, any amendment will still have to enter into force. This will require *notifications of*

acceptance of such amendment by the States *members of the Assembly at the time it adopted the amendment,* irrespective of whether those States have voted on the amendment and, if so, irrespective of whether they voted for or against it. When such notifications have been received from *three-fourths of the members of the Assembly* (even if the majority required for adoption of the amendment was four-fifths) the amendment will enter into force one month after receipt.

(f) Any amendment thus accepted will—with one exception—bind *all States which are or will become members of the Assembly.* The only exception is that, whenever any amendment increases the financial obligations of member States, it will bind only those States which have notified their acceptance of such amendment. This provision does not apply to States which newly accede to the Union, because for such States there is no question of an *increase* of *existing* financial obligations: in acceding to the Union they will have to accept the financial obligations as they stand.

ARTICLE 18[(a)]

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union *(b)*.

(2) For that purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries *(c)*.

(3) Amendments to Articles 13 to 17 are governed by the provisions of Article 17 *(d)*.

(a) Paragraphs (1) and (2) of this Article were already included in the original text of the Convention of 1883 (Article 14).[1] They underwent only minor changes as to form during the subsequent Revision Conferences.

Paragraph (3) of the Article, added by the Revision Conference of Stockholm in 1967, is a reminder of the distinction made by that Conference between *amendments* to Articles 13 to 17 and *revision* by way of amendments of other provisions of the Convention (see, above, observation *(a)* on Article 17).

(b) The member States will be free to decide which amendments will, in fact, improve the system of the Union. Another question, however, is what majority will be required to make such decisions. Although the Convention does not explicitly state this principle, it was considered by the various Revision Conferences[2] that a *unanimous vote* of all States participating in such Conferences—abstentions not being considered as votes (see also Articles 13(4)*(e)* and 14(8)*(d)* of

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[1] *Actes de Paris*, I, pp. 28 (proposal for Article 12), 119/20, 145 (discussion and adoption).

[2] See *Actes de la Conférence de Rome*, 1886, pp. 86/7 (the revision then adopted never entered into force); *Actes de La Haye*, pp. 428, 437; *Actes de Londres*, pp. 164/5, 294 (proposal of Mexico), 351/2 (discussion and vote in First Sub-Committee); *Actes de Lisbonne*, pp. 564, 668, 703/4, 731; Document S/3 prepared for the Stockholm Conference, p. 10, paragraph 27*(a)*, p. 40, paragraphs 118(ii), 119. See also LADAS: *The International Protection of Industrial Property*, p. 128; ROUBIER: *Le droit de la propriété industrielle*, I, p. 257; TROLLER: *Die mehrseitigen völkerrechtlichen Verträge im internationalen gewerblichen Rechtsschutz und Urheberrecht*, p. 195; RONGA: " La règle de l'unanimité pour la révision des Conventions de Paris et de Berne, " *R.I.D.A.*, XXXIII (Oct. 1961), p. 3.

the Stockholm text)—was necessary for revision of all the provisions of the Convention (under the Stockholm text, with the exception of Articles 13 to 17: see Article 17). This established rule must be considered binding on the Union until changed by a contrary provision adopted under the same rule.

(c) The delegates of member States participating in a revision conference must be duly empowered, according to their national constitutions or laws, to discuss and vote a revision of the Convention. The special rules for representation and voting *in the Assembly*, given in Article 13(3)*(b)* and (5)*(b)*, will not apply *to revision conferences*. See, for the *preparation* of revision conferences, Article 13(2)*(a)*(ii) and Article 15(7)*(a)* and *(b)*.

(d) As has been observed already under *(a)*, this paragraph is a reminder of the separate rules which govern *amendments* to Articles 13 to 17 of the Convention and *revision* of its other Articles, respectively.

ARTICLE 19*(a)*

It is understood that the countries of the Union reserve the right to make separately between themselves *(b)* **special agreements** *(c)* **for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention** *(d)*.

(a) This Article appeared already in the original text of the Convention of 1883.[1] Since then it has undergone only slight changes as to form.

(b) The member States of the Union may make special agreements for the protection of industrial property either bilaterally or in the form of multilateral treaties. It has already been observed above—observation *(e)* on Article 2, paragraph (1)—that the application of such bilateral or multilateral treaties may be limited to nationals (and persons assimilated to such nationals) of the States concluding such treaties.

(c) The most important of the Special Agreements concluded under the Paris Convention have been enumerated above under observation *(e)* on Article 14. Several other Agreements have been or are being made, such as the Agreement Establishing an International Classification for Industrial Designs,[2] signed at Locarno on October 8, 1968, and a Patent Cooperation Treaty,[3] in course of preparation.

(d) It has already been observed above—see Chapter II.4 *in fine*—that the Convention leaves much freedom to its member States to legislate in the field of industrial property on points not covered by the Convention. Similar freedom exists with respect to the concluding of special agreements between member States.

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[1] *Actes de Paris*, I, pp. 28 (proposal for Article 13), 120/2, 145 (discussion and adoption).

[2] See *I.P.*, 1964, p. 255; 1966, p. 103.

[3] *Ibidem*, 1967, pp. 58, 161, 301.

ARTICLE 20(a)

(1)(a) Any country of the Union *(b)* which has signed this Act may ratify it, and, if it has not signed it, may accede to it *(c)*. Instruments of ratification and accession shall be deposited with the Director General *(d)*.

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply *(e)*:

(i) to Articles 1 to 12, or
(ii) to Articles 13 to 17.

(c) Any country of the Union which, in accordance with subparagraph (b), has excluded from the effects of its ratification or accession one of the two groups of Articles referred to in that subparagraph may at any later time declare that it extends the effects of its ratification or accession to that group of Articles. Such declaration shall be deposited with the Director General *(f)*.

(2)(a) Articles 1 to 12 shall enter into force *(g)*, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)(b)(i), three months after the deposit of the tenth such instrument of ratification or accession.

(b) Articles 13 to 17 shall enter into force, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)(b)(ii), three months after the deposit of the tenth such instrument of ratification or accession.

(c) Subject to the initial entry into force, pursuant to the provisions of subparagraphs (a) and (b), of each of the two groups of Articles referred to in paragraph (1)(b)(i) and (ii), and subject to the provisions of paragraph (1)(b), Articles 1 to 17 shall, with respect to any country of the Union, other than those referred to in subparagraphs (a) and (b), which deposits an instrument of ratification or accession or any country of the Union which deposits a declaration pursuant to paragraph (1)(c), enter into force three months after the date of notification by the Director General of such deposit, unless a subsequent date has been indicated in the instrument or declaration deposited. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country of the Union which deposits an instrument of ratification or accession, Articles 18 to 30 shall enter into force on the earlier of the dates on which any of the groups of Articles referred to in paragraph (1)(b) enters into force with respect to that country pursuant to paragraph (2)(a), (b), or (c).

(a) Provisions concerning *ratification* of the Convention and *accession* to it, and its *entry into force*, have existed in the Convention from its origin.[1] They have been completed and modified by the successive revision conferences and were thoroughly changed by the Revision Conference of Stockholm in 1967, in view of the amendments to the administrative provisions of the Convention accepted on that occasion.

(b) With respect to the question *how a State may become a party to the Convention* as revised at Stockholm in 1967, a distinction must be made between States which, because of their acceptance of one or more of the earlier Acts of the Convention, are already *members of the Union* and States which are *not such members*. The situation regarding the first category of States is dealt with in Article 20, that of the second category in Article 21.

The principal reasons for this distinction are the following:[2]

As the Stockholm Conference was a conference of *revision* of the Convention, only States already party to the Convention could participate in it with voting powers and only such States could *sign* the revised Convention. For those member States there are therefore two possibilities: if they have signed the Convention as revised at Stockholm, they may ratify it, and, if they have not signed it, they may accede to it. On the other hand, non-member States, which cannot have signed the revised Convention, may only accede to it.

Furthermore, for reasons already indicated above—see observation *(c)* on Article 13—States already members of the Union may, when ratifying the Stockholm Act or acceding to it, declare that such ratification or accession will *not* apply to *a certain group of Articles* (Article 20*(b)* and *(c)* and observations *(e)* and *(f)* below). This possibility of limited accession is not open to States which were not members of the Union until they acceded to the Stockholm Act, because it was considered that such States would have to accept the Convention, as revised at Stockholm, as a whole.

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[1] Cf. Articles 16, 18 and 19 of the original text of the Convention of 1883.

[2] Cf. document S/3 prepared for the Stockholm Conference, p. 44, paragraph 131.

Thirdly, again because the text established at Stockholm was the result of a *revision* of the existing Convention, the number of ratifications and accessions required for entry into force of the Stockholm Act takes into account only ratifications and accessions *of States already members of the Union*, and not accessions of new member States.

(c) The distinction between *ratification* by a State which has signed an international convention and *accession* by a State which has not done so is customary in international public law.

(d) Under former texts of the Convention, and until the Revision Conference of Stockholm in 1967, the function of *depositary* for ratifications and accessions was entrusted to and fulfilled by the Government of the Swiss Confederation, which also exercised the supervision over the International Bureau. The Stockholm Conference did not prolong the special functions of the Government of the Swiss Confederation as such (as distinguished from the special situation of the State in which WIPO has its headquarters: see Article 14(2)*(a)* and Article 16(7)) and therefore transferred the function of depositary to the Director General of WIPO, who is at the same time the chief executive of the Paris Union (see Article 15(1)*(c)* and also the transitional provision of Article 30(1)).[1]

(e) As has been observed above—observation *(c)* on Article 13—the Revision Conference of Stockholm in 1967 dealt with *two entirely different subjects*, namely, on the one hand, the introduction into the Convention of provisions concerning the right of priority with respect to inventors' certificates (Article 4 I(1) and (2)) and, on the other hand, a thorough revision of the administrative provisions of the Convention. As the acceptance of each of these parts of the revised Convention in any member State may depend on different considerations and may require different legal procedures, it was decided to give member States the opportunity to accept *only one of these parts of the revision*, or *one of these parts earlier than the other.*

Member States may therefore *exclude* from their ratification or accession, at least until further notice, *either Articles 1 to 12* of the Stockholm Act (which include the newly introduced Article 4 I(1)

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[1] See, for the functions of the depositary of an international treaty: Summary of the Practice of the Secretary-General as depositary of multilateral agreements, U.N. document St/Leg/7, 1959.

and (2) but are otherwise, except for small differences in the English translation, identical with the same Articles of the preceding Lisbon Act), *or Articles 13 to 17* (which contain the revised administrative system).

A member State which *excludes* from its ratification or accession *Articles 1 to 12 of the Stockholm Act* will be *bound by the new administrative provisions*, whereas, as far as the substantive provisions are concerned, it will continue to be bound by Articles 1 to 12 of that earlier Act, or those earlier Acts, by which it has been bound before its (partial) acceptance of the Stockholm Act;[1] it will, finally, also be bound by Articles 18 to 30 of the Stockholm Act containing final clauses (see Article 20(3)). If, on the contrary, a member State *excludes* from its ratification or accession *Articles 13 to 17 of the Stockholm Act*, it will be bound only by the new substantive provisions of Articles 1 to 12 (including the provisions of Article 4 I(1) and (2)) and by the final clauses of Articles 18 to 30 (Article 20(3)). As far as the purely administrative provisions are concerned, such State will continue to be bound by Article 13 of the former Acts.[2]

(f) This provision permits a member State, at any time after its original ratification of or accession to the Stockholm Act, to declare that it extends the effects of its ratification or accession to the group of Articles which it had excluded from its earlier ratification or accession. The effect will be that such State will then become bound by the Stockholm Act in its entirety.

(g) Paragraphs (2) and (3) of Article 20 deal with the *entry into force* of the Stockholm Act of the Convention. The rules governing such entry into force are more complicated than they were in earlier texts of the Convention owing to the possibility given to member States to exclude certain groups of Articles of the Stockholm Act from their ratification or accession. Simply stated, the rules governing the entry into force are the following :

Both the *substantive clauses* of *Articles 1 to 12* of the Stockholm Act *and* its *new administrative clauses* in Articles 13 to 17 will—as the case may be, *separately*—enter into force *three months* after the deposit of the *tenth* instrument of ratification or accession by a member State not excluding the relevant group of Articles from such ratification or accession (Article 20(2)*(a)* and *(b)*). Such entry into force

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[1] See document S/3 prepared for the Stockholm Conference, p. 46, paragraph 134.

[2] *Ibidem*, p. 46, paragraph 135.

will bind only member States which have not excluded from their ratification or accession the relevant group of Articles (see, for new members of the Union, Article 21, to be commented upon below).

At the earlier of the dates on which any of the groups of Articles referred to will enter into force, *Articles 18 to 30* of the Stockholm text, *containing final clauses*, will *also enter into force* (Article 20(3)). This latter part of the Convention will bind *all* member States which have ratified or acceded to the Stockholm Act, even if they have excluded one of the groups of Articles 1 to 12 or 13 to 17 from their ratification or accession, because the final clauses of Articles 18 to 30 must apply together with any other part of the Stockholm Act. Of course, some of the final clauses, because of their nature—for example, those regarding the place of deposit of instruments of ratification or accession—will be applied even before any formal entry into force.

The provisions so far referred to deal only with the *initial* entry into force of the various parts of the Stockholm Act and not with the situation of member States which ratify or accede to that Act after the first ten such States. The member States first mentioned may also, according to Article 20(1)*(b)* and (2)*(c)*, exclude one of the groups of Articles 1 to 12 or 13 to 17 from their ratification or accession. If they do *not* exclude any group which has been excluded before by any other member State, their ratification or accession will count towards the total of ten ratifications or accessions required for the entry into force of the relevant group of Articles. Subject to their possible exclusion of one of the above groups of Articles, Articles 1 to 17 will enter into force with respect to those member States (Article 20(2)*(c)*) *three months* after the *date of notification* of their ratification or accession by the Director General to the other member States (Article 29(5)), unless *a subsequent date* has been indicated in the instrument or declaration deposited. At the same time, Articles 18 to 30 of the Stockholm Act will enter into force with respect to such member States (Article 20(3)).

ARTICLE 21*(a)*

(1) Any country outside the Union may accede to this Act and thereby become a member of the Union *(b)*. Instruments of accession shall be deposited with the Director General *(c)*.

(2)(a) With respect to any country outside the Union which deposits its instrument of accession one month or more before the date of entry into force of any provisions of the present Act, this Act shall enter into force *(d)*, unless a subsequent date has been indicated in the instrument of accession, on the date upon which provisions first enter into force pursuant to Article 20(2)(a) or (b); provided that:

(i) if Articles 1 to 12 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 1 to 12 of the Lisbon Act,

(ii) if Articles 13 to 17 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 13 and 14(3), (4), and (5), of the Lisbon Act.

If a country indicates a subsequent date in its instrument of accession, this Act shall enter into force with respect to that country on the date thus indicated.

(b) With respect to any country outside the Union which deposits its instrument of accession on a date which is subsequent to, or precedes by less than one month, the entry into force of one group of Articles of the present Act, this Act shall, subject to the proviso of subparagraph (a), enter into force three months after the date on which its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country outside the Union which deposits its instrument of accession after the date of entry into force of the present Act in its entirety, or less than one month before such date, this Act shall enter into force three months after the date on which

its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(a) This Article, regarding the accession to the Stockholm Act of States which before *were not members of the Union* and dealing further with the *entry into force* of the Stockholm Act *with respect to those States*, was introduced into the Convention by the Revision Conference of Stockholm in 1967. It replaces, with important modifications, Article 16 of the earlier texts.

(b) As has been observed above—see observation *(b)* on Article 20—States which were not party to the Convention before its revision at Stockholm in 1967 cannot have *signed* the Stockholm Act and therefore cannot *ratify* it, but they may *accede* to it. As further observed—see observation *(b)* on Article 1, paragraph (1)—the Convention does not provide any procedure for the admission of new members to the Union. However, reference must be made to Article 25, which declares that it should be understood that, at the time a country deposits its instrument of ratification or accession, *it will be in a position under its domestic law to give effect to the provisions of the Convention*, and which further states that any such country also undertakes to adopt, in accordance with its constitution, *the measures necessary to ensure the application of the Convention.*

(c) This provision parallels the second sentence of Article 20(1)*(a)* regarding member States of the Union (see, above, observation *(d)* on Article 20).

(d) States which were not previously members of the Union may accede to the Stockholm Act only *in its entirety* : they are not allowed to exclude certain groups of Articles from their accession. However, since *member States of the Union may*, when ratifying or acceding to the Stockholm Act, exclude certain groups of Articles, *the entry into force of the Stockholm Act may be only partial, or may be partial at first.*

It has therefore been necessary to give *special rules for the entry into force* of the Stockholm Act *with respect to States outside the Union*, which, although they are not allowed to exclude certain groups of Articles from their accession, may be faced with the effect of such exclusion by member States of the Union.

In these rules a distinction has been made between: (*i*) States outside the Union which deposit their instrument of accession one month or more *before* the entry into force of *any* provisions of the Stockholm Act (Article 21(2)*(a)*), (*ii*) States outside the Union which deposit their instrument of accession *after*, or *less* than *one month before, one group of Articles* of the Stockholm Act has entered into force (Article 21(2)*(b)*), and (*iii*) States outside the Union which deposit their instrument of accession *after the date of entry into force of the Stockholm Act in its entirety* (Article 21(3)).

The effects of accession in these three cases are described in the provisions referred to.

In the first case, the State concerned must " wait " until the initial entry into force of the Stockholm Act takes place before it becomes bound by that Act. When, afterwards, the Stockholm Act enters into force, the State concerned will (unless it has indicated a subsequent date) immediately be bound by it but, if the Stockholm Act does not then enter into force with respect to a certain group of Articles, such State will, in the interim period before the entry into force of the said provisions, be bound by the corresponding Articles of the Lisbon Act.

In the second case, the acceding State will be *bound by the same Acts* of Stockholm and possibly of Lisbon, but only *three months after the date on which its accession has been notified* by the Director General to the other member States, unless a subsequent date has been indicated in the instrument of accession.

In the third case, the acceding State will be *bound by the entire Stockholm Act* but as from the same *dates* as indicated in the preceding paragraph.

An additional observation may be made regarding territories (colonies, protectorates, etc.) to which the Convention was applied by virtue of Article 16*bis* of the Acts of Washington (1911), The Hague (1925), London (1934) and Lisbon (1958)—the Article which has become, in modified form, Article 24 of the Stockholm Act—but which since then *have obtained their independence as States.* It has already been observed above—see observation *(d)* on Article 1, paragraph (1)—that in such cases the new State is no longer bound by treaties applying to it in its former dependent status, unless it expressly accedes to these treaties. With respect to the Paris Convention, these States, desiring not to interrupt the application of the Convention, have often not limited themselves to a *new accession*, but have made a *declaration confirming membership or a declaration of continuity*, or the said *declaration combined with accession in the normal form.*[1] Such declarations mean that according to the country concerned the Convention has not ceased to be applicable, as regards that country, between the date of its independence and its subsequent accession.

With respect to the new State, such declaration may be considered to be an accession with retroactive effect from the date of its independence. Although the Convention does not provide for this procedure, it may be accepted with respect to States to which the Convention already applied, because uninterrupted application of the Convention is in the interest of all member States, for example, with respect to the right of priority—see, above, observation *(g)* on Article 4, Section A—and many other provisions of the Convention.

Declarations as referred to may also be made with regard to accession to the Stockholm Act. Their effect will be that the formerly applicable Act or Acts of the Convention will apply retroactively, whereas the Stockholm Act will apply according to the provisions of Article 21.

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[1] See, for example, the declarations of Indonesia, *P.I.*, 1950, p. 222; the Ivory Coast, the Central African Republic, Chad, Upper Volta and Laos, *I.P.*, 1963, p. 214; the Malagasy Republic and Senegal, *I.P.*, 1963, p. 234; Gabon, *I.P.*, 1964, p. 23; Cameroon, *I.P.*, 1964, p. 66; Niger, *I.P.*, 1964, p. 118; Trinidad and Tobago, *I.P.*, 1964, p. 139; Southern Rhodesia, *I.P.*, 1965, p. 43; Zambia, *I.P.*, 1965, p. 43; Malawi, *I.P.*, 1965, p. 239; Mauritania, *I.P.*, 1965, p. 43; Dahomey, *I.P.*, 1966, p. 270; Togo, *I.P.*, 1967, p. 196. See also U.N. document A/CN.4/200/Add.1.

ARTICLE 22[(a)]

Subject to the possibilities of exceptions provided for in Articles 20(1)(b) and 28(2), ratification or accession shall automatically entail acceptance of all the clauses and admission to all the advantages of this Act *(b)*.

(a) This Article existed in essence in the original text of the Convention of 1883.[1] It related then, however, only to States newly adhering to the Union. The provision was maintained by the Revision Conferences until that of Stockholm in 1967. This latter Conference made the provision also applicable to States already members of the Union which ratify or accede to the Stockholm Act, and introduced a reservation regarding Articles 20(1)*(b)* and 28(2).

(b) The purpose of the Article is to *exclude*, with two exceptions, *all possibility of making reservations* by a State which ratifies or accedes to the Stockholm Act. Apart from the two possible exceptions, ratification of or accession to that Act means that *all rights and obligations deriving from the Convention are automatically accepted*. The only exceptions are that, according to Article 20(1)*(b)*, *States already members of the Union* may, as observed above, *exclude* from their ratification of or accession to the Stockholm Act *either Articles 1 to 12 or Articles 13 to 17*, whereas, according to Article 28(2), *any State, whether already a member of the Union or not*, may, when ratifying or acceding to the Stockholm Act, declare that it does not agree to be bound by *the jurisdictional clause of Article 28(1)*. This latter provision will be commented upon below.

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[1] *Actes de Paris*, I, pp. 28 (proposal for Article 14), 122, 145/6 (adoption).

ARTICLE 23*(a)*

After the entry into force of this Act in its entirety *(b)*, a country *(c)* may not accede to earlier Acts of this Convention *(d)*.

(a) This provision was introduced into the Convention by the Revision Conference of Stockholm in 1967. No such provision existed in earlier texts of the Convention, but since the Revision Conference of Washington in 1911 the Convention contained other provisions according to which the earlier Act or Acts remained in force between member States which had ratified or acceded to them but had not (yet) accomplished those acts regarding the most recent Act (see, for example, Article 18(4), (5) and (6) of the Lisbon Act, to be compared with Article 27(2)*(a)*, *(b)* and *(c)* of the Stockholm Act). These provisions were traditionally[1] interpreted as meaning that earlier Acts of the Convention remained in force *only* for the purpose indicated and could not be independently acceded to after a more recent Act of the Convention had entered into force.

The Article under consideration was inserted in the Stockholm Act in order to confirm this tradition and to avoid future controversies.[2]

It must be observed, however, that if, in the conditions referred to in the Article, a State accedes to the Stockholm Act, this does not mean that it will not be bound to other States, members of the Union, which have not yet ratified or acceded to the Stockholm Act but are bound by earlier Acts of the Convention (see, for this question, observation *(e)* on Article 1(1), above, and also the commentary on Article 27, below). This is because the States party to the Convention have constituted *a Union* embodied in successive Acts of the Convention, as a consequence of which a State can only enter (and leave) *the Union as a whole* and must always be *bound*—albeit possibly by different Acts of the Convention—*to all other member States*.[3]

(b) The provision under consideration applies only after the entry into force of the Stockholm Act *in its entirety*, and not when it has entered into force with the exception of one of the groups of Articles

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[1] Although not without exceptions. See LACINA: " The Problem of Conventional Relations between Countries according to the different Texts of the Paris Convention, " *I.P.*, 1966, p. 259.

[2] See document S/3 prepared for the Stockholm Conference, p. 50, paragraph 152.

[3] Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 222, paragraph 17.

referred to in Article 20(1)*(b)*(i) and (ii). In the latter case, countries may still accede to the Lisbon Act.

(c) The provision applies both to States which are already members of the Union and to States newly adhering to it.

For the first category of States, this means that a member State which has not ratified or acceded to a more recent Act than that of The Hague (1925) or London (1934) may, under the conditions indicated, only ratify or accede to the Stockholm Act (1967) and not that of Lisbon (1958). The question which Act will govern the relations of such State with other member States will be examined below when considering Article 27.

With respect to the second category of States, the provision means that, under the conditions indicated, such State can only accede to the Stockholm Act and not to any earlier Act. See, for its relations with other member States, Article 27(3), to be examined below.

(d) In the past, some States acceded *not only* to the *most recent Act* of the Convention but *to the Convention as such, as it had been revised and with regard to all revisions still in force.*[1] In view of the Article under consideration, this practice may not be continued with regard to the Stockholm Act.[2] If it is continued, references in the instrument of ratification or accession to earlier Acts of the Convention will have to be disregarded. As has been said, the question *by which Acts* a State which ratifies or accedes to the Stockholm Act *will be bound*, or which Acts it will apply with regard to other member States of the Union, will be examined below when considering Article 27.

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[1] See, for example, the accession of U.S.S.R., *I.P.*, 1965, p. 74; of Uganda, *I.P.*, 1965, p. 98; of Algeria, *I.P.*, 1965, p. 239.

[2] See document S/3 prepared for the Stockholm Conference, p. 51: proposal for Article 16*quater*, corrected by document S/3 corr. 1; the latter proposal was adopted by the Conference.

ARTICLE 24(a)

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification any time thereafter, that this Convention shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible *(b)*.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories *(c)*.

(3)(a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in the instrument of which it was included, and any notification given under such paragraph shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

(a) Provisions enabling member States to accede to the Convention also on behalf of their colonies and other dependent territories were introduced into the Convention by the Revision Conference of Washington in 1911.[1] These provisions then constituted Article 16*bis* of the Convention, an Article which was only modified on matters of detail by the subsequent Revision Conferences of The Hague (1925), London (1934) and Lisbon (1958). The Revision Conference of Stockholm in 1967, in declaring the Article applicable to territories for the external relations of which a State is responsible, adapted the provision to contemporary terminology; the Stockholm Conference also modified the Article in the light of the new administrative system adopted at that Conference.

(b) A declaration making the Convention applicable to designated territories will have a twofold effect. On the one hand, after such declaration takes effect, nationals of member States of the Union,

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[1] *Actes de Washington*, pp. 57, 68, 208 (proposals), 221/2 (observations), 311 (report to Plenary Committee), 256/7 (discussion in Third Plenary Session), 260 (discussion and adoption in Fourth Plenary Session).

and those assimilated to such nationals, will be able to claim application of the Convention in such territories; on the other hand, nationals of those territories and persons who are assimilated to such nationals by Article 3 of the Convention may claim application of the Convention in all other member States (see also, above, observation *(b)* on Article 2(1)).

(c) This provision and the remaining provisions of the Article under consideration are self-explanatory.

ARTICLE 25(a)

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention *(b)*.

(2) It is understood that, at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to give effect to the provisions of this Convention *(c)*.

(a) The original text of the Convention of 1883 contained a provision (Article 17), according to which the carrying out of the reciprocal engagements contained in the Convention was subject, as far as necessary, to the observance of the formalities and rules established by the constitutional laws of the member States. To this was added the provision that member States were bound to procure the application of these engagements, which they undertook to do " with as little delay as possible."[1] This provision underwent only slight changes as to form during subsequent Revision Conferences until that of Lisbon in 1958. At that Conference it was replaced[2] by what is now, unaltered, with the exception of minor changes as to form, Article 25 of the Stockholm text.

(b) It is obvious that the Convention would not achieve its purpose if the member States did not carry out the obligations which they accepted in acceding to the Convention. These obligations may differ according to the constitutional system of the State concerned.

If such State accepts the " self-executing " character of certain provisions of the Convention—see, above, Chapter II.3 and II.4—its administrative and judicial authorities will have to apply those provisions directly. Moreover, such State will be obliged to adopt and maintain legislation in conformity with the Convention on all points where the Convention requires such legislation and it will also have to carry out its obligations in the administrative field.

A State which according to its constitution or constitutional system cannot accept the " self-executing " character of provisions of an international convention is under the obligation to introduce provisions

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[1] *Actes de Paris*, I, pp. 145/6 (adoption: the Acts do not show how the provision came into being).

[2] *Actes de Lisbonne*, pp. 292 (proposal of U.S.A. and discussion in First Committee), 304 (report of First Committee), 109 (adoption in Second Plenary Session) 120 (General Report).

to the same effect in its domestic legislation, while its further obligations are the same as indicated above.

In practice, there have been several instances where a member State did not, or at least did not for some time, comply with its obligations under the Convention, particularly because it maintained legislation which was not in conformity with the Convention.

Article 17 of the Convention, as it stood from the time of its origin until the Revision Conference of Lisbon in 1958, did not permit a very strong reaction against such practices because, referring first to the observance of formalities and rules established by the constitutional laws of the member States, the Article declared that those States were only bound to apply the Convention " with as little delay as possible."

This was changed by the introduction of the new Article 17 (now Article 25) by the Revision Conference of Lisbon.

Under this provision, the first obligation for any member State is to adopt, in accordance with its constitution, *the measures necessary to ensure the application of the Convention.* Such measures will be, in the first place, the *legislative* measures necessary to carry out the obligations of the Convention and, in the second place, the *administrative* measures necessary in connexion with such legislation or with provisions of the Convention which are considered " self-executing " in the State concerned.

(c) The second obligation imposed upon any member State by the Article under consideration relates to the *moment of its ratification of or accession to the Convention.* It must then be in a position, *under its domestic law,* to *give effect to the provisions of the Convention,* which means that at that time all measures referred to above under observation *(b) must already have been taken.* This provision has sometimes been violated by member States but until the Revision Conference of Stockholm in 1967 no organ existed to establish formally such violation. The Stockholm Conference has changed this situation by introducing into the Convention Article 28 concerning disputes between member States regarding the interpretation or application of the Convention. This jurisdictional clause binds any member State, unless it declares, at the time of signature or ratification of, or accession to, the Stockholm Act that it does not consider itself bound by it. It will enable States which are bound by it to bring before the International Court of Justice cases where a member State does not comply with Article 25 of the Convention, now under consideration, unless negotiations or other methods of settlement bring about such compliance.

ARTICLE 26*(a)*

(1) This Convention shall remain in force without limitation as to time *(b)*.

(2) Any country may denounce this Act by notification addressed to the Director General *(c)*. **Such denunciation shall constitute also denunciation of all earlier Acts** *(d)* **and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union** *(e)*.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification *(f)*.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union *(g)*.

(a) This Article partly maintains provisions on the duration of the Convention, and the possibility and effect of denunciation of it by a member State, which were already in the original text of the Convention of 1883 (then Article 18 but, since the Revision Conference of Washington, Article 17*bis*). The Revision Conference of Stockholm in 1967 introduced several modifications which will be commented upon below.

(b) The principle that the Convention is concluded for an *indefinite duration* and that possible denunciations by member States will affect only such States and not the other member States as regards which the Convention will remain in full force has been included in the Convention since its origin.

(c) Denunciations have to be addressed to the depositary of the Convention. Until the Revision Conference of Stockholm in 1967 this was the Government of the Swiss Confederation; according to the Stockholm Act, and in conformity with the adopted changes in the administrative system, it will be the Director General of WIPO.

(d) As has already been observed several times—see observation *(e)* on Article 1(1) and observation *(a)* on Article 23—one of the effects of the legal construction of the Paris Convention as a treaty whose member States constitute a Union is that States can only enter and leave the Union *as a whole*. It is therefore not possible for a member

State to denounce, for example, the most recent Act of the Convention, or any earlier Act, and to remain bound by other Acts. If a State denounces the Stockholm Act, this will constitute also denunciation of all earlier Acts.

(e) See observation *(b)* above.

(f) Several other communications by States, provided for under the Stockholm text of the Convention, will take effect after their *notification by the Director General* of WIPO (see, for example, Articles 20(2)*(c)*, 21(2)*(b)* and (3), 24(3)*(a)*). However, *denunciations* will take effect one year after the day on which the Director General has *received* the relevant notification because the effect of a denunciation must not be retarded by the delay involved in its transmission to other countries. See also, for an analogous situation, Article 24(3)*(b)*, and, further, Articles 17(3) and 30(2).

(g) This provision was added to the Article under consideration by the Revision Conference of Stockholm in 1967 in order to prevent hasty decisions as to denunciation of the Convention by States which have not belonged to the Union for a sufficiently long time to have experience to rely on.[1] It is to be noted that the period of five years is counted not from the ratification of or accession to the Stockholm Act but from the date on which the State concerned *has become a member of the Union* (through accession to any of the successive Acts of the Convention).

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[1] See document S/3 prepared for the Stockholm Conference, p. 54, paragraph 162.

ARTICLE 27*(a)*

(1) The present Act shall, as regards the relations between the countries to which it applies, and to the extent that it applies, replace the Convention of Paris of March 20, 1883, and the subsequent Acts of revision *(b)*.

(2)(a) As regards the countries to which the present Act does not apply, or does not apply in its entirety, but to which the Lisbon Act of October 31, 1958, applies, the latter shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1)*(c)*.

(b) Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act applies, the London Act of June 2, 1934, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(c) Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act, nor the London Act applies, the Hague Act of November 6, 1925, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(3) Countries outside the Union which become party to this Act shall apply it with respect to any country of the Union not party to this Act or which, although party to this Act, has made a declaration pursuant to Article 20(1)(b)(i). Such countries recognize that the said country of the Union may apply, in its relations with them, the provisions of the most recent Act to which it is party *(d)*.

(a) This Article deals with the application of earlier Acts of the Convention after the Stockholm Act has—wholly or partly—entered into force and until the moment when all member States will have ratified or acceded to the Stockholm Act in its entirety. With respect to such application of earlier Acts, the Stockholm Act has maintained the system which was introduced into the Convention by the Revision Conference of Washington in 1911[1] and was continued, with the necessary adaptations, by the subsequent Revision Conferences.[2]

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[1] *Actes de Washington*, pp. 232 (proposal for Article 27*bis*), 311 (report to Plenary Committee), 260/1 (adoption in Fourth Plenary Session).

[2] *Actes de La Haye*, pp. 266 (proposal), 424 (report of First Sub-Committee); 526 (report of General Committee), 549/50 (report of Drafting Committee), 581 (adoption in Second Plenary Session); *Actes de Londres*, pp. 474 (report of Drafting Committee), 519 (adoption in Second Plenary Session); *Actes de Lisbonne*, p. 109 (discussion and adoption in Second Plenary Session).

However, the Stockholm Act has introduced modifications, first of all because it had to take into account the fact that, in view of Article 20(1)*(b)*, it may enter into force only partially, that is, to the exclusion of a certain group of Articles, and secondly when it added an important provision (Article 27(3)) concerning the application of Acts of the Convention by, and in relation to, a State which was not a member of the Union before acceding to the Stockholm Act.

(b) This provision prescribes that relations between States to which the Stockholm Act applies, because they have ratified it or acceded to it, will be *exclusively governed by the Stockholm Act*, which *replaces*, as far as those relations are concerned, *all earlier Acts*. If, however, such State has excluded from its ratification or accession either Articles 1 to 12 or 13 to 17 of the Stockholm Act, only the other Articles of the Stockholm Act will apply, whereas Articles replaced by the excluded Articles will continue to apply according to the other paragraphs of the Article under consideration.

(c) Paragraphs 2*(a)(b)* and *(c)* of this Article maintain, with the exception that they also take into account the possibility of partial entry into force of the Stockholm Act, the system regarding the application of earlier Acts of the Convention adopted by the Revision Conference of Washington (1911) and continued by subsequent Revision Conferences. Unfortunately, although this system raises several questions,[1] it was not explained or commented upon during any of those Conferences. The Revision Conference of Stockholm in 1967 has clarified the situation to some extent, because it was observed there[2] that a distinction must be made between *accession* to earlier Acts of the Convention and *application* of such Acts, whereas a new provision (Article 27(3)) was adopted regarding the application of Acts of the Convention by, and in relation to, a State which would accede to the Convention without having previously been a member of the Union.

Taking into account those developments, the situation with regard to the application of earlier Acts of the Convention may be described as follows.

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[1] See, for the situation before the Revision Conference of Stockholm in 1967: "A propos de l'application simultanée des textes successifs de la Convention d'Union," *P.I.*, 1936, p. 99, and Lacina: "The Problem of Conventional Relations between Countries according to the different Texts of the Paris Convention, " *I.P.*, 1966, p. 257. See also *BIRPI Lecture Course on Industrial Property*, 1965, p. 11.

[2] Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 222, paragraph 18.

With respect to States which *were not members of the Union before they acceded to the Stockholm Act*, Article 27(3) will apply. Such States will apply the Stockholm Act not only, of course, with respect to member States which have already ratified or acceded to that Act, but also with respect to member States which have *not* yet ratified or acceded to the Stockholm Act or which have ratified or acceded to that Act *to the exclusion of Articles 1 to 12 thereof*. Although the provision does not say so, the same solution will apply with respect to member States which have ratified or acceded to the Stockholm Act *to the exclusion of Articles 13 to 17 thereof:* such States will continue to be bound by the old administrative system, but the newly acceding State will only be bound by the new administrative system of the Stockholm Act.

On the other hand, the newly acceding State will have to recognize that *any other member State* of the Union *may* apply, in its relations to that State, the provisions *of the most recent Act to which it is party*. The word " may " indicates that such other member State *may also apply*, in its relations with a newly acceding State, the Stockholm Act; although it has not yet *acceded* to that Act, it may apply it,[1] and the newly acceding State cannot complain because the Stockholm Act is precisely the Act which it has accepted.

The situation is more complicated with respect to States which *were already members of the Union* before they ratified or acceded to the Stockholm Act (to the possible exclusion of one of the groups of Articles 1 to 12 or 13 to 17).

Such States will, of course, apply the Stockholm Act (to the extent that they have accepted it) with respect to all other States which have (and to the extent that they have) accepted the Stockholm Act.

With respect to States which have not done so (or to the extent that they have not done so) the Article under consideration specifies (paragraphs (2)*(a)*, *(b)* and *(c)*) that *earlier Acts of the Convention remain in force*.

Nevertheless, a member State which has ratified or acceded to the Stockholm Act *may also apply* it—and may wish to do so because it has modified its domestic legislation accordingly—to member States which have not yet ratified or acceded to that Act. This is so, because there is no reason why a member State of the Union should not be *allowed* to do what a newly acceding State *must* do. The first-mentioned member State *may* however also apply, with respect to any other

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[1] This concerns the part of the Convention dealing with substantive law, the application of administrative provisions being regulated in Article 30, paragraph (2).

member State, *the most recent common Act*, and will in any case have to accept that *such other member State will apply*, with regard to it, *the most recent common Act* which according to the provision under examination has remained in force.

But what if there is *no such most recent common Act*, for example, because one member State ratifies the Stockholm Act after having acceded only to the Lisbon Act (1958), whereas another member State has not ratified or acceded to a more recent Act than that of London (1934) or The Hague (1925)? In such case, the member State which has ratified or acceded to the Stockholm Act may still apply that Act in its relations with the other State. It may, however, also apply, although it is not formally *bound by it*, the most recent Act to which the other member State is party, which is all that the other State may claim, not having ratified or acceded to more recent Acts. The State which has ratified or acceded to the Stockholm Act will in any case have to accept that any other member State will apply the most recent Act to which it is party and which has remained in force according to paragraphs (2)*(a)*, *(b)* and *(c)* of the Article under consideration.

In view of the uncertainties left by this Article, a declaration by member States regarding the Acts they consider applicable in certain situations [1] will be most useful.

(d) As has been observed, this provision applies only to States which *were not members of the Union* until they acceded to the Stockholm Act. The provision has already been commented upon above.

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[1] Cf. Report of Main Committee IV of the Stockholm Conference, *I.P.*, 1967, p. 222, paragraph 18, which, however, erroneously refers to newly acceding States, which are bound by Article 27(3) and therefore cannot make such declaration.

ARTICLE 28*(a)*

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement *(b)*. **The country bringing the dispute before the Court shall inform the International Bureau ; the International Bureau shall bring the matter to the attention of the other countries of the Union** *(c)*.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply *(d)*.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General *(e)*.

(a) This Article, containing a jurisdictional clause, which may however be subject to a declaration of non-acceptance, was introduced into the Convention by the Revision Conference of Stockholm in 1967. Earlier attempts to introduce such a clause, made at the Revision Conferences of The Hague (1925), London (1934) and Lisbon (1958), had failed.[1]

(b) The provision grants competence to the International Court of Justice to decide on any *dispute between two or more member States* concerning the *interpretation* or *application* of the Convention unless, of course, such dispute is settled by negotiation or the States concerned agree on some other method of settlement, for example, by way of international arbitration. Such dispute may be brought before the International Court by application in conformity with the Statute of the Court. This Court, established at The Hague (Netherlands), consists of

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[1] *Actes de La Haye*, pp. 353/4 (proposal of U.K.), 420/4 (report of First Sub-Committee); *Actes de Londres*, p. 293 (proposals of Mexico, Netherlands and Switzerland; see also pp. 162/4 for an intended proposal of the International Bureau), 349/51 (report of First Sub-Committee), 472/3 (report of Drafting Committee); *Actes de Lisbonne*, pp. 192/8 (proposal), 199/201 (observations), 202 (discussion in First Committee), 300/1 (report of First Committee).

fifteen members, elected for nine years by the General Assembly and by the Security Council of the United Nations. The Court may be supplemented by judges of the nationality of the litigating parties. It is declared competent to deal with all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force (Article 36, paragraph 1, of the Statue of the Court). *Only States may be parties in cases before the Court* (Article 34, paragraph 1, of its Statute).

(c) It is provided that the *State bringing* a dispute before the Court *must inform the International Bureau. The Court itself* may, subject to and in conformity with its Rules, request *of public international organizations,* such as WIPO, *information relevant to a case before it* and it will receive such *information presented by such organizations on their own initiative.* Moreover, whenever the construction of a convention (such as the Paris Convention) is in question in a case before the Court, the international organization concerned will receive copies of all the written proceedings at the Court (Article 34, paragraphs 2 and 3, of its Statute).

In the provision under consideration, it is further provided that *the International Bureau* will bring a dispute before the Court *to the attention of the other member States of the Union.* This will enable any such State which considers that it has an interest of a legal nature which may be affected by the decision in the case to submit a request to the Court to be permitted to intervene (Article 62 of the Statute). Whenever the construction of a convention in which States other than those concerned in the case are parties is in question, such States have a *right* to intervene, but, if they do so, the construction given by the judgment will be binding upon them (Article 63 of the Statute).

(d) As has already been observed above—see observation *(b)* on Article 22—the Stockholm Act of the Convention allows States to make reservations, that is, to exclude the application of provisions of the Convention, only on two points. One of these is the applicability of the jurisdictional clause. Any State may at the time of its signature[1] or ratification of, or accession to, the Stockholm Act declare that it does not consider itself bound by the jurisdictional clause, in which case the clause will not apply between such State and any other member State.

(e) A declaration concerning non-applicability of the jurisdictional clause may at any time be withdrawn. The provision is self-explanatory.

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[1] The following States made this reservation at the time of their signature of the Stockholm Act (cf. *I.P.*, 1968, p. 33): Algeria, Bulgaria, Indonesia, Poland, Rumania and U.S.S.R.

ARTICLE 29*(a)*

(1)(a) This Act shall be signed in a single copy in the French language and shall be deposited with the Government of Sweden *(b)*.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the English, German, Italian, Portuguese, Russian and Spanish languages, and such other languages as the Assembly may designate *(c)*.

(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail *(d)*.

(2) This Act shall remain open for signature at Stockholm until January 13, 1968 *(e)*.

(3) The Director General shall transmit two copies, certified by the Government of Sweden, of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country *(f)*.

(4) The Director General shall register this Act with the Secretariat of the United Nations *(g)*.

(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Article 20(1)(c), entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Article 24*(h)*.

(a) Since the Revision Conference of Washington in 1911 the Convention has contained (in Article 19) provisions concerning the signature of each successive Act and the communication of certified copies of those Acts to member States. The Revision Conference of Lisbon in 1958 introduced into this Article additional provisions concerning the languages of the official copy of the Act and of translations thereof. Those provisions were modified and adapted to the new administrative system by the Revision Conference of Stockholm to form what is now Article 29 of the Convention.

(b) The Stockholm Act has maintained the former system according to which there is *only one signed copy* of the Convention, as revised, and that Act is established *in the French language.*

(c) Whereas the Lisbon Act made provision, apart from the signed copy of the Act in French, for official *translations* of that Act in several other languages, the Stockholm Act prescribes that official *texts* —not mere translations—shall be established in such other languages. The status of texts in other languages has thereby been improved.

(d) However, since several texts in different languages may lead to different interpretations, it is also provided that in case of such differences the French text shall prevail.

(e) As in the case of the Lisbon Act, the Stockholm Act remained open for a period during which it could still be signed after the Revision Conference had closed, so that the Governments of member States could still reflect on the desirability of signing. At the closing date, January 13, 1968, the Stockholm Act had been signed by 46 member States.[1]

(f) This provision is self-explanatory.

(g) This provision implements an obligation existing under Article 102, paragraph 1, of the Charter of the United Nations, which provides that " every treaty and every international agreement entered into by any Member of the United Nations after the present [U. N.] Charter comes into force shall as soon as possible be registered with the Secretariat [of the U. N.] and published by it."

(h) This provision is again self-explanatory.

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[1] See *I.P.*, 1968, p. 33.

ARTICLE 30[(a)]

(1) Until the first Director General assumes office, references in this Act to the International Bureau of the Organization or to the Director General shall be deemed to be references to the Bureau of the Union or its Director, respectively *(b)*.

(2) Countries of the Union not bound by Articles 13 to 17 may, until five years after the entry into force of the Convention establishing the Organization, exercise, if they so desire, the rights provided under Articles 13 to 17 of this Act as if they were bound by those Articles. Any country desiring to exercise such rights shall give written notification to that effect to the Director General; such notification shall be effective from the date of its receipt. Such countries shall be deemed to be members of the Assembly until the expiration of the said period *(c)*.

(3) As long as all the countries of the Union have not become Members of the Organization, the International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau *(d)*.

(4) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization *(e)*.

(a) This Article, containing transitional provisions, was introduced into the Convention by the Revision Conference of Stockholm in 1967. This was necessary in view of the important modifications of the administrative provisions of the Convention adopted by that Conference. The first three paragraphs of the Article deal with three different periods and also with different questions.[1]

Paragraph (1) concerns the period which will elapse until such time as the first Director General of WIPO assumes office and it deals, for that period, with references made in the Act to the said Director General or to the International Bureau of the said Organization.

Paragraph (2) relates to a period of five years after the entry into force of the WIPO Convention and deals with the possibility open to

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[1] See document S/3 prepared for the Stockholm Conference, p. 58, paragraph 173.

member States to exercise, during that period, the rights provided by the new administrative system.

Paragraph (3) concerns the period which will end when all member States of the Union have also become Members of WIPO and deals with the functioning of the International Bureau and its head during that period, while paragraph (4) provides for certain consequences which will follow the expiration of the said period.

For all those provisions reference must be made to the close relationship envisaged between the Paris Union and WIPO (see, above, observation *(a)* on Article 13).

(b) Until the first Director General has assumed office, references made in the Stockholm Act to the International Bureau of Intellectual Property established by the WIPO Convention, or to its Director General, must be understood as references to BIRPI and its Director.[1] Examples of the application of this provision will include the transmittal of copies of the Stockholm Act to Governments (Article 29(3)) and the notifications to be made pursuant to Article 29(5). Those tasks have been assigned by the Stockholm Act to the Director General but, as long as there is no Director General, the said tasks will be carried out by the Director of BIRPI.

(c) Paragraph (2) of the Article under consideration will allow—during a period of five years after the entry into force of the WIPO Convention, entry into force which will complete the new administrative provisions of the Paris Convention—all member States which have not yet accepted the new administrative system embodied in Articles 13 to 17 to exercise, if they so desire, the rights provided under the said Articles as if they were bound by them. This possibility has been provided because the WIPO Convention, as well as the Stockholm Act of the Paris Convention, will enter into force after ratification or accession by comparatively few States and in such circumstances the organs of those Conventions, which would be composed only of the said States, would not have a sufficiently representative character. That is why, during this period, other member States of the Union will also be allowed, if they so desire, to vote in the Assembly, to be elected as members of the Executive Committee, to vote in the Executive Committee and to exercise all the other rights provided in Articles 13 to 17 (see also Article 21(2) of the WIPO Convention). The States which,

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[1] See document S/3 prepared for the Stockholm Conference, p. 58, paragraph 174.

at the expiration of the five-year period, are still not bound by Articles 13 to 17 will lose those rights at the end of the fifth year.[1] See also observation *(c)* on Article 14 above.

(d) As long as there are member States of the Paris Union which are not Members of WIPO, the administrative organ must have a dual identity (see also Article 21(3) of the WIPO Convention): it will function at the same time as BIRPI, supervised by the Swiss Government, and as the International Bureau of Intellectual Property, established by the WIPO Convention and defined in Article 15(1)*(a)* of the Stockholm Act of the Paris Convention, controlled by the organs of both Conventions. As was explained to the Stockholm Conference, no procedural difficulties are expected in this respect.[2]

(e) This provision is self-explanatory.

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[1] See document S/3 prepared for the Stockholm Conference, p. 58, paragraph 175.

[2] *Ibidem*, p. 58, paragraph 176; see also the rectification in document S/3 corr.2.

IV

PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY [1]

of March 20, 1883,
as revised
at BRUSSELS on December 14, 1900, at WASHINGTON on June 2, 1911,
at THE HAGUE on November 6, 1925, at LONDON on June 2, 1934,
at LISBON on October 31, 1958,
and at STOCKHOLM on July 14, 1967

Article 1

[Establishment of the Union; Scope of Industrial Property] [2]

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

Article 2

[National Treatment for Nationals of Countries of the Union]

(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of

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[1] Official English text established under Article 29(1)(b).

[2] Articles have been given titles to facilitate their identification. There are no titles in the signed (French) text.

the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

(2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.

Article 3

[Same Treatment for Certain Categories of Persons as for Nationals of Countries of the Union]

Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.

Article 4

[A to I. *Patents, Utility Models, Industrial Designs, Marks, Inventors' Certificates:* Right of Priority. — G. *Patents:* Division of the Application]

A(1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B. Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union.

C(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks.

(2) These periods shall start from the date of filing of the first application ; the day of filing shall not be included in the period.

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

(4) A subsequent application concerning the same subject as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union, shall be considered as the first application, of which the filing date shall be the starting point of the period of priority, if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority. The previous application may not thereafter serve as a basis for claiming a right of priority.

D(1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authen-

tication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation.

(4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.

(5) Subsequently, further proof may be required.

Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2), above.

E(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model, the period of priority shall be the same as that fixed for industrial designs.

(2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa.

F. No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple priorities, even if they originate in different countries, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed, provided that, in both cases, there is unity of invention within the meaning of the law of the country.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions.

G(1) If the examination reveals that an application for a patent contains more than one invention, the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any.

(2) The applicant may also, on his own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.

H. Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

I(1) Applications for inventors' certificates filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate shall give rise to the right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate.

Article 4*bis*

[*Patents :* Independence of Patents Obtained for the Same Invention in Different Countries]

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

(3) The provision shall apply to all patents existing at the time when it comes into effect.

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession.

(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority.

Article 4*ter*

[*Patents :* Mention of the Inventor in the Patent]

The inventor shall have the right to be mentioned as such in the patent.

Article 4*quater*

[*Patents:* Patentability in Case of Restrictions of Sale by Law]

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

Article 5

[A. *Patents:* Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses. — B. *Industrial Designs:* Failure to Work; Importation of Articles. — C. *Marks:* Failure to Use; Different Forms; Use by Co-proprietors. — D. *Patents, Utility Models, Marks, Industrial Designs:* Marking]

A(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.

B. The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected.

C(1) If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.

(2) Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.

(3) Concurrent use of the same mark on identical or similar goods by industrial or commercial establishments considered as co-proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed shall not prevent registration or diminish in any way the protection granted to the said mark in any country of the Union, provided that such use does not result in misleading the public and is not contrary to the public interest.

D. No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.

Article 5*bis*

[*All Industrial Property Rights:* Period of Grace for the Payment of Fees for the Maintenance of Rights; *Patents:* Restoration]

(1) A period of grace of not less than six months shall be allowed for the payment of the fees prescribed for the maintenance of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.

(2) The countries of the Union shall have the right to provide for the restoration of patents which have lapsed by reason of non-payment of fees.

Article 5*ter*

[*Patents:* Patented Devices Forming Part of Vessels, Aircraft, or Land Vehicles]

In any country of the Union the following shall not be considered as infringements of the rights of a patentee:

1. **the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories,**

when such vessels temporarily or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel;

2. the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.

Article 5*quater*

[*Patents:* Importation of Products Manufactured by a Process Patented in the Importing Country]

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Article 5*quinquies*

[*Industrial Designs*]

Industrial designs shall be protected in all the countries of the Union.

Article 6

[*Marks:* Conditions of Registration; Independence of Protection of Same Mark in Different Countries]

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.

(2) However, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin.

(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

Article 6*bis*

[*Marks :* Well-Known Marks]

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

Article 6*ter*

[*Marks :* Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations]

(1)(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

(3)(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated.

Nevertheless such communication is not obligatory in respect of flags of States.

(b) The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6*quinquies*, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above.

Article 6*quater*

[*Marks:* Assignment of Marks]

(1) When, in accordance with the law of a country of the Union, the assignment of a mark is valid only if it takes place at the same time as the transfer of the business or goodwill to which the mark belongs, it shall suffice for the recognition of such validity that the portion of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the goods bearing the mark assigned.

(2) The foregoing provision does not impose upon the countries of the Union any obligation to regard as valid the assignment of any mark the use of which by the assignee would, in fact, be of such a nature as to mislead the public, particularly as regards the origin, nature, or essential qualities, of the goods to which the mark is applied.

Article 6*quinquies*

[*Marks:* Protection of Marks Registered in One Country of the Union in the Other Countries of the Union]

A(1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservation indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin,

issued by the competent authority. No authentication shall be required for this certificate.

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed ;
2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed ;
3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10*bis*.

C(1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D. No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.

E. However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F. The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

Article 6*sexies*

[*Marks:* Service Marks]

The countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks.

Article 6*septies*

[*Marks:* Registration in the Name of the Agent or Representative of the Proprietor Without the Latter's Authorization]

(1) If the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favor of the said registration, unless such agent or representative justifies his action.

(2) The proprietor of the mark shall, subject to the provisions of paragraph (1), above, be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use.

(3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article.

Article 7

[*Marks:* Nature of the Goods to which the Mark is Applied]

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

Article 7*bis*

[*Marks:* Collective Marks]

(1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of

which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.

(2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.

(3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Article 8

[*Trade Names*]

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

Article 9

[*Marks, Trade Names :* Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name]

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10

[*False Indications:* Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer]

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10*bis*

[*Unfair Competition*]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. **all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;**
2. **false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;**
3. **indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.**

Article 10*ter*

[*Marks, Trade Names, False Indications, Unfair Competition:* Remedies, Right to Sue]

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*.

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10*bis*, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

Article 11

[*Inventions, Utility Models, Industrial Designs, Marks:* Temporary Protection at Certain International Exhibitions]

(1) The countries of the Union shall, in conformity with their domestic legislation, grant temporary protection to patentable inventions, utility models, industrial designs, and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them.

(2) Such temporary protection shall not extend the periods provided by Article 4. If, later, the right of priority is invoked, the authorities of any country may provide that the period shall start from the date of introduction of the goods into the exhibition.

(3) Each country may require, as proof of the identity of the article exhibited and of the date of its introduction, such documentary evidence as it considers necessary.

Article 12

[Special National Industrial Property Services]

(1) Each country of the Union undertakes to establish a special industrial property service and a central office for the communication to the public of patents, utility models, industrial designs, and trademarks.

(2) This service shall publish an official periodical journal. It shall publish regularly:

(a) the names of the proprietors of patents granted, with a brief designation of the inventions patented;

(b) the reproductions of registered trademarks.

Article 13

[Assembly of the Union]

(1)(a) The Union shall have an Assembly consisting of those countries of the Union which are bound by Articles 13 to 17.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2)(a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau") referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as "the Organization"), due account being taken of any comments made by those countries of the Union which are not bound by Articles 13 to 17;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the triennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii) establish such committees of experts and working groups as it deems appropriate to achieve the objectives of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 13 to 17;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) perform such other functions as are appropriate under this Convention;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3)(a) Subject to the provisions of subparagraph (b), a delegate may represent one country only.

(b) Countries of the Union grouped under the terms of a special agreement in a common office possessing for each of them the character of a special national service of industrial property as referred to in Article 12 may be jointly represented during discussions by one of their number.

(4)(a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 17(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(5)(a) Subject to the provisions of subparagraph (b), a delegate may vote in the name of one country only.

(b) The countries of the Union referred to in paragraph (3)(b) shall, as a general rule, endeavor to send their own delegations to the sessions of the Assembly. If, however, for exceptional reasons, any such country cannot send its own delegation, it may give to the delegation of another such country the power to vote in its name provided that each delegation may vote by proxy for one country only Such power to vote shall be granted in a document signed by the Head of State or the competent Minister.

(6) Countries of the Union not members of the Assembly shal be admitted to the meetings of the latter as observers.

(7)(a) The Assembly shall meet once in every third calendar year in ordinary session upon convocation by the Director Genera and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(8) The Assembly shall adopt its own rules of procedure.

Article 14

[Executive Committee]

(1) The Assembly shall have an Executive Committee.

(2)(a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 16(7)(b), have an ex officio seat on the Committee.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements established in relation with the Union to be among the countries constituting the Executive Committee.

(5)(a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected, but only up to a maximum of two-thirds of such members.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(6)(a) The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly in respect of the draft program and triennial budget of the Union prepared by the Director General;

(iii) approve, within the limits of the program and the triennial budget, the specific yearly budgets and programs prepared by the Director General;

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) take all necessary measures to ensure the execution of the program of the Union by the Director General, in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(7)(a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8)(a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers.

(10) The Executive Committee shall adopt its own rules of procedure.

Article 15

[International Bureau]

(1)(a) Administrative tasks concerning the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Literary and Artistic Works.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union.

(2) The International Bureau shall assemble and publish information concerning the protection of industrial property. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of industrial property. Furthermore, it shall furnish the International Bureau with all the publications of its industrial property service of direct concern to the protection of industrial property which the International Bureau may find useful in its work.

(3) The International Bureau shall publish a monthly periodical.

(4) The International Bureau shall, on request, furnish any country of the Union with information on matters concerning the protection of industrial property.

(5) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of industrial property.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee, and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7)(a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee, make the preparations for the conferences of revision of the provisions of the Convention other than Articles 13 to 17.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences.

(8) The International Bureau shall carry out any other tasks assigned to it.

Article 16

[Finances]

(1)(a) The Union shall have a budget.

(b) The budget of the Union shall include the income and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Union shall be financed from the following sources:

(i) contributions of the countries of the Union;
(ii) fees and charges due for services rendered by the International Bureau in relation to the Union;
(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union;
(iv) gifts, bequests, and subventions;
(v) rents, interests, and other miscellaneous income.

(4)(a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows:

Class I	25
Class II	20
Class III	15
Class IV	10
Class V	5
Class VI	3
Class VII	1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce such change to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the said session.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions may not exercise its right to vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its right to vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, as provided in the financial regulations.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General.

(6)(a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, the Assembly shall decide to increase it.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the decision to increase it is made.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7)(a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

Article 17

[Amendment of Articles 13 to 17]

(1) Proposals for the amendment of Articles 13, 14, 15, 16, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment to Article 13, and to the present paragraph, shall require four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment.

Article 18

[Revision of Articles 1 to 12 and 18 to 30]

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

(2) For that purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.

(3) Amendments to Articles 13 to 17 are governed by the provisions of Article 17.

Article 19

[Special Agreements]

It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.

Article 20

[Ratification or Accession by Countries of the Union ; Entry Into Force]

(1)(a) Any country of the Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it. Instruments of ratification and accession shall be deposited with the Director General.

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply :

(i) to Articles 1 to 12, or
(ii) to Articles 13 to 17.

(c) Any country of the Union which, in accordance with subparagraph (b), has excluded from the effects of its ratification or accession one of the two groups of Articles referred to in that subparagraph may at any later time declare that it extends the effects of its ratification or accession to that group of Articles. Such declaration shall be deposited with the Director General.

(2)(a) Articles 1 to 12 shall enter into force, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)(b)(i), three months after the deposit of the tenth such instrument of ratification or accession.

(b) Articles 13 to 17 shall enter into force, with respect to the first ten countries of the Union which have deposited instruments of ratification or accession without making the declaration permitted under paragraph (1)(b)(ii), three months after the deposit of the tenth such instrument of ratification or accession.

(c) Subject to the initial entry into force, pursuant to the provisions of subparagraphs (a) and (b), of each of the two groups of Articles referred to in paragraph (1)(b)(i) and (ii), and subject to the provisions of paragraph (1)(b), Articles 1 to 17 shall, with respect to any country of the Union, other than those referred to in subparagraphs (a) and (b), which deposits an instrument of ratification or accession or any country of the Union which deposits a declaration pursuant to paragraph (1)(c), enter into force three months after the date of notification by the Director General of such deposit, unless a subsequent date has been indicated in the instrument or declaration deposited. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country of the Union which deposits an instrument of ratification or accession, Articles 18 to 30 shall enter into force on the earlier of the dates on which any of the groups of Articles referred to in paragraph (1)(b) enters into force with respect to that country pursuant to paragraph (2)(a), (b), or (c).

Article 21

[Accession by Countries Outside the Union ; Entry Into Force]

(1) Any country outside the Union may accede to this Act and thereby become a member of the Union. Instruments of accession shall be deposited with the Director General.

(2)(a) With respect to any country outside the Union which deposits its instrument of accession one month or more before the date of entry into force of any provisions of the present Act, this Act shall enter into force, unless a subsequent date has been indicated in the instrument of accession, on the date upon which provisions first enter into force pursuant to Article 20(2)(a) or (b) ; provided that :

(i) if Articles 1 to 12 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 1 to 12 of the Lisbon Act,

(ii) if Articles 13 to 17 do not enter into force on that date, such country shall, during the interim period before the entry into force of such provisions, and in substitution therefor, be bound by Articles 13 and 14(3), (4), and (5), of the Lisbon Act.

If a country indicates a subsequent date in its instrument of accession, this Act shall enter into force with respect to that country on the date thus indicated.

(b) With respect to any country outside the Union which deposits its instrument of accession on a date which is subsequent to, or precedes by less than one month, the entry into force of one group of Articles

of the present Act, this Act shall, subject to the proviso of subparagraph (a), enter into force three months after the date on which its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

(3) With respect to any country outside the Union which deposits its instrument of accession after the date of entry into force of the present Act in its entirety, or less than one month before such date, this Act shall enter into force three months after the date on which its accession has been notified by the Director General, unless a subsequent date has been indicated in the instrument of accession. In the latter case, this Act shall enter into force with respect to that country on the date thus indicated.

Article 22

[Consequences of Ratification or Accession]

Subject to the possibilities of exceptions provided for in Articles 20(1)(b) and 28(2), ratification or accession shall automatically entail acceptance of all the clauses and admission to all the advantages of this Act.

Article 23

[Accession to Earlier Acts]

After the entry into force of this Act in its entirety, a country may not accede to earlier Acts of this Convention.

Article 24

[Territories]

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification any time thereafter, that this Convention shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories.

(3)(a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in the instrument of which it was included, and any notification given under such paragraph

shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

Article 25

[Implementation of the Convention on the Domestic Level]

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Article 26

[Denunciation]

(1) This Convention shall remain in force without limitation as to time.

(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of all earlier Acts and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union.

Article 27

[Application of Earlier Acts]

(1) The present Act shall, as regards the relations between the countries to which it applies, and to the extent that it applies, replace the Convention of Paris of March 20, 1883, and the subsequent Acts of revision.

(2)(a) As regards the countries to which the present Act does not apply, or does not apply in its entirety, but to which the Lisbon Act of October 31, 1958, applies, the latter shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(b) Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act applies, the London Act of June 2, 1934, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(c) Similarly, as regards the countries to which neither the present Act, nor portions thereof, nor the Lisbon Act, nor the London Act applies, the Hague Act of November 6, 1925, shall remain in force in its entirety or to the extent that the present Act does not replace it by virtue of paragraph (1).

(3) Countries outside the Union which become party to this Act shall apply it with respect to any country of the Union not party to this Act or which, although party to this Act, has made a declaration pursuant to Article 20(1)(b)(i). Such countries recognize that the said country of the Union may apply, in its relations with them, the provisions of the most recent Act to which it is party.

Article 28

[Disputes]

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau ; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

Article 29

[Signature, Languages, Depositary Functions]

(1)(a) This Act shall be signed in a single copy in the French language and shall be deposited with the Government of Sweden.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the English, German, Italian, Portuguese, Russian and Spanish languages, and such other languages as the Assembly may designate.

(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.

(2) This Act shall remain open for signature at Stockholm until January 13, 1968.

(3) The Director General shall transmit two copies, certified by the Government of Sweden, of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country.

(4) The Director General shall register this Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Article 20(1)(c), entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Article 24.

Article 30

[Transitional Provisions]

(1) Until the first Director General assumes office, references in this Act to the International Bureau of the Organization or to the Director General shall be deemed to be references to the Bureau of the Union or its Director, respectively.

(2) Countries of the Union not bound by Articles 13 to 17 may, until five years after the entry into force of the Convention establishing the Organization, exercise, if they so desire, the rights provided under Articles 13 to 17 of this Act as if they were bound by those Articles. Any country desiring to exercise such rights shall give written notification to that effect to the Director General; such notification shall be effective from the date of its receipt. Such countries shall be deemed to be members of the Assembly until the expiration of the said period.

(3) As long as all the countries of the Union have not become Members of the Organization, the International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau.

(4) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization.

V

MEMBER STATES

of the International Union for the Protection of Industrial Property (Paris Union) as on April 1, 1968

Member States *	Date on which adhesion to the Union took effect	Latest Act by which the State is bound and date on which the ratification of or accession to such Act became effective
Algeria	**March 1, 1966**	**Lisbon: March 1, 1966**
Argentina	**February 10, 1967**	**Lisbon: February 10, 1967**
Australia	*October 10, 1925*	*London: June 2, 1958*
Austria	*January 1, 1909*	*London: August 19, 1947*
Belgium	**July 7, 1884**	**Lisbon: August 21, 1965**
Brazil	July 7, 1884	The Hague: October 26, 1929
Bulgaria	**June 13, 1921**	**Lisbon: March 28, 1966**
Cameroon	**May 10, 1964**	**Lisbon: May 10, 1964**
Canada	*June 12, 1925*	*London: July 30, 1951*
Central African Republic	**November 19, 1963**	**Lisbon: November 19, 1963**
Ceylon	*December 29, 1952*	*London: December 29, 1952*
Chad	**November 19, 1963**	**Lisbon: November 19, 1963**
Congo (Brazzaville)	**September 2, 1963**	**Lisbon: September 2, 1963**
Cuba	**November 17, 1904**	**Lisbon: February 17, 1963**
Cyprus	**January 17, 1966**	**Lisbon: January 17, 1966**
Czechoslovakia	**October 5, 1919**	**Lisbon: January 4, 1962**
Dahomey	**January 10, 1967**	**Lisbon: January 10, 1967**
Denmark	*October 1, 1894*	*London: August 1, 1938*
Dominican Republic	July 11, 1890	The Hague: April 6, 1951
Finland	*September 20, 1921*	*London: May 30, 1953*
France	**July 7, 1884**	**Lisbon: January 4, 1962**
Gabon	**February 29, 1964**	**Lisbon: February 29, 1964**
Germany (Federal Republic)	**May 1, 1903**	**Lisbon: January 4, 1962**
Greece	*October 2, 1924*	*London: November 27, 1953*
Haiti	**July 1, 1958**	**Lisbon: January 4, 1962**
Holy See	*September 29, 1960*	*London: September 29, 1960*
Hungary	**January 1, 1909**	**Lisbon: March 23, 1967**
Iceland	*May 5, 1962*	*London: May 5, 1962*
Indonesia	*December 24, 1950*	*London: December 24, 1950*
Iran	**December 16, 1959**	**Lisbon: January 4, 1962**

Member States *	Date on which adhesion to the Union took effect	Latest Act by which the State is bound and date on which the ratification of or accession to such Act became effective
Ireland	**December 4, 1925**	**Lisbon: June 9, 1967**
Israel	**March 24, 1950**	**Lisbon: July 18, 1966**
Italy	*July 7, 1884*	*London: July 15, 1955*
Ivory Coast	**October 23, 1963**	**Lisbon: October 23, 1963**
Japan	**July 15, 1899**	**Lisbon: August 21, 1965**
Kenya	**June 14, 1965**	**Lisbon: June 14, 1965**
Laos	**November 19, 1963**	**Lisbon: November 19, 1963**
Lebanon	*September 1, 1924*	*London: September 30, 1947*
Liechtenstein	*July 14, 1933*	*London: January 28, 1951*
Luxembourg	*June 30, 1922*	*London: December 30, 1945*
Madagascar	**December 21, 1963**	**Lisbon: December 21, 1963**
Malawi	**July 6, 1964**	**Lisbon: July 6, 1964**
Malta	**October 20, 1967**	**Lisbon: October 20, 1967**
Mauritania	**April 11, 1965**	**Lisbon: April 11, 1965**
Mexico	**September 7, 1903**	**Lisbon: May 10, 1964**
Monaco	**April 29, 1956**	**Lisbon: January 4, 1962**
Morocco	**July 30, 1917**	**Lisbon: May 15, 1967**
Netherlands	*July 7, 1884*	*London: August 5, 1948*
New Zealand	*July 29, 1931*	*London: July 14, 1946*
Niger	**July 5, 1964**	**Lisbon: July 5, 1964**
Nigeria	**September 2, 1963**	**Lisbon: September 2, 1963**
Norway	**July 1, 1885**	**Lisbon: May 10, 1964**
Philippines	**September 27, 1965**	**Lisbon: September 27, 1965**
Poland	November 10, 1919	The Hague: Nov. 22, 1931
Portugal	*July 7, 1884*	*London: November 7, 1949*
Rhodesia	**April 6, 1965**	**Lisbon: April 6, 1965**
Rumania	**October 6, 1920**	**Lisbon: November 19, 1963**
San Marino	*March 4, 1960*	*London: March 4, 1960*
Senegal	**December 21, 1963**	**Lisbon: December 21, 1963**
South Africa	**December 1, 1947**	**Lisbon: April 17, 1965**
Spain	*July 7, 1884*	*London: March 2, 1956*
Sweden	*July 1, 1885*	*London: July 1, 1953*
Switzerland	**July 7, 1884**	**Lisbon: February 17, 1963**
Syrian Arab Republic	*September 1, 1924*	*London: September 30, 1947*
Tanzania	**June 16, 1963**	**Lisbon: June 16, 1963**
Togo	**September 10, 1967**	**Lisbon: September 10, 1967**
Trinidad and Tobago	**August 1, 1964**	**Lisbon: August 1, 1964**
Tunisia	*July 7, 1884*	*London: October 4, 1942*
Turkey	*October 10, 1925*	*London: June 27, 1957*
Uganda	**June 14, 1965**	**Lisbon: June 14, 1965**

Member States *	Date on which adhesion to the Union took effect	Latest Act by which the State is bound and date on which the ratification of or accession to such Act became effective
Union of Soviet Socialist Republics	**July 1, 1965**	**Lisbon: July 1, 1965**
United Arab Republic	*July 1, 1951*	*London: July 1, 1951*
United Kingdom of Great Britain and Northern Ireland	**July 7, 1884**	**Lisbon: January 4, 1962**
United States of America	**May 30, 1887**	**Lisbon: January 4, 1962**
Upper Volta	**November 19, 1963**	**Lisbon: November 19, 1963**
Uruguay	**March 18, 1967**	**Lisbon: March 18, 1967**
Viet-Nam	*December 8, 1956*	*London: December 8, 1956*
Yugoslavia	**February 26, 1921**	**Lisbon: April 11, 1965**
Zambia	**April 6, 1965**	**Lisbon: April 6, 1965**

(Total: 79 States)

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* Explanation of type:
Heavy type: States bound by the Lisbon Act (1958).
Italics: States bound by the London Act (1934).
Roman type: States bound by the Hague Act (1925).

Forrest-040

No. 11848

MULTILATERAL

Madrid Agreement for the repression of false or deceptive indications of source on goods of April 14, 1891, revised at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958. Done at Lisbon on 31 October 1958

Additional Act of Stockholm of July 14, 1967 to the abovementioned Agreement. Done at Stockholm on 14 July 1967

Authentic texts: French.

Registered by the Director General of the World Intellectual Property Organization, acting on behalf of the Parties, on 30 June 1972.

MULTILATÉRAL

Arrangement de Madrid concernant la répression des indications de provenance fausses ou fallacieuses du 14 avril 1891 revisé à Washington le 2 juin 1911, à La Haye le 6 novembre 1925, à Londres le 2 juin 1934 et à Lisbonne le 31 octobre 1958. Conclu à Lisbonne le 31 octobre 1958

Acte de Stockholm du 14 juillet 1967 additionnel à l'Arrangement susmentionné. Conclu à Stockholm le 14 juillet 1967

Textes authentiques : français.

Enregistrés par le Directeur général de l'Organisation mondiale de la propriété intellectuelle, agissant au nom des parties, le 30 juin 1972.

[TRANSLATION[1] — TRADUCTION[2]]

MADRID AGREEMENT FOR THE REPRESSION OF FALSE OR DECEPTIVE INDICATIONS OF SOURCE ON GOODS OF APRIL 14, 1891,[3] REVISED AT WASHINGTON ON JUNE 2, 1911,[4] AT THE HAGUE ON NOVEMBER 6, 1925,[5] AT LONDON ON JUNE 2, 1934,[6] AND AT LISBON ON OCTOBER 31, 1958[7]

Article 1

(1) All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is

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[1] Translation supplied by the World Intellectual Property Organization.

[2] Traduction fournie par l'Organisation mondiale de la propriété intellectuelle.

[3] *British and Foreign State Papers*, vol. 96, p. 837.

[4] *Ibid.*, vol. 104, p. 137.

[5] League of Nations, *Treaty Series*, vol. LXXIV, p. 319.

[6] *Ibid.*, vol. CXCII, p. 9.

[7] Came into force on 1 June 1963 between the following countries, which had deposited their instrument of ratification with the Government of Switzerland, or whose application for accession had been notified by the latter by 1 May 1963 at the latest, in accordance with article 6 (1) and (2):

Country	*Date of deposit of the instrument of ratification, or of notification of application for accession (a)*
France (With a declaration to the effect that the ratification shall apply to all the territories of the French Republic: Metropolitan Departments, Algerian Departments, Departments of the Sahara, Departments of Guadeloupe, Guyana, Martinique and Reunion, and Overseas Territories.)	24 March 1961
Federal Republic of Germany (With a declaration to the effect that the Agreement shall also apply to *Land Berlin* with effect from the day it will come into force for the Federal Republic of Germany.)(¹)	28 July 1961
Czechoslovakia	12 August 1961*a*
Monaco	2 September 1961
United Kingdom of Great Britain and Northern Ireland (With the following declaration: "With regard to the International Agreement for the Suppression of False Indications of Origin on Goods, the Embassy have the honour to declare that, in the view of Her Majesty's Government, the United Kingdom, by its present legislation, gives full and complete effect to the Arrangement of Madrid as revised at Lisbon on the 31st of October, 1958, and that the United Kingdom domestic legislation does not impair this Arrangement in any way.")	6 September 1961
Switzerland	25 June 1962

(¹) The following countries notified the Government of Switzerland of the communications by which they objected to the declaration by the Federal Republic of Germany: Cuba, Czechoslovakia, Hungary, Poland, Romania.

Subsequently, the Agreement came into force in each of the following countries after the notification by the Government of Switzerland of the deposit of its instrument of accession, in accordance with article 6 (1) and (2):

(Continued on page 167)

directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.

(2) Seizure shall also be effected in the country where the false or deceptive indication of source has been applied, or into which the goods bearing the false or deceptive indication have been imported.

(3) If the laws of a country do not permit seizure upon importation, such seizure shall be replaced by prohibition of importation.

(Footnote 7 continued from page 165)

Country	*Date of notification of the accession*		*Date of entry into force*	
Algeria	5 April	1972	5 July	1972(1)
Cuba	11 September	1964	11 October	1964
German Democratic Republic	15 December	1964(2)	15 January	1965
Hungary	23 February	1967	23 March	1967
(With the following declaration: [*Translation—Traduction*] With regard to article 5 (2) of the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods or 14 April 1891, revised at Washington on 2 June 1911, at the Hague on 6 November 1925, at London on 2 June 1934, and at Lisbon on 31 October 1958, the Presidential Council of the Hungarian People's Republic wishes to state that it adheres to the principles embodied in the Declaration adopted on 14 December 1960(3) by the United Nations General Assembly guaranteeing the independence of colonial countries and peoples. Accordingly, the Presidential Council of the Hungarian People's Republic considers that colonialism, in any of its forms and manifestations, is contrary to existing international law.)				
Ireland	9 May	1967	9 June	1967
Israel	2 June	1967	2 July	1967
Italy	29 November	1968	29 December	1968
Japan	21 July	1965	21 August	1965
Liechtenstein	10 March	1972	10 April	1972
Morocco	15 April	1967	15 May	1967
Sweden	3 September	1969	3 October	1969

(1) The date of entry into force, in respect of Algeria, of the Additional Act of Stockholm of 14 July 1967 to the above-mentioned Madrid Agreement (see p. 177 of this volume).

(2) The Governments of the following States have sent communications to the depositary to the effect that they objected to that instrument: Australia, Austria, Belgium, Brazil, Canada, Central African Republic, Denmark, Federal Republic of Germany, France, Greece, Haiti, Holy See, Iceland, Iran, Ireland, Ivory Coast, Japan, Luxembourg, Madagascar, Netherlands, New Zealand, Niger, Norway, Portugal, Republic of Viet Nam, San Marino, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America.

(3) United Nations, *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16* (A/4684), p. 66.

(4) If the laws of a country permit neither seizure upon importation nor prohibition of importation nor seizure within the country, then, until such time as the laws are modified accordingly, those measures shall be replaced by the actions and remedies available in such cases to nationals under the laws of such country.

(5) In the absence of any special sanctions ensuring the repression of false or deceptive indications of source, the sanctions provided by the corresponding provisions of the laws relating to marks or trade names shall be applicable.

Article 2

(1) Seizure shall take place at the instance of the customs authorities, who shall immediately inform the interested party, whether an individual person or a legal entity, in order that such party may, if he so desires, take appropriate steps in connection with the seizure effected as a conservatory measure. However, the public prosecutor or any other competent authority may demand seizure either at the request of the injured party or ex officio; the procedure shall then follow its normal course.

(2) The authorities shall not be bound to effect seizure in the case of transit.

Article 3

These provisions shall not prevent the vendor from indicating his name or address upon goods coming from a country other than that in which the sale takes place; but in such case the address or the name must be accompanied by an exact indication in clear characters of the country or place of manufacture or production, or by some other indication sufficient to avoid any error as to the true source of the wares.

Article 3bis

The countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods, and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communication.

Article 4

The courts of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement, regional appellations concerning the source of products of the vine being, however, excluded from the reservation specified by this Article.

Article 5

(1) Countries of the Union for the Protection of Industrial Property which have not acceded to this Agreement may accede at their request in the manner prescribed by Article 16 of the General Convention.[1]

(2) The provisions of Articles 16 *bis* and 17 *bis* of the General Convention shall apply to this Agreement.

Article 6

(1) This Act shall be ratified and the instruments of ratification deposited at Berne not later than May 1, 1963. It shall come into force, between the countries in whose names it has been ratified, one month after that date. However, if before that date it has been ratified in the name of at least six countries, it shall come into force, between those countries, one month after the deposit of the sixth ratification has been notified to them by the Government of the Swiss Confederation, and, in the countries in whose names it has been ratified at a later date, one month after the notification of each of such ratifications.

(2) Countries in whose names the instrument of ratification has not been deposited within the period provided for in the preceding paragraph may accede under the terms of Article 16 of the General Convention.

(3) This Act shall, as regards the relations between the countries to which it applies, replace the Agreement concluded at Madrid on April 14, 1891,[2] and the Acts resulting from subsequent revisions.[3]

(4) As regards countries to which this Act does not apply, but to which the Madrid Agreement revised at London in 1934[4] applies, the latter shall remain in force.

(5) Similarly, as regards countries to which neither this Act nor the Madrid Agreement revised at London applies, the Madrid Agreement revised at The Hague in 1925[5] shall remain in force.

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[1] *British and Foreign State Papers*, vol. 74, p. 44; vol. 92, p. 807; vol. 104, p. 116; League of Nations, *Treaty Series*, vol. LXXIV, p. 289; vol. CXCII, p. 17; and p. 107 of this volume.

[2] *British and Foreign State Papers*, vol. 96, p. 837.

[3] *Ibid.*, vol. 104, p. 137; and League of Nations, *Treaty Series*, vol. LXXIV, p. 319, and vol. CXCII, p. 9.

[4] League of Nations, *Treaty Series*, vol. CXCII, p. 9.

[5] *Ibid.*, vol. LXXIV, p. 319.

(6) Similarly, as regards countries to which neither this Act nor the Madrid Agreement revised at London nor the Madrid Agreement revised at The Hague applies, the Madrid Agreement revised at Washington in 1911[1] shall remain in force.

DONE at Lisbon, on October 31, 1958.

For the Federal Republic of Germany:

BERGER
HERBERT KÜHNEMANN
KURT HAERTEL

For the United States of Brazil:

For Cuba:

ad referendum
DR. JOSÉ ANTONIO MAHY

For the Dominican Republic:

For Spain:

ad referendum
RAFAEL MORALES

For France:

G. FINNISS

For the United Kingdom of Great Britain and Northern Ireland:

STEPHEN L. HOLMES
GORDON GRANT
WILLIAM WALLACE

For the People's Republic of Hungary:

ad referendum
PÀL RÁCZ

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[1] *British and Foreign State Papers*, vol. 104, p. 137.

For Ireland:

J. J. LENNON

For Israel:

DR. G. KITRON
DR. REINHOLD COHN
DR. I. BEN-MEIR

For Italy:

TALAMO
GIUSEPPE MARCHEGIANO
MARCELLO ROSCIONI

For Japan:

YUZO ISONO
SHOICHI INOUYE

For Liechtenstein:

PLINIO BOLLA
HANS MORF

For Morocco:

TAHAR MEKOUAR

For Monaco:

CONDE DE BOBONE
J. M. NOTARI

For New Zealand:

J. W. MILES

For the Polish People's Republic:

ZBIGNIEW MUSZYNSKI

For Portugal:

LUÍS DA CÂMARA PINTO COELHO
AFONSO MARCHUETA
ALEXANDRE DE LANCASTRE ARAÚJO BOBONE
JORGE VAN ZELLER GARIN

For Sweden:

STURE PETRÉN
ÅKE V. ZWEIGBERGK

For Switzerland:

PLINIO BOLLA
HANS MORF
FERD. DUFOUR
LÉON EGGER
PIERRE JEAN POINTET
WALTER STAMM

For the Czechoslovak Republic:

For Turkey:

For Viet-Nam:

ADDITIONAL ACT OF STOCKHOLM OF JULY 14, 1967[1] TO THE MADRID AGREEMENT FOR THE REPRESSION OF FALSE OR DECEPTIVE INDICATIONS OF SOURCE ON GOODS OF APRIL 14, 1891,[2] REVISED AT WASHINGTON ON JUNE 2, 1911,[3] AT THE HAGUE ON NOVEMBER 6, 1925,[4] AT LONDON ON JUNE 2, 1934,[5] AND AT LISBON ON OCTOBER 31, 1958[6]

Article 1

Instruments of accession to the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, of April 14, 1891[2] (hereinafter designated as "the Madrid Agreement"), as revised at Washington on June 2, 1911,[3] at The Hague on November 6, 1925,[4] at London on June 2, 1934,[5] and at Lisbon on October 31, 1958[6] (hereinafter designated as "the Lisbon Act"), shall be deposited with the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General"), who shall notify such deposits to the countries party to the Agreement.

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[1] Came into force on 26 April 1970, the date on which the Stockholm Convention of 14 July 1967 establishing the World Intellectual Property Organization(1) came into force, as between the following countries, which had by that date deposited their instrument of ratification or accession with the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI), in accordance with article 5 (1):

Country	*Date of deposit of instrument of ratification, or accession (a)*	
Ireland	27 March	1968
German Democratic Republic	20 June	1968*a*(2)
United Kingdom of Great Britain and Northern Ireland	26 February	1969
Israel	30 July	1969
Sweden	12 August	1969
Hungary	18 December	1969
Switzerland	26 January	1970

(1) See p. 3 of this volume.

(2) The Governments of the following States have sent communications to the depositary to the effect that they objected to that instrument: Argentina, Belgium, Canada, Denmark, Federal Republic of Germany, France, Gabon, Greece, Haiti, Holy See, Iceland, Iran, Ireland, Israel, Japan, Luxembourg, Madagascar, Niger, Portugal, South Africa, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America.

Subsequently, the Additional Act came into force with respect to each of the following countries three months after the date on which its ratification or accession had been notified by the Director General of the World Intellectual Property Organization (WIPO) (the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI) before 22 September 1970), in accordance with article 5 (2):

Country	*Date of notification of deposit instrument of ratification, or accession (a)*		*Date of entry into force*	
Algeria	5 April	1972*a*	5 July	1972
Czechoslovakia	29 September	1970*a*	29 December	1970

(Continued on page 181)

Article 2

References in Articles 5 and 6 (2) of the Lisbon Act to Articles 16, 16*bis*, and 17*bis*, of the General Convention shall be construed as references to those provisions of the Stockholm Act of the Paris Convention for the Protection of Industrial Property[7] which correspond to the said Articles.

Article 3

(1) This Additional Act may be signed by any country party to the Madrid Agreement and may be ratified or acceded to by any country which has ratified or acceded to the Lisbon Act.

(2) Instruments of ratification or accession shall be deposited with the Director General.

Article 4

Any country which has not ratified or acceded to the Lisbon Act shall become bound also by Articles 1 and 2 of this Additional Act from the date on which its accession to the Lisbon Act enters into force, provided however that, if on the said date this Additional Act has not yet entered into force pursuant to Article 5 (1), then, such country shall become bound by Articles 1 and 2 of this Additional Act only from the date of entry into force of this Additional Act pursuant to Article 5 (1).

(Footnote 1 continued from page 179)

Country	*Date of notification of deposit instrument of ratification, or accession (a)*	*Date of entry into force*
Federal Republic of Germany .... (With a declaration to the effect that the Additional Act shall also apply to *Land Berlin* with effect from the day it will come into force for the Federal Republic of Germany.)	19 June 1970	19 September 1970
Liechtenstein	25 February 1972	25 May 1972

[2] *British and Foreign State Papers*, vol. 96, p. 837.

[3] *Ibid.*, vol. 104, p. 137.

[4] League of Nations, *Treaty Series*, vol. LXXIV), p. 319.

[5] *Ibid.*, vol. CXCII, p. 9.

[6] See p. 165 of this volume.

[7] *British and Foreign State Papers*, vol. 74, p. 44; vol. 92, p. 807; vol. 104, p. 116; League of Nations, *Treaty Series*, vol. LXXIV, p. 289; vol. CXCII, p. 17; and p. 305 of this volume.

Article 5

(1) This Additional Act shall enter into force on the date on which the Stockholm Convention of July 14, 1967,[1] establishing the World Intellectual Property Organization has entered into force, provided however that, if by that date at least two ratifications or accessions to this Additional Act have not been deposited, then, this Additional Act shall enter into force on the date on which two ratifications or accessions to this Additional Act have been deposited.

(2) With respect to any country which deposits its instrument of ratification or accession after the date on which this Additional Act has entered into force pursuant to the foregoing paragraph, this Additional Act shall enter into force three months after the date on which its ratification or accession has been notified by the Director General.

Article 6

(1) This Additional Act shall be signed in a single copy in the French language and shall be deposited with the Government of Sweden.

(2) This Additional Act shall remain open for signature at Stockholm until the date of its entry into force pursuant to Article 5 (1).

(3) The Director General shall transmit two copies, certified by the Government of Sweden, of the signed text of this Additional Act to the Governments of all countries party to the Madrid Agreement and, on request, to the Government of any other country.

(4) The Director General shall register this Additional Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries party to the Madrid Agreement of signatures, deposits of instruments of ratification or accession, entry into force, and other relevant notifications.

Article 7

Until the first Director General assumes office, references in this Additional Act to him shall be construed as references to the Director of the United International Bureaux for the Protection of Intellectual Property.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Additional Act.

DONE at Stockholm, on July 14, 1967.

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[1] See p. 3 of this volume.

For Brazil:

For Ceylon:

For Cuba:

A. M. GONZÁLEZ
12/1/68

For Spain:

J. F. ALCOVER
ELECTO J. GARCIA TEJEDOR

For France:

B. DE MENTHON

For Hungary:

ESZTERGÁLYOS
12/1/1968
Subject to ratification.

For Ireland:

VALENTIN IREMONGER
12 January 1968

For Israel :

Z. SHER
G. GAVRIELI

For Italy:

CIPPICO
GIORGIO RANZI

For Japan:

M. TAKAHASHI
C. KAWADE

For Lebanon:

For Liechtenstein:

MARIANNE MARXER

For Morocco:

H'SSAINE

For Monaco:

J. M. NOTARI

For New Zealand:

For Poland:

M. KAJZER
Subject to subsequent ratification.

For Portugal:

ADRIANO DE CARVALHO
JOSÉ DE OLIVEIRA ASCENSÃO
RUY ALVARO COSTA DE MORAIS SERRÃO

For the United Arab Republic:

For the Dominican Republic:

For the Federal Republic of Germany:

KURT HAERTEL

For the Republic of Viet-Nam:

For the United Kingdom of Great Britain and Northern Ireland:

GORDON GRANT
WILLIAM WALLACE

For San Marino:

For Sweden:

HERMAN KLING

For Switzerland:

HANS MORF
JOSEPH VOYAME

For Syria:

For Czechoslovakia:

For Tunisia:

M. KEDADI

For Turkey:

Forrest-041

Forrest-041

GENEVA ACT OF THE LISBON AGREEMENT ON APPELLATIONS OF ORIGIN AND GEOGRAPHICAL INDICATIONS

List of Articles

Chapter VII: Final Provisions

Chapter I
Introductory and General Provisions

Article 1
Abbreviated Expressions

For the purposes of this Act, unless expressly stated otherwise:

(i) "Lisbon Agreement" means the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958;

(ii) "1967 Act" means the Lisbon Agreement as revised at Stockholm on July 14, 1967, and amended on September 28, 1979;

(iii) "this Act" means the Lisbon Agreement on Appellations of Origin and Geographical Indications, as established by the present Act;

(iv) "Regulations" means the Regulations as referred to in Article 25;

(v) "Paris Convention" means the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised and amended;

(vi) "appellation of origin" means a denomination as referred to in Article 2(1)(i);

(vii) "geographical indication" means an indication as referred to in Article 2(1)(ii);

(viii) "International Register" means the International Register maintained by the International Bureau in accordance with Article 4 as the official collection of data concerning international registrations of appellations of origin and geographical indications, regardless of the medium in which such data are maintained;

(ix) "international registration" means an international registration recorded in the International Register;

(x) "application" means an application for international registration;

(xi) "registered" means entered in the International Register in accordance with this Act;

(xii) "geographical area of origin" means a geographical area as referred to in Article 2(2);

(xiii) "trans-border geographical area" means a geographical area situated in, or covering, adjacent Contracting Parties;

(xiv) "Contracting Party" means any State or intergovernmental organization party to this Act;

(xv) "Contracting Party of Origin" means the Contracting Party where the geographical area of origin is situated or the Contracting Parties where the trans-border geographical area of origin is situated;

(xvi) "Competent Authority" means an entity designated in accordance with Article 3;

(xvii) “beneficiaries” means the natural persons or legal entities entitled under the law of the Contracting Party of Origin to use an appellation of origin or a geographical indication;

(xviii) “intergovernmental organization” means an intergovernmental organization eligible to become party to this Act in accordance with Article 28(1)(iii);

(xix) “Organization” means the World Intellectual Property Organization;

(xx) “Director General” means the Director General of the Organization;

(xxi) “International Bureau” means the International Bureau of the Organization.

Article 2
Subject-Matter

(1) *[Appellations of Origin and Geographical Indications]* This Act applies in respect of:

(i) any denomination protected in the Contracting Party of Origin consisting of or containing the name of a geographical area, or another denomination known as referring to such area, which serves to designate a good as originating in that geographical area, where the quality or characteristics of the good are due exclusively or essentially to the geographical environment, including natural and human factors, and which has given the good its reputation; as well as

(ii) any indication protected in the Contracting Party of Origin consisting of or containing the name of a geographical area, or another indication known as referring to such area, which identifies a good as originating in that geographical area, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

(2) *[Possible Geographical Areas of Origin]* A geographical area of origin as described in paragraph (1) may consist of the entire territory of the Contracting Party of Origin or a region, locality or place in the Contracting Party of Origin. This does not exclude the application of this Act in respect of a geographical area of origin, as described in paragraph (1), consisting of a trans-border geographical area, or a part thereof.

Article 3
Competent Authority

Each Contracting Party shall designate an entity which shall be responsible for the administration of this Act in its territory and for communications with the International Bureau under this Act and the Regulations. The Contracting Party shall notify the name and contact details of such Competent Authority to the International Bureau, as specified in the Regulations.

Article 4
International Register

The International Bureau shall maintain an International Register recording international registrations effected under this Act, under the Lisbon Agreement and the 1967 Act, or under both, and data relating to such international registrations.

Chapter II
Application and International Registration

Article 5
Application

(1) *[Place of Filing]* Applications shall be filed with the International Bureau.

(2) *[Application Filed by Competent Authority]* Subject to paragraph (3), the application for the international registration of an appellation of origin or a geographical indication shall be filed by the Competent Authority in the name of:

(i) the beneficiaries; or

(ii) a natural person or legal entity having legal standing under the law of the Contracting Party of Origin to assert the rights of the beneficiaries or other rights in the appellation of origin or geographical indication.

(3) *[Application Filed Directly]* (a) Without prejudice to paragraph (4), if the legislation of the Contracting Party of Origin so permits, the application may be filed by the beneficiaries or by a natural person or legal entity referred to in paragraph (2)(ii).

(b) Subparagraph (a) applies subject to a declaration from the Contracting Party that its legislation so permits. Such declaration may be made by the Contracting Party at the time of deposit of its instrument of ratification or accession or at any later time. Where the declaration is made at the time of the deposit of its instrument of ratification or accession, it shall take effect upon the entry into force of this Act with respect to that Contracting Party. Where the declaration is made after the entry into force of this Act with respect to the Contracting Party, it shall take effect three months after the date on which the Director General has received the declaration.

(4) *[Possible Joint Application in the Case of a Trans-border Geographical Area]* In case of a geographical area of origin consisting of a trans-border geographical area, the adjacent Contracting Parties may, in accordance with their agreement, file an application jointly through a commonly designated Competent Authority.

(5) *[Mandatory Contents]* The Regulations shall specify the mandatory particulars that must be included in the application, in addition to those specified in Article 6(3).

(6) *[Optional Contents]* The Regulations may specify the optional particulars that may be included in the application.

Article 6
International Registration

(1) *[Formal Examination by the International Bureau]* Upon receipt of an application for the international registration of an appellation of origin or a geographical indication in due form, as specified in the Regulations, the International Bureau shall register the appellation of origin, or the geographical indication, in the International Register.

(2) *[Date of International Registration]* Subject to paragraph (3), the date of the international registration shall be the date on which the application was received by the International Bureau.

(3) *[Date of International Registration Where Particulars Missing]* Where the application does not contain all the following particulars:

(i) the identification of the Competent Authority or, in the case of Article 5(3), the applicant or applicants;

(ii) the details identifying the beneficiaries and, where applicable, the natural person or legal entity referred to in Article 5(2)(ii);

(iii) the appellation of origin, or the geographical indication, for which international registration is sought;

(iv) the good or goods to which the appellation of origin, or the geographical indication, applies;

the date of the international registration shall be the date on which the last of the missing particulars is received by the International Bureau.

(4) *[Publication and Notification of International Registrations]* The International Bureau shall, without delay, publish each international registration and notify the Competent Authority of each Contracting Party of the international registration.

(5) *[Date of Effect of International Registration]* (a) Subject to subparagraph (b), a registered appellation of origin or geographical indication shall, in each Contracting Party that has not refused protection in accordance with Article 15, or that has sent to the International Bureau a notification of grant of protection in accordance with Article 18, be protected from the date of the international registration.

(b) A Contracting Party may, in a declaration, notify the Director General that, in accordance with its national or regional legislation, a registered appellation of origin or geographical indication is protected from a date that is mentioned in the declaration, which date shall however not be later than the date of expiry of the time limit for refusal specified in the Regulations in accordance with Article 15(1)(a).

Article 7
Fees

(1) *[International Registration Fee]* International registration of each appellation of origin, and each geographical indication, shall be subject to payment of the fee specified in the Regulations.

(2) *[Fees for Other Entries in the International Register]* The Regulations shall specify the fees to be paid in respect of other entries in the International Register and for the supply of extracts, attestations, or other information concerning the contents of the international registration.

(3) *[Fee Reductions]* Reduced fees shall be established by the Assembly in respect of certain international registrations of appellations of origin, and in respect of certain international registrations of geographical indications, in particular those in respect of which the Contracting Party of Origin is a developing country or a least-developed country.

(4) *[Individual Fee]* (a) Any Contracting Party may, in a declaration, notify the Director General that the protection resulting from international registration shall extend to it only if a fee is paid to cover its cost of substantive examination of the international registration. The amount

of such individual fee shall be indicated in the declaration and can be changed in further declarations. The said amount may not be higher than the equivalent of the amount required under the national or regional legislation of the Contracting Party diminished by the savings resulting from the international procedure. Additionally, the Contracting Party may, in a declaration, notify the Director General that it requires an administrative fee relating to the use by the beneficiaries of the appellation of origin or the geographical indication in that Contracting Party.

(b) Non-payment of an individual fee shall, in accordance with the Regulations, have the effect that protection is renounced in respect of the Contracting Party requiring the fee.

Article 8
Period of Validity of International Registrations

(1) *[Dependency]* International registrations shall be valid indefinitely, on the understanding that the protection of a registered appellation of origin or geographical indication shall no longer be required if the denomination constituting the appellation of origin, or the indication constituting the geographical indication, is no longer protected in the Contracting Party of Origin.

(2) *[Cancellation]* (a) The Competent Authority of the Contracting Party of Origin, or, in the case of Article 5(3), the beneficiaries or the natural person or legal entity referred to in Article 5(2)(ii) or the Competent Authority of the Contracting Party of Origin, may at any time request the International Bureau to cancel the international registration concerned.

(b) In case the denomination constituting a registered appellation of origin, or the indication constituting a registered geographical indication, is no longer protected in the Contracting Party of Origin, the Competent Authority of the Contracting Party of Origin shall request cancellation of the international registration.

Chapter III
Protection

Article 9
Commitment to Protect

Each Contracting Party shall protect registered appellations of origin and geographical indications on its territory, within its own legal system and practice but in accordance with the terms of this Act, subject to any refusal, renunciation, invalidation or cancellation that may become effective with respect to its territory, and on the understanding that Contracting Parties that do not distinguish in their national or regional legislation as between appellations of origin and geographical indications shall not be required to introduce such a distinction into their national or regional legislation.

Article 10
Protection Under Laws of Contracting Parties or Other Instruments

(1) *[Form of Legal Protection]* Each Contracting Party shall be free to choose the type of legislation under which it establishes the protection stipulated in this Act, provided that such legislation meets the substantive requirements of this Act.

(2) *[Protection Under Other Instruments]* The provisions of this Act shall not in any way affect any other protection a Contracting Party may accord in respect of registered appellations of origin or registered geographical indications under its national or regional legislation, or under other international instruments.

(3) *[Relation to Other Instruments]* Nothing in this Act shall derogate from any obligations that Contracting Parties have to each other under any other international instruments, nor shall it prejudice any rights that a Contracting Party has under any other international instruments.

Article 11

Protection in Respect of Registered Appellations of Origin and Geographical Indications

(1) *[Content of Protection]* Subject to the provisions of this Act, in respect of a registered appellation of origin or a registered geographical indication, each Contracting Party shall provide the legal means to prevent:

(a) use of the appellation of origin or the geographical indication

(i) in respect of goods of the same kind as those to which the appellation of origin or the geographical indication applies, not originating in the geographical area of origin or not complying with any other applicable requirements for using the appellation of origin or the geographical indication;

(ii) in respect of goods that are not of the same kind as those to which the appellation of origin or geographical indication applies or services, if such use would indicate or suggest a connection between those goods or services and the beneficiaries of the appellation of origin or the geographical indication, and would be likely to damage their interests, or, where applicable, because of the reputation of the appellation of origin or geographical indication in the Contracting Party concerned, such use would be likely to impair or dilute in an unfair manner, or take unfair advantage of, that reputation;

(b) any other practice liable to mislead consumers as to the true origin, provenance or nature of the goods.

(2) *[Content of Protection in Respect of Certain Uses]* Paragraph (1)(a) shall also apply to use of the appellation of origin or geographical indication amounting to its imitation, even if the true origin of the goods is indicated, or if the appellation of origin or the geographical indication is used in translated form or is accompanied by terms such as “style”, “kind”, “type”, “make”, “imitation”, “method”, “as produced in”, “like”, “similar” or the like[1].

(3) *[Use in a Trademark]* Without prejudice to Article 13(1), a Contracting Party shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a later trademark if use of the trademark would result in one of the situations covered by paragraph (1).

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[1] Agreed Statement concerning Article 11(2): For the purposes of this Act, it is understood that where certain elements of the denomination or indication constituting the appellation of origin or geographical indication have a generic character in the Contracting Party of Origin, their protection under this paragraph shall not be required in the other Contracting Parties. For greater certainty, a refusal or invalidation of a trademark, or a finding of infringement, in the Contracting Parties under the terms of Article 11 cannot be based on the component that has a generic character.

Article 12
Protection Against Becoming Generic

Subject to the provisions of this Act, registered appellations of origin and registered geographical indications cannot be considered to have become generic[2] in a Contracting Party.

Article 13
Safeguards in Respect of Other Rights

(1) *[Prior Trademark Rights]* The provisions of this Act shall not prejudice a prior trademark applied for or registered in good faith, or acquired through use in good faith, in a Contracting Party. Where the law of a Contracting Party provides a limited exception to the rights conferred by a trademark to the effect that such a prior trademark in certain circumstances may not entitle its owner to prevent a registered appellation of origin or geographical indication from being granted protection or used in that Contracting Party, protection of the registered appellation of origin or geographical indication shall not limit the rights conferred by that trademark in any other way.

(2) *[Personal Name Used in Business]* The provisions of this Act shall not prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

(3) *[Rights Based on a Plant Variety or Animal Breed Denomination]* The provisions of this Act shall not prejudice the right of any person to use a plant variety or animal breed denomination in the course of trade, except where such plant variety or animal breed denomination is used in such a manner as to mislead the public.

(4) *[Safeguards in the Case of Notification of Withdrawal of Refusal or a Grant of Protection]* Where a Contracting Party that has refused the effects of an international registration under Article 15 on the ground of use under a prior trademark or other right, as referred to in this Article, notifies the withdrawal of that refusal under Article 16 or a grant of protection under Article 18, the resulting protection of the appellation of origin or geographical indication shall not prejudice that right or its use, unless the protection was granted following the cancellation, non-renewal, revocation or invalidation of the right.

Article 14
Enforcement Procedures and Remedies

Each Contracting Party shall make available effective legal remedies for the protection of registered appellations of origin and registered geographical indications and provide that legal proceedings for ensuring their protection may be brought by a public authority or by any interested party, whether a natural person or a legal entity and whether public or private, depending on its legal system and practice.

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[2] Agreed Statement concerning Article 12: For the purposes of this Act, it is understood that Article 12 is without prejudice to the application of the provisions of this Act concerning prior use, as, prior to international registration, the denomination or indication constituting the appellation of origin or geographical indication may already, in whole or in part, be generic in a Contracting Party other than the Contracting Party of Origin, for example, because the denomination or indication, or part of it, is identical with a term customary in common language as the common name of a good or service in such Contracting Party, or is identical with the customary name of a grape variety in such Contracting Party.

Chapter IV
Refusal and Other Actions in Respect of International Registrations

Article 15
Refusal

(1) *[Refusal of Effects of International Registration]* (a) Within the time limit specified in the Regulations, the Competent Authority of a Contracting Party may notify the International Bureau of the refusal of the effects of an international registration in its territory. The notification of refusal may be made by the Competent Authority *ex officio*, if its legislation so permits, or at the request of an interested party.

(b) The notification of refusal shall set out the grounds on which the refusal is based.

(2) *[Protection Under Other Instruments]* The notification of a refusal shall not be detrimental to any other protection that may be available, in accordance with Article 10(2), to the denomination or indication concerned in the Contracting Party to which the refusal relates.

(3) *[Obligation to Provide Opportunity for Interested Parties]* Each Contracting Party shall provide a reasonable opportunity, for anyone whose interests would be affected by an international registration, to request the Competent Authority to notify a refusal in respect of the international registration.

(4) *[Registration, Publication and Communication of Refusals]* The International Bureau shall record the refusal and the grounds for the refusal in the International Register. It shall publish the refusal and the grounds for the refusal and shall communicate the notification of refusal to the Competent Authority of the Contracting Party of Origin or, where the application has been filed directly in accordance with Article 5(3), the beneficiaries or the natural person or legal entity referred to in Article 5(2)(ii) as well as the Competent Authority of the Contracting Party of Origin.

(5) *[National Treatment]* Each Contracting Party shall make available to interested parties affected by a refusal the same judicial and administrative remedies that are available to its own nationals in respect of the refusal of protection for an appellation of origin or a geographical indication.

Article 16
Withdrawal of Refusal

A refusal may be withdrawn in accordance with the procedures specified in the Regulations. A withdrawal shall be recorded in the International Register.

Article 17
Transitional Period

(1) *[Option to Grant Transitional Period]* Without prejudice to Article 13, where a Contracting Party has not refused the effects of an international registration on the ground of prior use by a third party or has withdrawn such refusal or has notified a grant of protection, it may, if its legislation so permits, grant a defined period as specified in the Regulations, for terminating such use.

(2) *[Notification of a Transitional Period]* The Contracting Party shall notify the International Bureau of any such period, in accordance with the procedures specified in the Regulations.

Article 18
Notification of Grant of Protection

The Competent Authority of a Contracting Party may notify the International Bureau of the grant of protection to a registered appellation of origin or geographical indication. The International Bureau shall record any such notification in the International Register and publish it.

Article 19
Invalidation

(1) *[Opportunity to Defend Rights]* Invalidation of the effects, in part or in whole, of an international registration in the territory of a Contracting Party may be pronounced only after having given the beneficiaries an opportunity to defend their rights. Such opportunity shall also be given to the natural person or legal entity referred to in Article 5(2)(ii).

(2) *[Notification, Recordal and Publication]* The Contracting Party shall notify the invalidation of the effects of an international registration to the International Bureau, which shall record the invalidation in the International Register and publish it.

(3) *[Protection Under Other Instruments]* Invalidation shall not be detrimental to any other protection that may be available, in accordance with Article 10(2), to the denomination or indication concerned in the Contracting Party that invalidated the effects of the international registration.

Article 20
Modifications and Other Entries in the International Register

Procedures for the modification of international registrations and other entries in the International Register shall be specified in the Regulations.

Chapter V
Administrative Provisions

Article 21
Membership of the Lisbon Union

The Contracting Parties shall be members of the same Special Union as the States party to the Lisbon Agreement or the 1967 Act, whether or not they are party to the Lisbon Agreement or the 1967 Act.

Article 22
Assembly of the Special Union

(1) *[Composition]* (a) The Contracting Parties shall be members of the same Assembly as the States party to the 1967 Act.

(b) Each Contracting Party shall be represented by one delegate, who may be assisted by alternate delegates, advisors and experts.

(c) Each delegation shall bear its own expenses.

(2) *[Tasks]* (a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Special Union and the implementation of this Act;

(ii) give directions to the Director General concerning the preparation of revision conferences referred to in Article 26(1), due account being taken of any comments made by those members of the Special Union which have not ratified or acceded to this Act;

(iii) amend the Regulations;

(iv) review and approve the reports and activities of the Director General concerning the Special Union, and give him or her all necessary instructions concerning matters within the competence of the Special Union;

(v) determine the program and adopt the biennial budget of the Special Union, and approve its final accounts;

(vi) adopt the financial Regulations of the Special Union;

(vii) establish such committees and working groups as it deems appropriate to achieve the objectives of the Special Union;

(viii) determine which States, intergovernmental and non-governmental organizations shall be admitted to its meetings as observers;

(ix) adopt amendments to Articles 22 to 24 and 27;

(x) take any other appropriate action to further the objectives of the Special Union and perform any other functions as are appropriate under this Act.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) *[Quorum]* (a) One-half of the members of the Assembly which have the right to vote on a given matter shall constitute a quorum for the purposes of the vote on that matter.

(b) Notwithstanding the provisions of subparagraph (a), if, in any session, the number of the members of the Assembly which are States, have the right to vote on a given matter and are represented is less than one-half but equal to or more than one-third of the members of the Assembly which are States and have the right to vote on that matter, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the members of the Assembly which are States, have the right to vote on the said matter and were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of such members having thus expressed their vote or abstention attains the number of the members which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(4) *[Taking Decisions in the Assembly]* (a) The Assembly shall endeavor to take its decisions by consensus.

(b) Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,

(i) each Contracting Party that is a State shall have one vote and shall vote only in its own name; and

(ii) any Contracting Party that is an intergovernmental organization may vote, in place of its member States, with a number of votes equal to the number of its member States which are party to this Act. No such intergovernmental organization shall participate in the vote if any one of its member States exercises its right to vote, and *vice versa*.

(c) On matters concerning only States that are bound by the 1967 Act, Contracting Parties that are not bound by the 1967 Act shall not have the right to vote, whereas, on matters concerning only Contracting Parties, only the latter shall have the right to vote.

(5) *[Majorities]* (a) Subject to Articles 25(2) and 27(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(b) Abstentions shall not be considered as votes.

(6) *[Sessions]* (a) The Assembly shall meet upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, either at the request of one-fourth of the members of the Assembly or on the Director General's own initiative.

(c) The agenda of each session shall be prepared by the Director General.

(7) *[Rules of Procedure]* The Assembly shall adopt its own rules of procedure.

Article 23
International Bureau

(1) *[Administrative Tasks]* (a) International registration and related duties, as well as all other administrative tasks concerning the Special Union, shall be performed by the International Bureau.

(b) In particular, the International Bureau shall prepare the meetings and provide the Secretariat of the Assembly and of such committees and working groups as may have been established by the Assembly.

(c) The Director General shall be the Chief Executive of the Special Union and shall represent the Special Union.

(2) *[Role of the International Bureau in the Assembly and Other Meetings]* The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the committees and working groups established by the Assembly. The Director General, or a staff member designated by him, shall be *ex officio* Secretary of such a body.

(3) *[Conferences]* (a) The International Bureau shall, in accordance with the directions of the Assembly, make the preparations for any revision conferences.

(b) The International Bureau may consult with intergovernmental and international and national non-governmental organizations concerning the said preparations.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at revision conferences.

(4) *[Other Tasks]* The International Bureau shall carry out any other tasks assigned to it in relation to this Act.

Article 24
Finances

(1) *[Budget]* The income and expenses of the Special Union shall be reflected in the budget of the Organization in a fair and transparent manner.

(2) *[Sources of Financing of the Budget]* The income of the Special Union shall be derived from the following sources:

(i) fees collected under Article 7(1) and (2);

(ii) proceeds from the sale of, or royalties on, the publications of the International Bureau;

(iii) gifts, bequests, and subventions;

(iv) rent, investment revenue, and other, including miscellaneous, income;

(v) special contributions of the Contracting Parties or any alternative source derived from the Contracting Parties or beneficiaries, or both, if and to the extent to which receipts from the sources indicated in items (i) to (iv) do not suffice to cover the expenses, as decided by the Assembly.

(3) *[Fixing of Fees; Level of the Budget]* (a) The amounts of the fees referred to in paragraph (2) shall be fixed by the Assembly on the proposal of the Director General and shall be so fixed that, together with the income derived from other sources under paragraph (2), the revenue of the Special Union should, under normal circumstances, be sufficient to cover the expenses of the International Bureau for maintaining the international registration service.

(b) If the Program and Budget of the Organization is not adopted before the beginning of a new financial period, the authorization to the Director General to incur obligations and make payments shall be at the same level as it was in the previous financial period.

(4) *[Establishing the Special Contributions Referred to in Paragraph (2)(v)]* For the purpose of establishing its contribution, each Contracting Party shall belong to the same class as it belongs to in the context of the Paris Convention or, if it is not a Contracting Party of the Paris Convention, as it would belong to if it were a Contracting Party of the Paris Convention. Intergovernmental organizations shall be considered to belong to contribution class I (one), unless otherwise unanimously decided by the Assembly. The contribution shall be partially weighted according to the number of registrations originating in the Contracting Party, as decided by the Assembly.

(5) *[Working Capital Fund]* The Special Union shall have a working capital fund, which shall be constituted by payments made by way of advance by each member of the Special Union when the Special Union so decides. If the fund becomes insufficient, the Assembly may decide to increase it. The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General. Should the Special Union record a surplus of income over expenditure in any financial period, the Working Capital Fund advances may be repaid to each member proportionate to their initial payments upon proposal by the Director General and decision by the Assembly.

(6) *[Advances by Host State]* (a) In the headquarters agreement concluded with the State on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such State shall grant advances. The amount of those advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such State and the Organization.

(b) The State referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(7) *[Auditing of Accounts]* The auditing of the accounts shall be effected by one or more of the States members of the Special Union or by external auditors, as provided in the Financial Regulations of the Organization. They shall be designated, with their agreement, by the Assembly.

Article 25
Regulations

(1) *[Subject-Matter]* The details for carrying out this Act shall be established in the Regulations.

(2) *[Amendment of Certain Provisions of the Regulations]* (a) The Assembly may decide that certain provisions of the Regulations may be amended only by unanimity or only by a three-fourths majority.

(b) In order for the requirement of unanimity or a three-fourths majority no longer to apply in the future to the amendment of a provision of the Regulations, unanimity shall be required.

(c) In order for the requirement of unanimity or a three-fourths majority to apply in the future to the amendment of a provision of the Regulations, a three-fourths majority shall be required.

(3) *[Conflict Between This Act and the Regulations]* In the case of conflict between the provisions of this Act and those of the Regulations, the former shall prevail.

Chapter VI
Revision and Amendment

Article 26
Revision

(1) *[Revision Conferences]* This Act may be revised by Diplomatic Conferences of the Contracting Parties. The convocation of any Diplomatic Conference shall be decided by the Assembly.

(2) *[Revision or Amendment of Certain Articles]* Articles 22 to 24 and 27 may be amended either by a revision conference or by the Assembly according to the provisions of Article 27.

Article 27
Amendment of Certain Articles by the Assembly

(1) *[Proposals for Amendment]* (a) Proposals for the amendment of Articles 22 to 24, and the present Article, may be initiated by any Contracting Party or by the Director General.

(b) Such proposals shall be communicated by the Director General to the Contracting Parties at least six months in advance of their consideration by the Assembly.

(2) *[Majorities]* Adoption of any amendment to the Articles referred to in paragraph (1) shall require a three-fourths majority, except that adoption of any amendment to Article 22, and to the present paragraph, shall require a four-fifths majority.

(3) *[Entry into Force]* (a) Except where subparagraph (b) applies, any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of those Contracting Parties which, at the time the amendment was adopted, were members of the Assembly and had the right to vote on that amendment.

(b) Any amendment to Article 22(3) or (4) or to this subparagraph shall not enter into force if, within six months of its adoption by the Assembly, any Contracting Party notifies the Director General that it does not accept such amendment.

(c) Any amendment which enters into force in accordance with the provisions of this paragraph shall bind all the States and intergovernmental organizations which are Contracting Parties at the time the amendment enters into force, or which become Contracting Parties at a subsequent date.

Chapter VII
Final Provisions

Article 28
Becoming Party to This Act

(1) *[Eligibility]* Subject to Article 29 and paragraphs (2) and (3) of the present Article,

(i) any State which is party to the Paris Convention may sign and become party to this Act;

(ii) any other State member of the Organization may sign and become party to this Act if it declares that its legislation complies with the provisions of the Paris Convention concerning appellations of origin, geographical indications and trademarks;

(iii) any intergovernmental organization may sign and become party to this Act, provided that at least one member State of that intergovernmental organization is party to the Paris Convention and provided that the intergovernmental organization declares that it has been duly authorized, in accordance with its internal procedures, to become party to this Act and that, under the constituting treaty of the intergovernmental organization, legislation applies under which regional titles of protection can be obtained in respect of geographical indications.

(2) *[Ratification or Accession]* Any State or intergovernmental organization referred to in paragraph (1) may deposit

(i) an instrument of ratification, if it has signed this Act; or

(ii) an instrument of accession, if it has not signed this Act.

(3) *[Effective Date of Deposit]* (a) Subject to subparagraph (b), the effective date of the deposit of an instrument of ratification or accession shall be the date on which that instrument is deposited.

(b) The effective date of the deposit of the instrument of ratification or accession of any State that is a member State of an intergovernmental organization and in respect of which the protection of appellations of origin or geographical indications can only be obtained on the basis of legislation applying between the member States of the intergovernmental organization shall be the date on which the instrument of ratification or accession of that intergovernmental organization is deposited, if that date is later than the date on which the instrument of the said State has been deposited. However, this subparagraph does not apply with regard to States that are party to the Lisbon Agreement or the 1967 Act and shall be without prejudice to the application of Article 31 with regard to such States.

Article 29
Effective Date of Ratifications and Accessions

(1) *[Instruments to Be Taken into Consideration]* For the purposes of this Article, only instruments of ratification or accession that are deposited by States or intergovernmental organizations referred to in Article 28(1) and that have an effective date according to Article 28(3) shall be taken into consideration.

(2) *[Entry into Force of This Act]* This Act shall enter into force three months after five eligible parties referred to in Article 28 have deposited their instruments of ratification or accession.

(3) *[Entry into Force of Ratifications and Accessions]* (a) Any State or intergovernmental organization that has deposited its instrument of ratification or accession three months or more before the date of entry into force of this Act shall become bound by this Act on the date of the entry into force of this Act.

(b) Any other State or intergovernmental organization shall become bound by this Act three months after the date on which it has deposited its instrument of ratification or accession or at any later date indicated in that instrument.

(4) *[International Registrations Effected Prior to Accession]* In the territory of the acceding State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies, the provisions of this Act shall apply in respect of appellations of origin and geographical indications already registered under this Act at the time the accession becomes effective, subject to Article 7(4) as well as the provisions of Chapter IV, which shall apply *mutatis mutandis*. The acceding State or intergovernmental organization may also specify, in a declaration attached to its instrument of ratification or accession, an extension of the time limit referred to in Article 15(1), and the periods referred to in Article 17, in accordance with the procedures specified in the Regulations in that respect.

Article 30
Prohibition of Reservations

No reservations to this Act are permitted.

Article 31
Application of the Lisbon Agreement and the 1967 Act

(1) *[Relations Between States Party to Both This Act and the Lisbon Agreement or the 1967 Act]* This Act alone shall be applicable as regards the mutual relations of States party to both this Act and the Lisbon Agreement or the 1967 Act. However, with regard to international registrations of appellations of origin effective under the Lisbon Agreement or the 1967 Act, the States shall accord no lower protection than is required by the Lisbon Agreement or the 1967 Act.

(2) *[Relations Between States Party to Both This Act and the Lisbon Agreement or the 1967 Act and States Party to the Lisbon Agreement or the 1967 Act Without Being Party to This Act]* Any State party to both this Act and the Lisbon Agreement or the 1967 Act shall continue to apply the Lisbon Agreement or the 1967 Act, as the case may be, in its relations with States party to the Lisbon Agreement or the 1967 Act that are not party to this Act.

Article 32
Denunciation

(1) *[Notification]* Any Contracting Party may denounce this Act by notification addressed to the Director General.

(2) *[Effective Date]* Denunciation shall take effect one year after the date on which the Director General has received the notification or at any later date indicated in the notification. It shall not affect the application of this Act to any application pending and any international registration in force in respect of the denouncing Contracting Party at the time of the coming into effect of the denunciation.

Article 33
Languages of this Act; Signature

(1) *[Original Texts; Official Texts]* (a) This Act shall be signed in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in such other languages as the Assembly may designate.

(2) *[Time Limit for Signature]* This Act shall remain open for signature at the headquarters of the Organization for one year after its adoption.

Article 34
Depositary

The Director General shall be the depositary of this Act.

Forrest-042

Forrest-042

WIPO LISBON
The International System of Appellations of Origin
WORLD INTELLECTUAL PROPERTY ORGANIZATION

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Search Appellations of Origin (Lisbon Express)

This database contains information on all the appellations of origin entered, in accordance with the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, in the international register kept by the WIPO International Bureau and which are in force.

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WIPO-Administered Treaties

Contracting Parties > Lisbon Agreement (Total Contracting Parties : 28)

Contracting Party	Signature	Instrument	In Force	Details
Algeria		Accession: March 24, 1972	July 5, 1972	Details
Bosnia and Herzegovina		Accession: April 4, 2013	July 4, 2013	Details
Bulgaria		Accession: April 29, 1975	August 12, 1975	Details
Burkina Faso		Accession: May 23, 1975	September 2, 1975	Details
Congo		Accession: August 8, 1977	November 16, 1977	Details
Costa Rica		Accession: April 30, 1997	July 30, 1997	Details
Cuba	October 31,	Ratification:	September 25,	Details

	1958	September 17, 1963	1966	
Czech Republic		Declaration of Continued Application: December 18, 1992	January 1, 1993	Details
Democratic People's Republic of Korea		Accession: October 4, 2004	January 4, 2005	Details
France	October 31, 1958	Ratification: March 22, 1961	September 25, 1966	Details
Gabon		Accession: March 6, 1975	June 10, 1975	Details
Georgia		Accession: June 23, 2004	September 23, 2004	Details
Greece	December 22, 1959			
Haiti		Accession: January 17, 1961	September 25, 1966	
Hungary	October 31, 1958	Ratification: December 29, 1966	March 23, 1967	Details
Iran (Islamic Republic of)		Accession: December 9, 2005	March 9, 2006	Details
Israel	October 31, 1958	Ratification: January 30, 1963	September 25, 1966	Details
Italy	October 31, 1958	Ratification: July 10, 1968	December 29, 1968	Details
Mexico		Accession: February 21, 1964	September 25, 1966	Details
Montenegro		Declaration of Continued Application: December 4, 2006	June 3, 2006	Details
Morocco	October 31, 1958			
Nicaragua		Accession: March 15, 2006	June 15, 2006	Details
Peru		Accession: February 16, 2005	May 16, 2005	Details

Portugal	October 31, 1958	Ratification: June 9, 1966	September 25, 1966	Details
Republic of Moldova		Accession: January 5, 2001	April 5, 2001	Details
Romania	October 31, 1958			Details
Serbia		Declaration of Continued Application: September 19, 2006	June 1, 1999	Details
Slovakia		Declaration of Continued Application: December 30, 1992	January 1, 1993	Details
Spain	October 31, 1958			
the former Yugoslav Republic of Macedonia		Accession: July 6, 2010	October 6, 2010	Details
Togo		Accession: January 28, 1975	April 30, 1975	Details
Tunisia		Accession: July 31, 1973	October 31, 1973	Details
Turkey	April 24, 1959			

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Forrest-044

Forrest-044

ICANN
The Internet Corporation for Assigned Names and Numbers

7 April 2014

Governmental Advisory Committee
Via, Ms. Heather Dryden
Chair, Governmental Advisory Committee

Re: Governmental Advisory Committee (GAC) Advice – .AMAZON (and related IDNs)

Dear Ms. Dryden:

I am pleased to inform you that the ICANN Board New gTLD Program Committee (NGPC) continues to make progress to address the open item of advice from the GAC concerning the New gTLD Program applications for .AMAZON, and related IDNs. As you are aware, in its Durban Communiqué, the GAC advised the ICANN Board that "the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)."

As previously reported, ICANN commissioned an independent, third-party expert to provide additional advice on the specific issues of application of law at issue. The analysis attached has been received and is being considered by the NGPC as it continues to deliberate on the appropriate next steps to address the GAC's advice on .AMAZON (and related IDNs).

ICANN provides this analysis to keep the parties informed and welcomes any additional information that they believe is relevant to the NGPC in making its final decision on the GAC's advice on .AMAZON (and related IDNs). ICANN has requested that Amazon EU S.à r.l. (the applicant of the .AMAZON applications identified in the GAC's advice) submit any additional information by 14 April 2014.

The NGPC is committed to giving due consideration to the complex issues at the crux of the matter, and reiterates its commitment to the most timely response possible to all interested parties including the distinguished members of the GAC. We appreciate the collaboration of the GAC in the New gTLD Program and all of its deliberations and inputs to the process.

Jérôme Passa

Contact Information Redacted

I, the undersigned Jérôme Passa, *agrégé* in law, professor at the Université Panthéon-Assas (Paris II, France), have been requested by ICANN to provide an opinion on the well-foundedness of various objections raised against the reservation of the new gTLD '.amazon'. This legal opinion is set out below.

1. In 2011, the Internet Corporation for Assigned Names and Numbers (ICANN), which is responsible for the worldwide administration of the Domain Name System (DNS), launched a new domain name system offering operators the possibility of reserving new gTLDs (generic Top Level Domains) designed to provide suffixes for new domain names.

Under this system, a company can reserve its own name or that of its trade mark or one of its trade marks, such as '.vuitton' or '.ipad', for example, as a new gTLD. Geographical names and purely generic product or service names can also be reserved in this way.

The system and, in particular, the conditions for assigning these new gTLDs are set out in a lengthy document entitled the Applicant Guidebook.

When, after an in-depth evaluation process, ICANN decides to assign a new gTLD to an applicant, the parties enter into an agreement known as a 'registry agreement' under which ICANN delegates the management of the new suffix to the beneficiary; the beneficiary thus becoming the registry operator for the new gTLD.

The beneficiary to whom the new gTLD is reserved is the only one permitted to exploit, or to authorise others to exploit, worldwide the domain names associated with the

2. Reservation of a new gTLD may infringe prior third-party rights or, more generally, interests.

ICANN is clearly well aware of this issue since a certain number of provisions in the Applicant Guidebook are aimed at preventing this type of infringement.

The beneficiary of a prior right or interest, for example, can object to the assignment of a gTLD (Applicant Guidebook, 3.2.1).

In addition, on issues affecting its member states, ICANN's Governmental Advisory Committee (GAC), an inter-governmental committee made up of representatives of national governments and intergovernmental organisations, can issue advice to ICANN's board on applications for new gTLDs (Applicant Guidebook, section 3.1).

The advice of the GAC, which may suggest that ICANN refuse to reserve a given gTLD (as in the case of '.amazon as we shall see below) is sent to the applicant which has a right of reply.

3. In view of the objections raised by the GAC and various member states, this concern to protect prior third-party rights and interests has led ICANN to consider the legitimacy and opportuneness of assigning the new gTLD '.amazon' to its applicant, namely the Amazon company .

The undersigned has been consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be **bound**:

- to assign the new gTLD in question to its applicant, or, to the contrary,
- to refuse to assign it in order to protect prior rights as mentioned above.

In essence, the answer lies in whether or not a prior right actually exists and, where this is the case, in the nature and function of the right and the scope of protection conferred upon it by the rules of law.

Consequently, the undersigned will limit his opinion to the provisions of applicable international **intellectual property** agreements, to the fundamental principles governing this area of law and, where applicable, to the rules of supranational law constituted by the provisions of the applicable European Union legislation in the field of intellectual property.

With a few individual exceptions, there will be no reference to the provisions of the various regulations adopted by ICANN, the legal nature of which is likely to give rise to some

4. Amazon, a US corporation and owner of the *Amazon* trade mark for various products and services in a wide range of countries, has made an application for the new gTLD '.amazon'.

Objections have been raised against this application by various Latin American countries, including Brazil and Peru, through which the River Amazon flows and whose territories form part of the river's 5.5 million km^2 plain, known as Amazonia.

These objections were passed on by the GAC which recommended that ICANN reject Amazon's application.

The issues currently facing ICANN are:

- whether the rules and principles cited in support of these objections and reiterated in the unfavourable advice issued by the GAC are of such nature as to oblige ICANN to reject the application filed by Amazon (A) or, to the contrary,

- whether the rules and principles cited by Amazon in its response of 23 August 2013 to the GAC's advice oblige it to reserve the new gTLD '.amazon' (B).

A.- Concerning the objections to the assignment of the new gTLD '.amazon'

5. Though the term 'amazon' does not appear to correspond to the name of the Amazonia region in any language, and in particular in Spanish, Portuguese or English, an objection against the reservation of the new gTLD '.amazon' for Amazon might, in principle, nevertheless be raised on the basis of the notion of 'geographical indication' as defined in intellectual property law.

Indeed, where a geographical indication is protected on this basis it is protected not simply against the use of identical names but also, in most legal systems, against the use of names which imitate or invoke it. This is only logical since the use of a name which is merely similar may also be designed to take advantage of the reputation of the geographical indication or result in a reduction in its attractiveness in the eyes of the public.

Thus, if the names 'Amazonia' and 'Amazonas' were geographical indications, it would, given the evident similarity of the names in question, be possible to protect them against the use of the name 'Amazon'.

Indeed, the geographical name of a place can constitute a geographical indication and be recognised and protected as such under intellectual property law only if there exists in the public mind a link between the place in question and particular qualities or a reputation for specific products of that place because these qualities or this reputation are attributed to this geographical origin.

Thus, Article 22(1) of the TRIPS Agreement, which forms Annex I C of the Agreement establishing the World Trade Organisation and is binding on a great number of states, provides that "geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

Both European Union law and certain international conventions draw a distinction between such geographical indications based on the strength of the link between the geographical origin and the characteristics and qualities of the product in question. For example, the various European regulations on geographical indications draw a distinction between appellations of origin and geographical indications in the strict sense of the term.

Appellations of origin are the geographical names with the closest link between geographical origin and product characteristics or qualities. For example, Article 5(1) of Regulation (EU) No 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs[1] provides that "'designation of origin' is a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural <u>and</u> human factors; and (c) the production steps of which all take place in the defined geographical area."

This definition is based closely on that given in Article 2(1) of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, an international convention which came into effect in 1966 and which defines the term 'appellation of origin' as "the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment including natural <u>and</u> human factors."

An appellation of origin is thus characterised by the fact that the particular quality or

Geographical indications in the strict sense of the term differ from appellations of origin in that the link between the qualities or character of a product and its locality of origin is more tenuous. Indeed, Article 5(2) of the aforementioned EU Regulation provides that "'geographical indication' is a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristics is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area." The effect of geographical provenance on product characteristics is thus required, but not specified, and may therefore relate to both natural or human factors.

7. In many legal systems the protection of geographical indications in its wider sense is dependent on the completion of certain formalities in the country or region – such as the European Union – of origin of the products in question. This may be through either statutory recognition or registration with an administrative authority. In both cases, the formalities will define the geographical area in which the products in question must be produced, manufactured or processed and specify the production or manufacturing conditions to be fulfilled in order for the products to be identified under the geographical indication in question.

However, in certain legal systems – including under French law, for example[2] – a geographical name which is not – or not yet – recognised either by statute or by registration can still be afforded a certain degree of protection where the products from the geographical area in question are deemed to have special characteristics or qualities.

8. Under intellectual property law, a geographical name enjoys no status, regime or particular protection where it designates a place which is not specially known by the public for its products and services, whatever they may be. This is the case where this place is not the origin of any particular products or services or where the products or services originating in it do not or are not deemed to have any particular characteristics due to this origin in the minds of the public.

Such conclusion clearly results from the law governing geographical indications. It also emerges from the rules governing the relationships – frequent in practice – between trade marks and geographical names in most legal systems and in particular under EU and French law.

For example, we know that a trade mark consisting of the geographical name of a

For example, it has been held in France – and the solution would be the same in most legal systems – that a trade mark registered for clothing can validly consist of or contain the name 'Boston' even if the products in question are not manufactured in Boston as long as this US city has no particular reputation for clothing[3], which would only be the case if clothing made in Boston possessed particular characteristics or qualities because of its origin or a reputation in the minds of the public.

In this example the name 'Boston' is a **neutral geographical name** for clothing which has no impact under trade mark law.

It is also accepted that a trade mark consisting exclusively of the geographical name of a place will be refused or invalidated as being devoid of distinctive character if the place is the place of origin of the products covered by the trade mark, in this case the trade mark being, in effect, deemed to be descriptive of one of the characteristics of the products in question, i.e. their geographical provenance.

It has, however, also been held, notably by the General Court of the European Union, that this solution applies only where the geographical name has a certain reputation for the products in question in the minds of the public.

Thus in a judgment dealing with the trade mark *Port Louis*, consisting of the name of the capital of Mauritius, registered for textile products, the General Court underlined that "the registration as a Community trade mark of names designating certain geographical places already reputed or known for the category of products in question and which consequently have a link with this category in the eyes of interested parties"[4] is not possible. The fact that the trade mark owner's clothing comes or may come from this place is of no relevance and the trade mark is not considered to be descriptive since the town in question has no particular reputation for this category of products.

As in the case of the name 'Boston' dealt with above, the geographical name is neutral and therefore has no impact on the conditions of validity of the trade mark.

9. Supposing that, given its very large surface area and the fact that it comprises parts of various different countries, Amazonia constitutes the geographical area of a geographical indication within the legal meaning of the term – though this is already be disputed in view of the aforementioned definition of Article 22 (1) of the TRIPS Agreement which refers to products "originating in the territory of a Member" Amazonia would appear to have no

It is my view that the geographical names 'Amazonie', 'Amazonia' and 'Amazonas' do not constitute a geographical indication within the meaning of intellectual property law and in particular within the meaning of Article 22 (1) of the TRIPS Agreement, nor do they appear likely to become so in the near future for any specific products. However, ICANN may have specific information on this last point which might lead it to reach a different conclusion.

In consequence, I do not believe that assignment of the new gTLD '.amazon' to the Amazon company could be rejected on the basis of international or even local law on geographical indications.

10. Even supposing, hypothetically, that the geographical names 'Amazonie', 'Amazonia' and 'Amazonas' constituted geographical indications for specific products, this geographical indication would not necessarily justify the rejection of the application for assignment of the gTLD to the Amazon company.

As has already been pointed out, it is true that the fact that the name 'Amazon' and the name of the geographical indication are not identical is unlikely to prevent the application of the law governing geographical indications.

However, legal recognition of a geographical indication does not in any away imply that the geographical indication enjoys absolute protection, that is to say, protection against **any type** of use of an identical or similar name by a third party.

11. On one hand, indeed, Article 22 of the TRIPS Agreement provides only for protection against use as an indication of the geographical provenance of a product where this use misleads the public as to the geographical origin of the product.

On this point, "in respect of geographical indications" Article 22 2(a) requires parties to the Agreement to provide the legal means for interested parties to prevent "the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.".

However, given the nature of the Amazon company's activities and the fact that the *Amazon* sign is neither used nor designed to be used by it as an indication of the geographical origin of a product or service, the reservation and use by Amazon of the gTLD '.amazon'

Article 22 2(b) of the Agreement also requires the parties to protect geographical indications against "any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention". However, in order for an "act of competition contrary to honest practices in industrial or commercial matters" within the meaning of this last provision (sub-section 2) and an act "of such a nature as to create confusion (…) with the establishment, the goods, or the industrial or commercial activities, of a competitor" (sub-section 3 (i)) or "indications or allegations the use of which (…) is liable to mislead the public as to the (…) characteristics" or the quality "of the goods" (sub-section 3(iii)) to exist, the name identical or similar to the geographical indication must, as above, necessarily be used as the indication of the geographical provenance of products.

To summarize, the legal protection afforded to a geographical indication – supposing that such geographical indication exists – by the provisions of the TRIPS Agreement and the Paris Convention does not, <u>on its own</u>, justify a rejection of the Amazon's company application.

12. On the other hand, unlike the TRIPS Agreement, some legal systems do not limit the protection of geographical indications to cases in which an identical or similar name is used by a third party to indicate the geographical provenance of a product.

Thus, in the case of appellations of origin, Article 3 of the aforementioned Lisbon Agreement provides that "protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation" or the like".

Even though the Agreement does not specify what such "usurpation or imitation" consists of, its general nature and wording suggest that the protection extends beyond cases in which a third party uses an identical or similar sign to indicate the geographical provenance of a product. Given the broad language used in this provision, it is difficult however to know exactly what the conditions and terms of this protection are.

The provisions of the above mentioned European regulations protecting geographical indications of agricultural and food products[5], wines[6] and spirits[7] are, however, more specific on this point.

This is the case, in particular, of Article 13(1) of the aforementioned Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs[8], according to b). any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or similar, including when those products are used as an ingredient;

c). any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

d). any other practice liable to mislead the consumer as to the true origin of the product.”

A joint reading of sub-sections a) and b) of this provision reveals that geographical names registered under the Regulation are protected against any direct or indirect commercial use of a sign identical or similar (imitation or evocation) to the protected name for products comparable to those covered by the registration or for an product or service where this use takes advantage of the reputation of the protected name.

Though, where not otherwise stipulated, protection extends to uses which do not indicate a geographical provenance, a number of conditions must nevertheless be fulfilled. Either the sign in dispute must be used for products comparable to those covered by the registration or – unlike for a comparable product – the use in dispute must take advantage of the reputation of the protected name.

Though the trade mark *Champagne* registered and exploited by Yves-Saint-Laurent for a luxury perfume, i.e. in a non-geographical manner, was invalided and prohibited in France on the basis of comparable statutory provisions, it was because the use of this trade mark allowed its owner to take advantage of the reputation and prestige of the renown appellation of origin *Champagne* for a sparkling wine from the Champagne region[9].

Supposing that ICANN were required to take account of the provisions of European Union law, even though I do not believe this to be so particularly since in this case the geographical names in question – Amazonia, Amazonas and Amazonie – is not registered under any EU regulation, the reservation of the gTLD ‘.amazon’ would not in any case infringe a prior geographical indication, if one existed.

For, firstly, it would not in all likelihood be for the use of products comparable to those covered by this geographical indication indeed it is hard to see just what the

Beyond the law of geographical indications, the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

Finally, the fact that neither the name 'Amazon' nor that of the Amazonia region appears in any language on the ISO 3166 list is irrelevant. It is true that the country and region names on this list, whether they are reproduced, imitated or translated into a foreign language, cannot be reserved[10]. However, the fact that there is no bar to reserving the TLD '.amazon' on this ground does not mean that it could not be rejected on other grounds put forward by the objecting states or that Amazon could not claim a right to reserve it. On this last point, it is clear that no one can claim a TLD simply because the name it consists of is not included on the ISO list.

B.- Concerning the arguments put forward by the Amazon company in support of the assignment of the new gTLD '.amazon'

14. In response to the advice of the GAC reiterating the arguments of the objecting states, the Amazon company cites a certain number of rules of international law which, it claims, mean it must be assigned the TLD '.amazon'.

15. Firstly, and principally, the Amazon company cites its trade mark *Amazon* which is registered in almost 150 states around the world, including Brazil and Peru.

In substance, it contends that the intellectual property rights it holds in the name *Amazon* as a result of these registrations give it a *right to* the TLD '.amazon' and that ICANN is therefore obliged to assign the TLD to it.

In support of this argument Amazon cites Article 16(1) of the TRIPS Agreement which gives the owner of a registered trade mark "the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trade mark is registered (…)."

15 1. However, it is my view that the argument advanced by Amazon is based on an

An intellectual property right is therefore, like any property, a right to exclude third parties and, in this case, a right to exclude unauthorised third parties from the scope of protection which the law grants to the owner of the intellectual property right.

Binding as against third parties, an intellectual property right never affords its owner **the right to exploit or to use the subject matter of its right.**

We know, for example, that a patent does not confer upon its owner the right to exploit the invention. Firstly, the exploitation of the invention may, for example, require him to obtain marketing approval as is the case for the marketing of pharmaceutical products. Secondly, if the patented invention in question represents an improvement of a prior invention which is itself also covered by a patent valid for the same territory, the patented invention cannot legally be exploited without the authorisation of the holder of the prior patent.

We also know that the holder of a copyright in a work is not necessarily able to exploit the work simply on the basis of this right. Firstly, its exploitation may come up against an administrative or legal prohibition based on reasons of public policy or a third party's right to privacy, for example. Secondly, if this work is derived from a prior work which is itself also protected, it cannot legally be exploited without the consent of the holder of the rights in the first work.

These simple examples demonstrate that an intellectual property right does not grant its owner a **right *to* use** the intangible subject matter in question. The right grants him ownership, ownership which is always binding on unauthorised third parties, but not, unless misinterpreting the notion of intellectual property, the possibility to exploit the subject matter of its ownership in any circumstances.

15-2. The same applies under trade mark law.

A trade mark right – the right associated with the registration of a trade mark – grants the owner a monopoly binding on third parties within the limits defined by law.

However, the holder cannot invoke this right as *a right to use* the sign, even for the products and services specified in the registration, or even as the right to use the sign in particular forms, such as a new gTLD.

The owner of a registered trade mark, though it is fully binding on third parties while

A few months earlier, the Court of Justice had already adopted the same solution with regard to Community designs[13].

15-3. The exclusive right held by the Amazon company in its trade mark *Amazon* in various Member States under Article 16(1) of the TRIPS Agreement does not therefore necessarily give it **the right per se either to use it or to use the *Amazon* sign in any other form it may choose, such as a new TLD**.

In my belief, therefore, the Amazon company is wrong in citing its registered trademarks and its rights under Article 16(1) of the TRIPS Agreement and in deducing that ICANN is therefore obliged to assign it the new TLD to allow it to exploit, as a TLD, the *Amazon* sign which forms the subject matter of these trade marks.

The *Amazon* trade marks held by the applicant do not in legal terms give it a *right to* the new TLD '.amazon'. The fact that the objecting states did not cite any trade marks in support of their arguments is irrelevant in this respect.

Moreover, I would also add that all these *Amazon* trade marks, which are each subject to the principle of territoriality, are legally effective on a national – or regional in the case of a Community trade mark – territory only, in particular, if Amazon holds one of them and that in consequence none of these trade marks would be binding on ICANN, which is responsible for the assignments of new TLDs worldwide in any event.

15-4. At the very most, the Amazon company's trademarks permit it to claim a **legitimate interest for applying for assignment** of '.amazon'.

However, this interest does not in any way guarantee it assignment of this new TLD in legal terms for there are other considerations to be taken into account in the ICANN decision.

16. The same can be said of the arguments put forward by Amazon based on Article 8 of the Paris Convention for the Protection of Industrial Property.

This very succinct article provides for the protection of trade names in the states party to the Convention without the need for any filing or registration formality.

Apart from the fact that it does not specify the conditions or the nature of this

17. Finally, in this case Amazon cannot effectively rely on the provisions of international human rights law and, in particular, – supposing it were applicable to and binding on ICANN – the European Convention on Human Rights (ECHR).

It is true that Article 1 of the First Additional Protocol to the ECHR provides for an entitlement "to the peaceful enjoyment of (…) possessions", while in its *Anheuser-Busch/Portugal* judgment of 11 January 2007[14] the European Court of Human held that this provision "applies to intellectual property as such".

However, Amazon cannot use this argument to claim a right to the registration of the new TLD '.amazon'.

Indeed, **firstly**, filing an application for assignment of this new TLD in no way guarantees it the assignment of the TLD.

In the aforementioned judgment, the European Court of Human Rights held that, given all the economic rights and interests attached to such an application, the owner of an application for registration of a trade mark is the holder of a substantial interest protected by Article 1 of the First Additional Protocol but that the Trade Mark Office's rejection of the application did not constitute interference in the applicant's right to the peaceful enjoyment of his possessions and thus a breach of Article 1 – thereby thankfully guaranteeing the freedom of offices to refuse trade mark or patent applications.

Supposing that an application for assignment of a new gTLD corresponding to a trade mark held by the applicant were to be qualified as a possession within the meaning of Article 1 of the First Additional Protocol, as is the case with an application for the registration of a trade mark – which in my view could be disputed –, according to the European Court's analysis ICANN's rejection of this application would not constitute a breach of the peaceful enjoyment of this possession.

Secondly, the Amazon company's *Amazon* trade marks undeniably constitute goods within the meaning of the aforementioned provision.

However, given its subject matter and purpose, a registered trade mark does not in any way guarantee its holder (as set out in section 15-2 et seq. above) a **right to** the assignment of the corresponding new TLD. Since this assignment is not a prerogative of the owner of the

18. Therefore, there exists no provision in either international intellectual property law or in the field of fundamental rights which could oblige ICANN to assign the gTLD '.amazon' to the Amazon company.

Conclusion

As regards the application for assignment of the new gTLD '.amazon' filed by the Amazon company:

i) **there is no rule of international, or even regional or national, law applicable in the field of geographical indications which obliges ICANN to reject the application;**

ii) **there is no rule of international, or even regional or national, law applicable in the field of intellectual property and in particular of trade marks or in the field of fundamental rights, which obliges ICANN to accept this application.**

Jérôme Passa

Paris, March 31st , 2014

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
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PROTECTION AGAINST UNFAIR COMPETITION

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PREFACE

This study is presented by the International Bureau of the World Intellectual Property Organization (WIPO) as a first step in a series of activities concerning protection against unfair competition. The first draft of the study was based on a text produced by two staff members of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (Munich, Germany), Mrs. Frauke Henning-Bodewig and Mr. Heijo Ruijsenaars. The final version takes into account the advice of the following experts (given at a meeting in 1992 and in the form of written comments in 1993):

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The International Bureau expresses its gratitude to the above-named experts for their invaluable contributions.

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I. INTRODUCTION

1. Protection against unfair competition has been recognized as forming part of industrial property protection for almost a century. It was in 1900, at the Brussels Diplomatic Conference for the Revision of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as "the Paris Convention"), that this recognition was first manifested by the insertion of Article 10*bis* in the Convention. In its original version, as adopted at the Brussels Diplomatic Conference, the Article read as follows: "Nationals of the Convention (Articles 2 and 3) shall enjoy, in all the States of the Union, the protection granted to nationals against unfair competition." As a result of the subsequent revision conferences, the Article now reads as follows (in the Stockholm Act (1967) of the Paris Convention):

> "(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
>
> (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
>
> (3) The following in particular shall be prohibited:
>
> 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
> 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
> 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

2. At first glance, there seem to be basic differences between the protection of industrial property rights, such as patents, registered industrial designs, registered trademarks, etc., on the one hand, and protection against acts of unfair competition on the other. Whereas industrial property rights, such as patents, are granted on application by industrial property offices and confer exclusive rights with respect to the subject matter concerned, protection against unfair competition is based not on such grants of rights but on the consideration – either stated in legislative provisions or recognized as a general principle of law – that acts contrary to honest business practice are to be prohibited. Nevertheless, the link between the two kinds of protection is clear when certain cases of unfair competition are considered. For example, in many countries unauthorized use of a trademark that has not been registered is considered illegal on the basis of general principles that belong to the field of protection against unfair competition (in a number of countries such unauthorized use is called "passing-off"). There is another example of this kind in the field of inventions: if an invention is not disclosed to the public and is considered to constitute a trade secret, the unauthorized performance by third parties of certain acts in relation to that trade secret may be illegal. Indeed the performance of certain acts in relation to an invention that has been disclosed to the public and is not patented or in respect of which the patent has expired, may under very special circumstances also be illegal (as an act of "slavish imitation").

3. The above examples show that protection against unfair competition effectively supplements the protection of industrial property rights, such as patents and registered trademarks, in cases where an invention or a sign is not protected by such a right. There are, of course, other cases of unfair competition, for example the case referred to in Article 10*bis*(3)2 of the Paris Convention, namely that of a false allegation in the course of trade of such a nature as to discredit a competitor, in which protection against unfair competition does not perform such a supplementary function. This is due to the fact that the notion of unfair competition covers a great variety of acts, as will be discussed in the analysis below.

II. THE NEED FOR PROTECTION

4. In the wake of recent political developments, a number of countries are currently in the process of adopting market economy systems, which allow free competition between industrial and commercial enterprises within certain limits defined by law. These developments are taking place not only in Central and Eastern European countries, but also in a number of developing countries. Free competition between enterprises is considered the best means of satisfying supply and demand in the economy and of serving the interests of consumers and the economy as a whole. However, where there is competition, acts of unfair competition are liable to occur. This phenomenon has been discernible in all countries and at all times, regardless of prevailing political or social systems.

5. Sometimes economic competition has been compared to competition in sport, because in both the best should win. In economic competition, that should be the enterprise providing the most useful and effective product or service on the most economical and (to the consumer) satisfying terms. This result can only be achieved, however, if all participants play according to a certain set of basic rules; and also as in sport, it may be tempting to disregard the rules. Violations of the basic rules of economic competition can take various forms, ranging from illegal but harmless acts (which can be committed by the most honest and careful entrepreneur) to malicious fouls, intended to harm competitors or mislead consumers. They may consist in a direct attack on an individual competitor or in a surreptitious deception of the "referee," who in economic competition typically is the consumer. Whatever form such violations may take, it is in the interest of the honest entrepreneur, the consumer and the public at large that they should be prevented as early and as effectively as possible.

6. Experience has shown that there is little hope of fairness in competition being achieved solely by the *free play of market forces.* In theory consumers, in their role as referees of economic play, could deter dishonest entrepreneurs by disregarding their goods or services

and favoring those of honest competitors. Reality, however, is different. As an economic situation becomes more complex, consumers become less able to act as referees. Often they are not even in a position to detect by themselves acts of unfair competition, let alone react accordingly. Indeed it is the consumer who – along with the honest competitor – has to be protected against unfair competition.

7. *Self-regulation* has sometimes been referred to as a remedy but it has not proved to be a sufficient safeguard against unfair competition. Without doubt, self-regulation by associations of enterprises can play an important role in ensuring honest business conduct: if self-regulation is well developed and generally observed, it can even be faster, less expensive and more efficient than any court system. Yet it stands or falls on continuing observance by all participants.

8. In order to prevent unfair competition effectively, self-regulation must, at least in certain areas, be supplemented by a system of legal enforcement. Only such a system can assure honest entrepreneurs that their chances of success will be determined by their own efforts, and assure consumers that they can make optimum buying choices, thus avoiding the waste of scarce resources, and ensuring improved market transparency and maximum economic welfare.

9. The rules on the prevention of unfair competition and those on the prevention of restrictive business practices (*antitrust* law) are interrelated: both aim at ensuring the efficient operation of a market economy. They do so in different ways, however: antitrust law is concerned with the preservation of the *freedom of competition* by combating restraints on trade and abuses of economic power, while unfair competition law is concerned with ensuring fairness in competition by forcing all participants to play according to the same rules. Yet both laws are equally important, although in different respects, and supplement each other. Countries setting up a system of market economy need an antitrust law, but one cannot rely on antitrust law alone to ensure fairness of competition as a side effect: that can be achieved only by distinct rules providing for protection against unfair competition.

10. *Industrial property laws* protecting inventions, industrial designs, marks, trade names, geographical indications, etc., are insufficiently comprehensive on their own to ensure honest practice in the market-

place. It is true that the protection of industrial property rights is in the interest not only of their owners, but also of consumers and of the public at large, and thus also serves the objective of ensuring fairness in competition. In particular, the unauthorized use of a trademark for a competing product not only constitutes undue exploitation of the trademark owner's goodwill, but also deceives the public as to the commercial origin of the product (and hence its characteristics). It can therefore be argued that trademark law is a specific part of the larger field of unfair competition law and that the enforcement of trademark protection serves to prevent acts of unfair competition, in particular, passing-off and dilution of distinctive quality or advertising value. The same is true, to a lesser extent, of other industrial property rights, such as patents, which protect inventors against undue exploitation of their efforts.

11. However, in spite of these common objectives, fair play in the marketplace cannot be ensured only by the protection of industrial property rights. A wide range of unfair acts, such as misleading advertising and the violation of trade secrets, are usually not dealt with by the specific laws on industrial property. Unfair competition law is therefore necessary either to supplement the laws on industrial property or to grant a type of protection that no such law can provide. In order to fulfill this function, unfair competition law must be *flexible*, and protection thereunder must be independent of any formality such as registration. In particular, unfair competition law must be able to adapt to all new forms of market behavior. Such flexibility does not necessarily entail a lack of predictability. Of course, unfair competition law can never be as specific as patent law or trademark law; yet experience in many countries has shown that it is possible to develop an efficient and flexible system of unfair competition law and at the same time to ensure sufficient predictability.

III. THE LEGAL BASIS FOR PROTECTION

A. *Development of Unfair Competition Law*

12. All countries that have established market economy systems have devised some kind of safeguard against unfair business practices. In doing so, however, they have chosen quite *different approaches.* While in other areas of industrial property law, such as those dealing with patents, designs or marks, it is generally agreed that protection is best afforded by a specific, comprehensive statute, the legal basis for the repression of unfair competition can range from a succinct general tort provision to detailed regulation in a special statute. The reason for this diversity of approaches is often purely historical.

13. The concept of unfair competition law emerged first in *France* around 1850. Although at that time there was no specific prohibition of dishonest business practices, the French courts were able to develop a comprehensive and effective system of unfair competition law on the basis of the *general provision* contained in Article 1382 of the French Civil Code, according to which unlawful acts entail an obligation to pay damages. As far as the protection of competitors is concerned, the principles developed by court decisions on the basis of Article 1382 of the French Civil Code are still the main bases for relief against unfair competition in France. For the protection of consumers, a law on fraud in connection with products was enacted as early as 1905, and has since been complemented by numerous statutes and decrees, including the so-called "Loi Royer" of 1973, which prohibits misleading advertising, and the Consumer Information Laws of 1978 and 1989.

14. In *Germany,* the situation evolved differently. Since the courts refused to extend the tort provisions of the Civil Code to unfair business practices, it was necessary to enact *specific legislation* on the subject. Thus the Law Against Unfair Competition of 1909 became, and has remained, the main basis for the repression of acts of unfair competi-

tion. The Law contains two general provisions on dishonest and deceptive trade practices, around which special provisions, for example, on the protection of trade secrets, are grouped. Furthermore, it relies almost exclusively on private party complaints, granting capacity to sue to competitors, consumers and business organizations. The German courts, relying especially on the two general provisions contained in Articles 1 and 3 of the Law, have developed a comprehensive system for the repression of unfair trade practices, which aims at protecting not only competitors but also consumers and the public at large.

15. The law of the various jurisdictions that make up the *United Kingdom* (England, Scotland, Wales and Northern Ireland) has taken a different approach, based on common law and equity, and has not developed a separate legal regime for protection against unfair competition. A traditionally liberal approach makes for reluctance to enact general rules that allow subjective opinions to be held on what is "fair" or not. The tort of passing-off, which has been recognized since 1824, is regarded as sufficient protection for competitors. Consequently, civil remedies for *competitors* are still restricted to isolated cases under uncodified tort principles, in particular the protection against passing-off, claims of injurious falsehood or breach of confidence. On the other hand, provisions on *consumer* protection against misleading acts were already introduced in 1862 and have in the meantime been supplemented by an autonomous set of consumer protection statutes, such as the Trade Descriptions Act of 1968, the Fair Trading Act of 1973, the Unsolicited Goods and Services Acts of 1971 and 1975 and the Consumer Protection Act of 1987. In 1988, the Control of Misleading Advertisements Regulations were enacted pursuant to the EC Directive of 1984. Additionally, a number of self-disciplinary advertising codes are fully recognized.

16. As in the United Kingdom, unfair competition law in the *United States of America* developed from judicial decisions, especially from the common law tort of passing-off. And, again as in the United Kingdom, there was – and is – no comprehensive common law tort of unfair competition. However, limited statutory relief against false claims about one's own product in interstate commerce has been granted since 1946 under the trademark protection provision of Section 43(a) of the trademark law (Lanham Act). In 1988 that provision was extended to cover also false or misleading representations about another's product or service. In addition, a federal agency, the Federal Trade Commission (FTC), was created in 1914, which has broad jurisdiction to pursue

any unfair or deceptive act or practice in or affecting interstate commerce. However, Section 5(a) of the FTC Act gives no right of action to injured competitors or consumers, whereas the statutes against unfair business practices which all States enacted in the latter half of this century (typically modelled on the FTC Act) often allow legal action to be brought by interested parties.

17. The above examples show how unfair competition law has developed differently in different countries. In the meantime many countries have passed *special legislation* on the subject or have replaced earlier laws on unfair competition. As regards recent legislative activity in this area, Switzerland adopted a Law Against Unfair Competition in 1986 which contains a broad general provision and a detailed regulation of specific market behavior, for example slavish imitation; Hungary adopted a Law on the Prohibition of Unfair Market Practice in 1990 which regulates unfair competition and antitrust law; Spain's Unfair Competition Law of 1991 contains a detailed regulation on practices harmful to consumers and competitors; and in 1991 Belgium adopted a Trade Practices and Consumer Protection Law which emphasizes the idea of consumer protection.

B. *International Protection: Article 10*bis *of the Paris Convention for the Protection of Industrial Property*

18. Article 1(2) of the Paris Convention mentions the repression of unfair competition along with patents, utility models, industrial designs, trademarks, trade names, indications of source and appellations of origin among the objects of industrial property protection, and Article 10*bis* contains an express provision on the repression of unfair competition (the text is reproduced in paragraph 1, above). In the more than one hundred States party to the Paris Convention the legal basis for the protection against unfair competition may thus be found not only in national legislation but also at the international level.

19. Under *Article 10*bis*(1)* of the Paris Convention, the countries of the Paris Union are bound to ensure *effective protection against unfair competition. Article 10*ter*(1)* of the Convention further provides for the obligation to ensure "appropriate legal remedies." In particular, measures must be taken to permit federations and associations repre-

senting interested industrialists, producers or merchants to take action, provided that this is not contrary to the laws of the country concerned and does not exceed the rights normally granted to national associations.

20. *Article 10*bis*(2)* of the Paris Convention defines unfair competition as any act of competition contrary to *honest practices* in industrial or commercial matters. This definition leaves the determination of the notion of "commercial honesty" to the national courts and administrative authorities. Member States of the Paris Union are also free to grant protection against certain acts even if the parties involved are not competing against each other.

21. *Article 10*bis*(3)* of the Paris Convention gives three examples of cases that "in particular" have to be prohibited. These *examples* must not be seen as exhaustive, but rather as the minimum protection that has to be granted by all member States. The first two – creating confusion and discrediting – can be regarded as belonging to the "traditional" field of competition law, namely that of competitor protection. The third one – misleading – was added by the 1958 Revision Conference in Lisbon, and takes into account the interests of both competitors and consumers.

22. Apart from Articles 10*bis* and 10*ter*, the Paris Convention contains several provisions relevant to protection against acts of unfair competition in a broader sense, especially those concerning *trademarks* and *trade names*. For example, Articles 6*sexies* and 8 provide for the protection of service marks and trade names, respectively. The protection of *indications of geographical origin*, to the extent that it is not provided by Article 10*bis*(3), results from Article 10 and Article 9, to which Article 10 refers.[1] Special agreements concluded within

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[1] Articles 9 and 10 of the Paris Convention read as follows (the text of Article 10*bis* of the Paris Convention appears in paragraph 1, above):

"Article 9

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

the Paris Convention, namely, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, along with bilateral treaties, specifically provide for the international protection of geographical indications.

C. *National Protection: Three Main Approaches to Unfair Competition Law*

23. According to Article 10*bis*(1) of the Paris Convention, the member States of the Paris Union have to provide effective protection against unfair competition. Although they are not obliged to introduce *special legislation* for the purpose, they must provide – at least on the basis of existing general legislation – effective safeguards against all acts "contrary to honest trade practices" and specifically against the practices referred to in Article 10*bis*(3). In the implementation of these treaty obligations, three main approaches can be distinguished.

(Footnote 1, continued)

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party."

(1) *Protection Mainly Based on Specific Legislation*

24. Several countries have enacted *special statutes*[2] or *specific provisions within broader statutes*,[3] which, sometimes combined with provisions in general statutes such as the Civil Code, deal with protection against unfair competition. These statutes provide for civil or criminal sanctions and contain a broad general provision (often modelled on Article 10*bis*(2) of the Paris Convention) which is supplemented by detailed provisions on specific forms of unfair trade practice; they usually provide for civil sanctions and, in respect of specific cases, also for criminal sanctions. Although many of these countries have also enacted additional legislation concerning acts relating to certain products (food, drugs, etc.), the media (television) or marketing practices (gifts, bonuses), the statute against unfair competition remains the *main basis for protection.* Often the scope of that statute has been made even broader by the assumption that the violation of any other law can be an unfair trade practice because it gives an undue advantage in competition over the law-abiding competitor. In some countries the concept of a special law on competition has evolved towards the adoption of a more general law on market behavior,[4] or the link with antitrust law is stressed by the enactment of statutes that deal with the institution of competition itself as well as with fairness in competition.[5]

(2) *Protection Based on General Tort Law and/or on the Law Concerning "Passing Off" and Trade Secrets*

25. In a group of countries with a civil-law tradition,[6] which follow the approach consisting in the protection of the honest businessman, such protection is usually to be found in the *general tort law.* In another group of countries which follow common law traditions,[7] the

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[2] For example, Austria, Belgium, Denmark, Finland, Germany, Japan, Luxembourg, Peru (see also footnote 3), the Republic of Korea, Spain, Sweden and Switzerland.

[3] For example, Bolivia, Brazil, Bulgaria, Canada, Colombia, Hungary, Mexico, Peru, Romania and Venezuela (as regards Bulgaria, Hungary and Romania, see also footnote 5).

[4] This has been done, for example, in Belgium, Sweden and, to a certain extent, Switzerland.

[5] This has been done, for example, in Bulgaria, Hungary (the relevant law has the title "Law on the Prohibition of Unfair Market Practice"), Romania and Venezuela.

[6] Notably France, Italy and the Netherlands.

[7] Notably in the various jurisdictions of the United Kingdom.

actions for *passing off* and for violation of trade secrets developed by the courts (at least originally) remain the main basis for the protection of competitors. As for the protection of *consumers*, a number of the same two groups of countries have, in addition, enacted separate sets of laws regulating specific cases of undesirable market behavior, such as misleading advertising, price comparisons, lotteries, games and bonuses; those laws are essentially independent of the protection of competitors under civil law or common law principles.

(3) *Combination of the Above Two Approaches*

26. Most countries party to the Paris Convention – even those that at first attempted to regulate unfair competition by means of general tort law – provide for a *combination* of general civil code principles, case law and special laws. In many countries with a *federal structure*, the division of legislative competence between the federal legislature and the legislatures of the federated States has led to an even more complex combination of the various forms of protection. In some of those countries, the federal legislator even has no jurisdiction over unfair competition to the extent that it is considered a State common law tort. Where, in such countries, protection is granted by the States, it is in general better developed than that granted at the federal level. In the United States of America, in particular, the limited availability of common law remedies against unfair competition was first dealt with in federal law through the establishment of an administrative authority (the Federal Trade Commission), and more recently through the extension of a federal law provision on trademarks (Article 43(a) of the trademark law (Lanham Act)) to a wide variety of misleading representations. Yet the most progressive regulation is to be found in the "business laws," "little FTC Acts," "Consumer Protection Laws" and other legislation adopted by States within the United States of America.

D. *The Role of Jurisprudence*

27. In spite of the different approaches mentioned above, all countries that have introduced effective safeguards against unfair competition take particular care over the *enforcement* of the law, and usually allow

their courts considerable discretion. The success of an unfair competition law depends largely on what the courts make of it. A few words in a general tort provision may be a sufficient basis on which to develop an efficient system of unfair competition law, while a most impressively drafted statute may give disappointing results. This does not mean, however, that an explicit and detailed regulation of unfair trade practices is not useful: it will at least have some preventive effect on market behavior; but it will remain ineffectual if it is not activated by the courts. In the ever-changing world of competition, even the most perceptive legislator cannot possibly anticipate all future forms of unfair market behavior and must rely on interpretation of the law by the courts. Many countries have therefore supplemented their explicit provisions against certain market practices with a *general provision*, which allows the courts to include new forms of unfair market practice in the general system.

IV. THE ACTS OF UNFAIR COMPETITION

A. *General Definition*

28. According to Article 10*bis*(2) of the Paris Convention, unfair competition consists in "any act of competition contrary to *honest practices*." Most countries with special laws on unfair competition have adopted the same or similar definitions for their general provision – using such terms as "honest trade practices" (Belgium and Luxembourg), "the principle of good faith" (Spain and Switzerland), "professional correctness" (Italy) and "good morals" (Germany, Greece and Poland). In the absence of specific legislation, the courts have defined fair competition with phrases like "the principles of honesty and fair dealing" or "the morals of the marketplace" (United States of America).

29. It is true that describing unfair competition as acts contrary to "honest trade practices," "good faith" and so on does not make for clear-cut, universally accepted standards of behavior, since the meaning of the terms used is rather fluid. The standard of "fairness" or "honesty" in competition is no more than a reflection of the sociological, economic, moral and ethical concepts of a society, and may therefore differ from country to country (and sometimes even within a country). That standard is also liable to change with time. Furthermore, there are always new acts of unfair competition, since there is ostensibly no limit to inventiveness in the field of competition. Any attempt to encompass all existing and future acts of competition in one sweeping definition – which at the same time defines all prohibited behavior *and* is flexible enough to adapt to new market practices – has so far failed.

30. This does not mean, however, that unfair competition is incapable of any general definition, and that the best one can do is label concrete examples of market behavior as being unfair. On the contrary, there

are some aspects that clearly indicate which practices are to be considered "fair" and which "unfair."

31. It has been generally recognized that certain acts of commercial behavior are always (or, as Article 10*bis*(3) of the Paris Convention puts it, "in particular") considered to constitute unfair competition. The most notable of those acts are the causing of confusion, discrediting and the use of misleading indications. The *common aspect* of these most important, but by no means exhaustive, examples of unfair market behavior is the attempt (by an entrepreneur) to succeed in competition without relying on his own achievements in terms of quality and price of his products and services, but rather by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements. Practices that involve such methods are therefore doubtful at the outset as to their fairness in competition.

32. Another reference point could be the *subjective element* in the unfair act. At first sight, the notion of "honesty" seems to refer to a moral standard, and some sort of *legal/ethical standard* is indeed involved. This, however, has to be distinguished from the question whether an act of unfair competition can be established in the absence of any fault, bad faith or negligence. Where unfair competition law has been developed on the basis of general tort provisions, the "tort of unfair competition" requires some kind of subjective element such as "fault" or "bad faith." In practice, however, the element of fault or bad faith is often assumed by the courts. Such subjective elements are therefore not essential to the notion of fairness in competition. Indeed, with certain exceptions, rather objective standards are applied for the purposes of establishing an act of unfair competition; of course, subjective conditions may be relevant for the purpose of determining the sanction applicable. Sometimes this objective approach to unfair competition law is expressly stated in the legislation, as in the Spanish law of 1991, which uses the expression "any act against good faith in an *objective sense*."

33. The most important factor for determining "unfairness" in the marketplace, however, is derived from the *purpose* of unfair competition law. In this respect, unfair competition law was initially designed to protect the honest businessman. In the meantime, consumer protection has been recognized as equally important. Moreover, some countries put special emphasis on the protection of the public at large, and

especially its interest in the freedom of competition. Modern unfair competition law therefore serves a threefold purpose, namely: the protection of competitors, the protection of consumers and the safeguarding of competition in the interest of the public at large. As stated in the Swiss law of 1986 and the Spanish law of 1991, the purpose of unfair competition law is to ensure fair and undistorted competition in the interest of all concerned. In practice, this means that unfair competition has also to be defined *functionally*, taking into account particularly the interests of those "concerned" by it, namely the parties involved in the operation of the marketplace.

34. One party who is always "concerned" is the honest *businessman.* Since unfair competition law started as a special law for the protection of the honest businessman, *a businessman's standard of behavior* logically serves as a starting point. A practice that is condemned as improper by all businessmen can, therefore, hardly qualify as a "fair" act of competition.

35. On the other hand, certain practices may be generally accepted within a branch of business but nevertheless considered "improper" by other market participants. In such cases, there has to be some *ethical correction* of the actual standards of behavior. Ethical standards dictate in particular that the interests of consumers must not be unnecessarily impaired, for example, by disregard for the principle of truthfulness (on which the consumer relies in his transactions), by enticement of the consumer into unsocial or even harmful behavior or by invasion of his privacy.

36. Furthermore, there may be practices that at first sight are not prejudicial either to other businessmen or to consumers, but nevertheless may have unwanted effects on the *economy at large.* For example, selling at dumping prices may in the long run destroy small and medium-sized businesses, and thus have adverse effects on free competition. Where these economic aspects are incorporated in unfair competition law,[8] such behavior will often be expressly labelled as "unfair."

37. When determining "honesty" in business dealings, all these factors have to be taken into account. In practice, the concept of unfair competition has increasingly become a *balancing of interests.* Differ-

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[8] As in Belgium and Hungary.

ences in the evaluation of what is "fair" or "unfair" can generally be explained by the different emphasis placed on the aspects referred to above. For example, a particular kind of market behavior may well be seen differently in countries where the traditional law of unfair competition still focuses on the protection of the honest competitor, as opposed to countries that put special emphasis on the protection of consumers or the public at large.

38. On the other hand, there is broad agreement that at least some acts and practices are always irreconcilable with the notion of fairness in competition. These are discussed in detail below.

B. *Categories of Acts of Unfair Competition*

(1) *General Explanation*

39. Acts of unfair competition may be categorized in a variety of ways, depending on the criteria applied or the emphasis given to certain aspects of a given act or form of behavior. An act which is found to be "unfair" will often have taken place in circumstances which are complex, and which require scrutiny and judgment on the basis of established or prevailing standards. An act may be found to be unfair on more than one count, depending on the approach adopted to characterize the act. Therefore, one and the same act may fall into two or more categories. Likewise, no systematic categorization or classification of the acts of unfair competition can avoid some degree of overlap among the concepts and categories used.

40. For the purposes of establishing categories of acts of unfair competition and facilitating their analysis in this study, two broad groups of acts of unfair competition are distinguished, namely acts of the types expressly mentioned in Article 10*bis* of the Paris Convention and acts not expressly mentioned in Article 10*bis*.

(2) *Acts Expressly Mentioned in Article 10*bis

41. Article 10*bis*(3) (see paragraph 1, above) contains a non-exhaustive list of three types of acts of unfair competition, namely, acts likely

to cause confusion, acts that discredit a competitor, and acts that may mislead the public. Because the acts that are likely to cause confusion and those that may mislead the public are akin to one another and sometimes overlap, they are dealt with before the act of discrediting a competitor.

(a) Causing Confusion

(i) *General Circumstances Under Which Confusion Is Established*

42. Article 10*bis*(3)1 of the Paris Convention obliges member States to prohibit all acts that are of such a nature as to create confusion, by any means, with the establishment, the goods or the industrial or commercial activities of a competitor. The scope of Article 10*bis*(3)1 is very broad, as it covers any act in the course of trade involving a mark, sign, label, slogan, packaging, shape or color of goods, or any other distinctive indication used by a businessman. Thus not only *indications* used to distinguish goods, services or businesses but also the *appearance of goods* and the presentation of services are considered relevant for the prohibition of confusion. For example, Article 2598(1) of the Italian Civil Code expressly provides that anyone who uses names or distinctive signs likely to cause confusion with those of another person, or slavishly imitates the product of a competitor, or by whatever other means creates confusion with the names, signs, products or activities of competitors, commits an act of unfair competition. Similarly, under Article 6 of the Spanish Law on Unfair Competition, any acts that are capable of creating confusion with the activities, achievements or business of another, including the likelihood of association by consumers with respect to the commercial source, is deemed unfair. In the countries with a common law tradition, the concept of "passing-off" is broad enough to provide all types of indication, product and other subject matter with protection against confusion.

43. Under Article 10*bis*(3)1 of the Paris Convention, the "intent" to confuse is immaterial for the purposes of determining whether such an act constitutes an act of unfair competition. However, bad faith on the part of the imitator may have a bearing on the sanctions to be applied. Also, it is not usually necessary for confusion actually to have occurred, as the *likelihood of confusion* is often sufficient for an action

based on unfair competition. Finally, protection against confusion is provided *without any limitation in time*. Protection is available as long as confusion is likely, but sufficient latitude is allowed for the use of non-confusing indications in respect of products, services and businesses, so that competition in the relevant market is not stifled. However, as soon as the marketable creation becomes generic or commonplace, it loses its original or distinctive character, and likelihood of confusion may no longer be assumed to the same degree.

44. There are two main areas in which confusion frequently occurs. These are indications of commercial origin on the one hand, and the appearance of goods on the other. However, this does not preclude or limit the protection of other attributes or achievements against confusion.

(ii) *Types of Confusion*

45. Confusion can be established in different ways. The test for the *basic type of confusion* is whether the similar mark so resembles the protected mark that it is liable to confuse a substantial number of average consumers as to the *commercial source* of the goods or services. Factors frequently considered in determining confusion are the degree of distinctiveness of the protected mark, the size and reputation of its owner, the sophistication of the consumers concerned and, of course, the similarity of the marks and the goods or services involved. In many countries, confusion is not restricted to basic confusion as to the commercial source, but also includes that which gives the impression of a strong business connection between the two users of the same trademark or similar trademarks, i.e., confusion as to *affiliation*. However, the use of an identical or similar mark on clearly unrelated or completely different goods usually falls outside the scope of protection, as a large degree of dissimilarity of the goods or services involved will lead consumers to assume that the source of the goods or services is not the same and also that there is no particular business connection between the users.

46. A third form of confusion that has been referred to, for example, under Section 43(a) of the Lanham Act of the United States of America and under Section 53 of the Australian Trade Practices Act, is called confusion as to *sponsorship*. Under this test for confusion, consumers

will assume both that the goods or services do not originate from the same source and that the two enterprises do not entertain business relations so intensive and continuous as to cause confusion as to affiliation. Nevertheless, the consumer will expect, from the similarity of the marks, from the types of product or service that the mark is used for and from the manner of use by the second user, that the use of the protected mark by the second user has been *authorized by agreement* for a certain period of time. This type of confusion can be relevant, for example, in cases where the third party uses the mark (without authorization) for ornamental purposes on goods. However, unlike confusion as to source or affiliation, this third type of confusion has not the same status as other fully established grounds for relief under statutory trademark laws, as its exact boundaries are still developing.

47. This concept of confusion may be relevant to so-called "*publicity*" rights, relating to well-known artists and media or sports personalities, and to "*merchandising*" rights, relating to fictional characters in literary or artistic works. These rights concern relatively new marketing techniques whereby enterprises are "licensed," for a certain period of time, to make use of the popularity or fame symbolized by the names or likenesses of certain personalities or characters, as this use is expected to stimulate consumer demand for the product or service of the "licensee." Consumers would generally be misled by the use of the name or likeness of the personality or character in connection with the product or service into believing that the personality or the owner of rights in the character, which could also be a registered mark, had *expressly authorized* the use of their personality or character.

(iii) *Confusion With Respect to Indications*

48. An indication can be any sign, symbol or device that conveys to the consumer the message that a product or service on the market comes from a particular commercial source, even if this source is not known by its name. Indications may therefore consist of two-dimensional or three-dimensional signs, labels, slogans, packaging, colors or tunes, but are not limited to these. Protection against confusion with respect to indications is already available under specific legislation on trademarks, service marks and trade names. However, this protection

is often limited in several ways. The limitations may concern the *applicability* of the specific law to certain types of indication, or the exact *scope of protection.* Thus protection against confusion under unfair competition law may still be relevant where the specific legislation does not afford overall protection against confusion. This aspect is also relevant to the protection of *well-known marks* against confusion, as required by Article 6*bis* of the Paris Convention.

[Limited Applicability of Specific Legislation]

49. The general applicability of trademark law is usually confined to particular indications. Some countries do not, for example, recognize titles of single literary works or films, get-up (product appearances), shop interiors, colors or color combinations, or trade dress under statutory trademark law. As regards service marks, although most countries have a system for the registration of such marks in the same way as trademarks, in those that do not, protection under the rules of prevention of unfair competition is needed. Also, even in countries where three-dimensional trademarks are recognized and registrable, particular shapes may nevertheless be excluded. For example, shapes determined solely by the nature of the goods, appearances resulting from some technical or industrial function of the goods and product configurations determining the essential value of the goods are expressly excluded by the EC Directive to Approximate the Laws Relating to Trade Marks. The "functionality" doctrine, particularly developed in the United States of America, produces similar results.

50. Apart from this, protection under trademark law can sometimes be invoked only for marks that have been properly registered in the country where protection is sought. In this respect *Article 6*bis *of the Paris Convention* constitutes an exception in favor of a *well-known mark,* which does not need to be registered in order to be protected against the potentially confusing use of a mark that is a reproduction or an imitation of the well-known mark and is used for identical or similar articles. It is to be noted that a trademark may be well known in a country before it is registered or even used in that country, as a result of the advertising or reputation of the mark in other countries.

51. Unfair competition law may provide protection against confusion for indications or signs that are not protectable under trademark law. However, the *availability of protection* for a sign under unfair com-

petition law will depend partly on the reasons for the lack of protection for unregistered signs under the special laws. If a sign can in principle be covered by the specific legislation but does not meet the substantive requirements of that legislation, it would not seem consistent with a balanced system of protection to grant that sign the same protection under unfair competition law as would be granted to it under the special law. It is therefore argued that protection against confusion should only be available under unfair competition law if the indication or sign to be protected has *sufficient distinctiveness* to distinguish the products, services or other business activities concerned from the same or similar activities of other traders. Nevertheless, in order to promote the registration of marks, some unfair competition laws require more than just a minimum degree of distinctiveness for the protection of unregistered indications. For example, Article 2(1) of the Unfair Competition Prevention Law of the Republic of Korea requires the indication to be "widely known," which could in some cases restrict actual protection to one particular region.

52. The *degree of distinctiveness* of an indication that is not protected under statutory trademark law is assessed in relation to the same factors as apply to registered marks, including the meaning and the appearance of the indication, and its uniqueness compared with other indications for the same or a similar activity. Even if distinctiveness is inherently lacking, for example, owing to the descriptive nature of the indication for particular goods or services, the indication can be protected if it has acquired "distinctiveness by use," or *secondary meaning*, in the country where protection is sought. Secondary meaning implies that, as a result of continuous and exclusive use of the mark on the market, a substantial number of consumers have become aware of it and will associate the activity carried on under it with a particular commercial source. In Germany, for example, the trademark "4711" for perfume has been considered sufficiently distinctive as a result of public awareness that the goods under that mark come from a particular source. In fact the degree of secondary meaning depends on the market for the goods or services involved and the degree of descriptiveness of the indication in relation to those goods or services. The degree of secondary meaning (or percentage of consumers) necessary to achieve sufficient distinctiveness varies according to the practices of the court concerned. In some countries,[9] opinion polls or *market surveys* on con-

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[9] Notably Germany.

sumer reactions often provide empirical data with which to determine the degree of secondary meaning, whereas in other countries[10] the courts themselves will judge whether an indication has acquired sufficient distinctiveness.

53. Secondary meaning analysis also applies to indications that have been *expressly excluded* from statutory trademark protection. For example, the configurations or shapes of goods that are deemed to be excluded from statutory protection under trademark law by the EC Directive to Approximate Laws Relating to Trade Marks may still acquire secondary meaning among consumers in a particular market. Under those circumstances, protection against confusion is justified if consumers could be led to believe mistakenly that other goods using the configuration come from the first user. It may not always be easy, however, to establish the necessary degree of secondary meaning, since the particular configuration of the goods must be recognized by the relevant consumers as indicating a particular source. If the exclusion in the specific legislation is clearly intended to dismiss the indication as not worth protecting at all, for example, in the case of purely descriptive words, protection is likely to be denied also under unfair competition law.

[Limited Scope of Trademark Protection]

54. Limitations on the *scope of protection* afforded by trademark law may also have the effect of allowing indications to be protected against confusion under unfair competition law. Although trademark laws usually grant protection against any potentially confusing use of a registered trademark, there may still be differences with respect to the exact scope of the protection against confusion. For example, protection against the use of the same or a similar mark might be restricted to those goods or services for which the mark is registered. If a mark identical or similar to the registered trademark is used for other goods or services and that use is likely to cause confusion, such protection might only be available under unfair competition law or passing-off principles. Generally, trademarks are protected against the use of identical or similar signs not only in respect of identical goods or services but also in respect of *similar* goods or services. This type of protection derives from what is sometimes called the "principle of speciality,"

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[10] Notably Italy and France.

as the protection is related to the trademark's primary function of distinguishing the goods of one enterprise from those of competitors and other market participants. Thus if trademark protection is not available because the goods or services involved are held to be dissimilar (although confusion as to source may in fact be possible), protection against confusion can be sought under unfair competition law. However, there are also trademark laws that consider the likelihood of confusion to be the sole criterion for protection, regarding the similarity of the goods or services involved as not decisive in itself, but only as one of several determining factors. This kind of statutory protection would encompass all types of confusion.

55. The *criteria* used to judge the similarity of indications are, with some minor differences, the same throughout the world. The determining factors include the common elements of appearance, pronunciation and meaning or verbal translation of the marks involved, but the decisive factor is the *overall impression on the average consumer* of the goods or services involved. Particularly if the goods are for mass consumption, the individual elements of the marks involved are less carefully examined by the average consumer. Since the two marks are as a rule not closely examined side by side, in practice the similarities between the indications are more important than the differences. The similarity of the goods or services depends largely on the question whether consumers would generally expect the goods or services to originate from the same source. However, they do not need to be either functionally interchangeable or competitive.

56. Protection against confusion may be too limited for so-called "*well-known*" marks and, in particular, for marks with an even higher reputation. Article 6*bis* of the Paris Convention requires member States to protect trademarks that are well known in their country against any potentially confusing use of similar trademarks, but that obligation is only relevant for identical or similar goods. In certain cases, the unauthorized use of well-known marks for different goods or services may nevertheless cause confusion among consumers. For example, if the mark has been used for a broad range of products and has been extensively advertised or is well known for the particular "image" of its proprietor, consumers might associate such a mark with a certain origin and quality consistency rather than with goods or services of a specific kind. Such associations can also cause confusion. The member States are not obliged under Article 6*bis* to grant this extended

protection, but unfair competition law may be relevant. The question whether a trademark is "well known" in a given country for the purposes of Article 6*bis* of the Paris Convention has to be decided in each case on the basis of the facts. Usually, the factual determination of the notoriety of a trademark is based on its reputation and image in the mind of the trade circles and consumer groups concerned at the place and time relevant in the particular case. Factors such as the mark's inherent distinguishing power, the length of time that it has been used in the given country, the amount of advertising and other publicity given to it in various media and its established association with particular goods or services are often taken into consideration.

57. Statutory trademark law frequently requires that the use of a similar mark must be a form of *trademark use*, that is, use as an indication of the commercial source of the products or services. Thus ornamental use, such as use on advertising material or as a mere decoration on goods, for instance on ballpoint pens or ashtrays, or even as the configuration of an actual product such as an earring in the shape of the mark, is not always regarded as falling within the scope of statutory trademark protection. Protection against this type of use could, however, be sought under unfair competition law. One example of a trademark law that is very extensive in the above respects is the Uniform Benelux Trademark Law of 1971, which provides a broad definition of registrable marks and protection against any use of an identical or similar trademark by others without proper justification that is likely to cause prejudice to the trademark proprietor.

[Trade Names]

58. Similar limitations on protection against the unauthorized use of traders' or businesses' indications are to be found in the protection of *trade names*. Trade names serve to identify and to distinguish an enterprise and its business activities from those of other enterprises. Article 8 of the Paris Convention imposes the obligation to protect trade names in all countries of the Paris Union, without specifying what kind of protection should be granted or how it should be given. Nevertheless, trade names must be protected without any obligation of filing or registration. Most countries already protect trade names against the risk of confusion. This protection applies not only where trade names are covered by a special law, but also where they are protected under special provisions of unfair competition law, civil law,

company law or commercial law. As a general rule, a direct competitive relationship between the enterprises concerned is not decisive, but remains relevant in determining whether the use of the same or similar trade names might confuse consumers regarding the identity of enterprises or the relationship between them. The protection may extend beyond the particular field in which the prior trade name is used, as trade practice or the likelihood of expansion and diversification of the activities of the enterprise is frequently taken into account by the courts. Thus the scope of protection of trade names against confusion may sometimes be a little wider than the scope of protection of trademarks under trademark law.

(iv) *Confusion With Respect to Product Shapes*

59. The actual shape of a product could also lead to confusion among consumers. If the shape is so well known that consumers will relate the product with a particular commercial *source* (as in the case of the "Coca-Cola" bottle), then the shape can be regarded as a protectable indication.

60. It must also be noted that specific legislation is available in many countries for the protection of *industrial designs*, either to complement or to replace copyright protection for works of so-called "applied art." Such legislation usually prohibits the use of identical or similar product appearances for identical or similar goods. However, as with trademark legislation, protection under special laws on industrial designs is also limited in several ways, which vary significantly from country to country. In a manner similar to the specific protection under trademark laws, such limitations may concern the *general applicability* of the designs law to certain product appearances and also the *exact scope of the protection* granted by the specific legislation. For example, if the design protection of a surface decoration is limited to the use of the decoration on products for which the design is registered, protection against copying of the design for the decoration of other products may be obtained under unfair competition law, if the copied design is misleading or causes confusion as to the commercial source.

61. For protection against confusion concerning the *products* only, most requirements under unfair competition law are established by case law, frequently with reference to the practice of "*slavish imitation.*" Within this particular field of unfair competition law, it has often been

stated that, as a principle inherent in the free market system, market participants are free to imitate designs or other shapes, appearances or visual characteristics of products that are not protected by specific laws such as patent, copyright, design or possibly trademark laws.[11] Some of those specific laws even expressly preclude protection under unfair competition law for acts that are covered by the specific legislation if the design involved could be protected under that legislation. For example, Article 14(5) of the Uniform Benelux Designs Law of 1975 precludes actions to protect registrable designs under unfair competition law if protection could have been granted had the design been properly registered. Therefore, the mere risk of confusion as to the shape of the products will be insufficient to constitute unfair competition if the design would have been protectable under a specific law and product imitation would have been covered by that specific legislation. On the other hand, the risk of confusion as to the products may be sufficient to obtain protection under unfair competition if the design involved reveals a certain degree of originality but cannot be registered as a design owing to other requirements of the specific legislation, or if registration has been applied for but not yet secured.

62. If the design, shape or other characteristic non-functional features of the product are associated to a substantial degree by consumers with a certain source or origin, potential *confusion as to the source* of the product will usually constitute an act of unfair competition. Whether such potential confusion occurs in cases of imitation will be determined by the same factors as outlined above with respect to indications, that is, after examination of the question whether the characteristic features of a product have acquired a sufficient degree of secondary meaning, and the product designs involved will be judged on their similarities. In some countries[12] it is accepted that the risk of confusion as to source can be reduced by the use of *disclaimers*, like a clearly visible statement ruling out the possible assumption that the product or service comes from a particular source. However, such disclaimers are only seldom recognized as sufficiently reducing the risk of confusion.

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[11] For example, under Article 11(1) of the Spanish Law on Unfair Competition, the imitation of achievements and entrepreneurial initiatives of another person is permitted, unless they are protected by an exclusive right. However, Article 11(2) contains an exception to this principle for cases of unfair imitation.

[12] Notably Japan.

63. Protection against confusion as to the *commercial source* of a product may also be available under specific trademark law if the applicable trademark legislation provides for the protection of three-dimensional marks or the "get-up" of products. However, if the product's appearance is not registered as a trademark, or if particular forms are possibly excluded from statutory trademark protection, the same principles as outlined above will apply to the protection against confusion between product shapes under unfair competition law.

(b) Misleading

(i) *General*

64. Misleading can roughly be defined as creating a false impression of a competitor's *own* products or services. It may well be the single most prevalent form of unfair competition, and it is by no means harmless. On the contrary, misleading can have quite serious consequences: the consumer, relying on incorrect information, may suffer financial (or more harmful) prejudice. The honest competitor loses clients. The transparency of the market diminishes, with adverse consequences for the economy as a whole and economic welfare.

65. Since truthfulness is rightly considered to be one of the main principles of honest trade practice, it is generally agreed that the prohibition of deception is essential to the concept of fairness in competition. Or, as Article 10*bis*(3) of the Paris Convention states, any indication or allegation that is likely to mislead, has "in particular" to be regarded as being contrary to honest practice.

66. Consequently, most member States of the Paris Union have included the prohibition of misleading acts or practices in their legal systems (or have even passed specific laws on the subject). In addition, the courts have developed a particularly abundant case law on misleading. Even in countries where in the past protection against deception has been less strong than in others, recent developments indicate a move towards greater strictness. In the search for effective legal solutions, however, countries have chosen quite divergent methods. A significant factor of this divergence is that misleading acts are primarily directed to the *consumer* and not directly to competitors. Where consumer protection is primarily looked upon as a matter of criminal

law, enforcement is left to the State enforcement authorities. However, most of the countries that have specific legislation on unfair competition have included a provision against deception into the relevant laws,[13] thus adopting a civil law approach.

67. While, on the whole, the regulation of misleading makes a many-faceted picture, most countries share the distinction between "normal" misleading, which may be done in good faith, and *special cases of misleading*, which may have particularly severe consequences. For the most serious cases of misleading, such as malicious misleading or deception in the health and drug field, several countries have introduced criminal sanctions in addition to civil law remedies. Moreover, special cases of potential deception such as bonuses, gifts, clearance sales and travelling sales are often regulated in detail. Even tighter restrictions are frequently imposed by self-regulatory institutions, which in some countries[14] have reached a particularly advanced state of development as regards protection against misleading.

68. In some countries the existing protection against misleading practices is to some extent a result of international *harmonization.* Because of the internationalization of commerce and communication media such as television, misleading acts and practices, especially in advertising, seldom stop at the border of a given country. Different national laws not only result in different and thus at least to some extent inadequate levels of consumer protection, but also affect the free circulation of goods and services. Countries that are economically bound in a common market have a particular need for harmonization of diverging national laws on misleading. Thus the European Community issued a Directive on Misleading Advertising in 1984 in order to set up a minimum objective criterion for determining whether advertising is misleading. A certain degree of harmonization has also been reached among the Nordic and the African countries.

(ii) *The Concept of Misleading*

69. There is a consensus according to which the concept of misleading is restricted neither to inherently false statements nor to statements

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[13] Especially Belgium, Bulgaria, Germany, Hungary, Luxembourg, the Netherlands and Switzerland.

[14] Notably the United Kingdom.

that have actually led to a false impression on the part of the consumer. Instead it is considered sufficient (as it is by Article 10*bis*(3)3 of the Paris Convention) that the indications in question are *likely* to have a misleading effect. Even statements that are literally correct can be deceptive. If, for example, chemical ingredients are generally forbidden in bread, the courts of most countries would consider an advertising claim that a certain bread "was without chemical ingredients" to be deceptive, because, though literally true, it gives the misleading impression that the advertised fact is something out of the ordinary.

70. It is likewise not necessary for the product in question to be inferior, in an objective sense, so long as the indication or allegation has some *enticing effect* on the consumer. For example, if the public prefers domestic goods to foreign goods, a false declaration to the effect that imported goods are domestic is misleading even if the imported goods are of superior quality.

71. It is generally agreed that the question whether or not there is deception must be determined by the *reaction of the addressee* to the statement and not by the intention of its maker. However, the actual determination and evaluation of this reaction may differ from country to country and may also depend on the kind of addressee (consumers or traders) and the type of goods or services. The Paris Convention leaves this question to member States (as does the EC Directive on Misleading Advertising). The different opinions as to what *standards* have to be applied are the result of different answers to the following questions:

— Is the prohibition of misleading meant to protect the average or (also) the less educated, less critical consumer?

— How is the public reaction determined? Empirically or by an overall estimation by the judge himself?

— How many of the addressees must be likely to be misled for a statement to be considered misleading?

72. In a number of countries[15] the relevant standards are set on the basis of the notion of the *average consumer*. Where the courts base their assessments on the judges' own experience, there is a tendency

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[15] Notably Belgium, France, Italy, the Netherlands, Spain and the United States of America (as far as Section 43(a) of the Lanham Act is concerned).

to assume that the average consumer is generally well informed and intelligent enough to be immunized against most of the dangers of deception. In those countries the threshold is also considerably higher. Although it is frequently stressed that it is sufficient if a "not unsubstantial proportion of the addressees" are likely to be misled, the tendency is to favor an average deception rate.

73. However, in Germany the emphasis is clearly on the less educated, less critically prepared consumer, who is easily influenced by false statements. Misleading is frequently proven by empirical methods, mainly consumer surveys, and the interference threshold is set very low, at 10 to 15 percent of the consumers.

(iii) *The Communication of Misleading Statements*

74. Since the main area of misleading in commerce is to be found in advertising, most countries with special legislation have focused on misleading *advertising*.[16] Other countries have chosen, as Article 10*bis*(3) of the Paris Convention has, the broader notion of "*indication or allegation*."[17] In countries that have a general provision on unfair competition this difference is minimal, however, since there is basic agreement that deceptions other than those in advertising are irreconcilable with "honest trade practice" and can therefore be judged under the general provision.

75. It is further agreed that the exact way in which the allegation, indication or presentation is made is immaterial. So is the form of the message. All methods of *communication* – written, oral or even symbolic – have to be taken into account. Communications may be in the form of trademarks, labels, brochures, radio commercials, television publicity spots, posters and so on. In general, misleading is concerned only with the effect a statement has on the addressee and not with the way in which the statement is communicated.

76. The communication need not contain "information" in a neutral, objective sense in order to be considered under the heading of mis-

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[16] For example, Belgium, France, Germany, Greece, Luxembourg and Peru, as well as the EC Directive on Misleading Advertising.

[17] Notably Germany and Switzerland.

leading practices. On the other hand, the concept of misleading is restricted to those indications that might cause *misconceptions* on the part of the consumer. The allegation, indication or presentation must therefore be able to create some sort of *concrete impression* which can be shown to be true or untrue. "Unobjective" or suggestive advertising which does no more than create vague positive feelings about a product is therefore outside the scope of misleading. If in some countries[18] certain kinds of suggestion are forbidden, this is not done under the provisions on misleading, but rather under the general provision concerning honest trade practices.

77. A misleading communication does not necessarily have to be a positive one: a half-truth is always also a half-lie. For example, if it is claimed that a particular slice of bread has fewer calories than others, while this is solely due to the fact that it is thinner, the *omission* of this information can create as strong an incorrect impression as an express statement would have done. Consequently, some countries[19] have expressly mentioned the omission of relevant facts in their lists of misleading practices, or alternatively the courts have recognized that such omission can be a misleading practice.[20] An omission cannot always be equated with a positive statement, however. Since no businessman has the general duty to reveal adverse features of the product that he is offering, there can only be deception if the public, in the absence of express information, expects a certain characteristic to be present.

(iv) *Exaggerations*

78. The consequences of the different concepts of misleading can best be seen in the treatment of exaggerations. Although in all countries obvious exaggerations (even if literally inaccurate) are not considered deceptive because they can easily be recognized as "sales talk," the question of what is mere "*hot air*" or "puffing" and what is to be taken seriously is answered differently in different countries. In some countries (such as Germany), it is assumed that the public basically believes all advertising statements, and especially those that claim uniqueness ("the best, the first," etc.); consequently a specially strict

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[18] Notably Germany.

[19] Notably Belgium, Bulgaria, Hungary and Spain.

[20] Notably Germany, the Netherlands and the United States of America.

standard is applied. Other countries (such as Italy and the United States of America) take the exact opposite position and tolerate generally formulated indications, in particular those in the form of claims of uniqueness. Thus in the United States of America the courts have generally only intervened if the product advertised as the best is in reality inferior.

(v) *The Subject Matter of Misleading*

79. Deceptive statements can be made on *all relevant aspects of business matters*. However, in principle, the prohibition of deception should be broad enough to cover those new forms of misleading that the legislator has not thought of. On the other hand, a statutory provision must give guidance to the courts. In countries with a predominantly civil law approach, this is often achieved by expressly naming those forms that "in particular" must be regarded as misleading, leaving the courts free to take other forms of deception into account. Usually at least the examples given in Article 10*bis*(3)3 of the Paris Convention are included, namely, "the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods." Often services and indications of geographical origin are also included. Recent legislation on unfair competition also mentions some "modern" examples of misleading. The Greek Decree on Misleading Advertising, for example, expressly refers to misleading statements in the endorsement of products or the passing-off of an advertisement as a press article. The same applies in Belgium. In Hungary, any misleading references to the environment, among other things, are expressly forbidden. Still other countries (and the EC Directive on Misleading Advertising) prohibit any deception with respect to the *identity* of the advertiser. This is interesting inasmuch as there seems to be basic agreement that these specific errors of identity (while they do, of course, involve deception) are rather dealt with under the heading of *confusion* (or passing-off), which is largely covered by specific laws on trademarks and trade names. However, the express inclusion of errors as to commercial origin under the heading of deception is significant in that the special procedure provisions of unfair competition law may be applied. For example, consumer associations may bring an action in a case of misleading involving trademarks, whereas trademark law itself would restrict the right of action to the trademark owner.

80. A list of examples of misleading practices supplemented with a general provision is only possible, however, if the sanctions against misleading are predominantly those of civil law. *Criminal law* usually requires a relatively narrowly worded, enumerative prohibition, although in practice this difference is mitigated by the fact that usually the list of expressly named practices is fairly comprehensive.

(vi) *Subjective Requirements*

81. Even the most careful businessman can issue a statement that the public misunderstands in a way not foreseen by him. Misleading statements, especially in advertising, are therefore not always made in bad faith. On the other hand, even in the absence of any fault on the part of the advertiser, deception in competition has to be stopped in the interest of the consumer and of other competitors. The EC Directive on Misleading Advertising, for example, obliges member States to ensure the cessation of misleading "even without proof of actual loss or damage or of intention or negligence on the part of the advertiser." Countries that favor a civil law approach in the repression of unfair competition usually have few problems in doing so, but where the law against misleading conduct is essentially part of criminal law,[21] at least in theory some subjective element is required. Because of the difficulty of furnishing such evidence, this "subjective" concept has proved a hindrance. Thus, in practice, the courts have gradually reduced the requirement of intent. This can best be seen in France, where the (criminal) prohibition of misleading advertising in Article 44 of the Loi Royer in theory still requires "bad faith," but where the courts have first reduced this requirement to mere knowledge of facts, and have later even assumed such knowledge.

82. This primarily *objective approach* to the repression of misleading statements is, of course, restricted to a cease-and-desist action (and possibly to the remedy of publication). In all countries, an action for damages will only be successful if there is at least negligence. Intent, or even malicious behavior, is required in cases that can be described as real criminal offenses, for example in the food and drug field.

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[21] As it is in France, in Peru and, partly, in the United Kingdom.

(vii) *Burden of Proof*

83. The question of who has to furnish evidence of the accuracy of a statement or the likelihood of deception can be of paramount importance in misleading advertising cases. According to general principles of procedural law in most countries, it is the plaintiff (or the public prosecutor or administrative authority) who bears the burden of proof. In the field of misleading, especially misleading advertising, however, some exceptions to this rule are made. The EC Directive on Misleading Advertising, for example, obliges member States to require the advertiser to furnish evidence of the accuracy of factual claims if "such a requirement appears appropriate on the basis of the circumstances of the particular case." Some countries have gone even further by implementing a general reversal of the burden of proof[22] or by placing the advertiser under the obligation to "reasonably substantiate" all advertising claims.[23]

(c) Discrediting Competitors

(i) *General*

84. Discrediting (or disparagement) is usually defined as any false allegation concerning a competitor that is likely to harm his commercial goodwill. Like misleading, discrediting tries to entice customers with incorrect information. Unlike misleading, however, this is not done by false or deceptive statements about one's own product, but rather by casting untruthful aspersions on a competitor, his products or his services. Discrediting, therefore, always involves a *direct attack on a particular businessman* or a particular category of businessmen, but its consequences go beyond that aim: since the information on the competitor or his products is incorrect, the consumer is liable to suffer also.

85. Article 10*bis*(3)2 of the Paris Convention obliges member States to prohibit all "false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or com-

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[22] Notably Belgium, Denmark, France and the Netherlands.

[23] As does the Federal Trade Commission in the United States of America.

mercial activities, of a competitor." A similar provision can be found in most national laws on unfair competition.[24] But even without such an express prohibition, it is generally agreed that discrediting is irreconcilable with the notion of "fairness" in competition. Where unfair competition law has been developed on the basis of general tort provisions,[25] it is considered one of the "classical" forms of unfair competition. In all common law countries a (common law) tort of disparagement or discrediting is recognized; additionally some of those countries[26] have recently granted statutory relief. Since it is primarily the individual businessman who suffers from disparaging remarks, civil law sanctions (injunctive relief or damages) are preferred. However, in the most serious cases, especially those involving intentional or malicious defamation, criminal sanctions are also provided, often under the general criminal code.

(ii) *Reference to an Individual Competitor*

86. As mentioned above (in paragraph 84), it is in the very nature of discrediting to be directed against a particular businessman or *a particular category of businessmen.* The target need not necessarily be named, however: easy identification by the addressee of the statement is sufficient. This can be achieved by references like "a certain enterprise in X" or may even be the result of a special market situation, for example if there is only one relevant competitor.

87. Frequently, the person attacked will be a *competitor.* As in Article 10*bis*(3)2 of the Paris Convention, most countries restrict unfair competition law protection against disparagement to cases where there is at least some sort of competitive relationship between the plaintiff and the defendant. In some countries, however, the requirement of a competitive relationship has been totally abandoned,[27] and this has led to a considerably broader concept of discrediting: not only competitors but also consumer associations or the media can be held liable under

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[24] Notably Argentina, Bulgaria, Colombia, Germany, Greece, Hungary, Italy, Japan, Peru, Poland, Spain, Switzerland and the United States of America.

[25] As in France, the Netherlands, and in the various jurisdictions within the United Kingdom.

[26] Notably the United States of America: see Section 43(a) of the Lanham Act and State statutes.

[27] Notably Belgium, Sweden and Switzerland.

unfair competition law if they make derogatory statements about an individual businessman.

(iii) *The Subject Matter of the Attack*

88. As to the subject matter of the attack, Article 10*bis*(3)2 of the Paris Convention names the establishment, the goods and the industrial or commercial activities (of a competitor). However, *any* kind of disparaging remark that is likely to harm the *goodwill* of an entrepreneur should be forbidden. The way in which the harm is done should be irrelevant. Harm to a business reputation can be caused by all forms of reference to the enterprise or to its goods, prices, employees, credit rating, qualifications and so on. It can also be caused by references to an entrepreneur's personal status, for example, his race, his nationality, his religion or his political position. These so-called "*personal references*" which have nothing to do with commercial activities are in some countries[28] expressly forbidden as disparaging; in others[29] they are considered illegal under the general provisions on protection against unfair competition.

(iv) *Intent or Actual Damage*

89. References to a competitor that affect his commercial goodwill can be made in good faith, for example if the maker of the statement believes it to be true. Effective protection against discrediting is therefore typically independent of any proof of *actual damage or intent.* In some countries (such as the United States of America), however, the common law tort of disparagement in theory requires proof of malice and damage. Although the courts in the United States of America have gradually eased that requirement, the concept still has proved to be too narrow, and that has led to the enactment of legislative provisions for the grant of statutory relief against disparagement without any evidence of damage or intent (see Section 43(a) of the Lanham Act).

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[28] Notably Hungary.

[29] Notably Belgium, France, Germany and the Netherlands.

(v) *Statements of Fact*

90. Opinions differ on whether discrediting should be restricted to *statements of fact*. In some countries,[30] the statutory notion of discrediting is broad enough to cover also *statements of opinion*. In other countries, it has at least been recognized by the courts that such statements are within the scope of the general provision against dishonest trade practices.[31] In still other countries, disparagement is concerned mainly with statements of fact.

(vi) *False Statements*

91. The question whether statements of opinion can be discrediting has to be considered in connection with another question, namely, whether protection should be extended to the case of *accurate* statements. Article 10*bis*(3)2 of the Paris Convention speaks of *false* allegations. Many countries go further, however, recognizing that true, but nevertheless discrediting remarks are either directly within the scope of the express prohibition of discrediting,[32] or at least a violation of the general provisions on honest trade practices.[33] Thus, a literally truthful remark about a competitor may be considered unfair competition if the "attack" is blown up out of proportion, or if the words used are needlessly injurious. On the other hand, some countries expressly restrict the notion of discrediting to *inaccurate or at least misleading statements*. In the United States of America, for example, true but nevertheless disparaging statements are neither within the scope of the common law tort of disparagement nor within that of the statutory relief granted by Section 43(a) of the Lanham Act or – at State level – the statutes on business practices.

92. An explanation of this difference in attitudes can be found in the diverging assessment of "commercial honor." Where unfair competition law has its roots in the protection of the commercial reputation of the individual businessman – as it does in the continental European countries – a "special tort of business disparagement" has emerged,

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[30] Notably Hungary and Switzerland.

[31] Notably Belgium, Germany and the Netherlands.

[32] Notably Denmark, Hungary and Switzerland.

[33] Notably Belgium, France, Germany and the Netherlands.

to which, in principle, much stricter rules apply than to defamatory statements outside the bounds of competition, where constitutional considerations such as freedom of speech have to be taken into account. In other countries,[34] especially those that have not developed a comprehensive system of protection against unfair competition, the attitude is exactly the opposite: it is assumed that, in the interest of competition, attacks on individual competitors are unavoidable, that they must be widely tolerated and that a line should only be drawn where the attack is based on false facts. In those countries, the plaintiff usually also bears the burden of proof as to the falseness of the statement (which can sometimes make an action impossible).

(3) *Acts Not Expressly Mentioned in Article 10*bis

(a) General

93. In addition to acts that cause confusion, mislead or discredit, which are referred to in Article 10*bis* of the Paris Convention, there are a number of other acts which have been recognized by the courts as unfair practices and which, increasingly, have become the subject of legislative provisions. Of particular interest in this connection is the trend towards explicit protection of trade secrets by express provisions in unfair competition laws, and the continuing evolution of provisions governing the practice of comparative advertising. Moreover, there has been an increasing recognition of the need to grant protection against undue "misappropriation" of, or "free riding" on, the achievements of competitors, regardless of the availability of specific industrial property rights, provided that, under the circumstances of the case, such acts are found to be unfair.

94. The above-mentioned categories of acts of unfair competition, as well as other categories, are discussed in the following paragraphs. It should be noted, however, that those categories can – and often do – overlap with the categories referred to in Article 10*bis* of the Paris Convention. For example, certain aspects of an act of unfair "free riding" may fall under the categories of causing confusion or discrediting another person's products or business.

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[34] Notably the United States of America.

(b) Violation of Trade Secrets

(i) *General*

95. Competitive strength usually depends on *innovative techniques and accompanying know-how* in the industrial and/or commercial field. However, such techniques and know-how are not always protectable by patent law. Firstly, patents are available only for inventions in the field of technology and not for innovative achievements concerning the conduct of business, etc. Moreover, some technical discoveries or information, while providing a valuable commercial advantage for a particular trader, may lack the novelty or inventive step required to make them patentable. Furthermore, during the pendency of a patent application, as long as the information has not been disclosed to the public, the owner of the information to be patented ought to be protected against any wrongful disclosure of the information by others, regardless of whether or not the application eventually leads to the grant of a patent. Although the Paris Convention does not mention trade secrets, the need for their protection against wrongful disclosure is generally recognized. The unauthorized use of valuable secret information by persons other than the holder of the secret is regarded as a misappropriation of business values that have been developed by the holder, who loses his competitive and economic advantage over competitors as soon as the information is used or disclosed by another.

96. Trade secrets are protected against unauthorized use and disclosure by various statutory means. Some countries have *special provisions* for the protection of trade secrets either under specific legislation on unfair competition[35] or as part of another law.[36] Other countries treat trade secrets as an aspect of *tort law*.[37] Still other countries have enacted *criminal*, *administrative*, *commercial* or *civil law provisions* prohibiting the unauthorized use or disclosure of business secrets. The criminal provisions are less important in practice, however, since normally knowledge of the secrecy, as well as malicious or fraudulent intent, have to be proved. Yet if the disclosure of a trade secret constitutes a criminal offense, it will normally constitute an act of unfair

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[35] Notably Germany, Japan, Spain and Switzerland.

[36] For example, certain States of the United States of America, Mexico and Peru.

[37] For example, France and the Netherlands.

competition as well. Furthermore, since employees, consultants, independent contractors and joint venturers are often privy to trade secrets, several aspects of civil law concerning *employment contracts* and general contract law are also relevant, depending on the circumstances of the case. Finally, it is not unusual to have combinations of the above means available. For example, violation of trade secrets could result in unfair competition or tort liability, as well as in criminal sanctions. On the other hand, in situations where *non-competitors* have intimidated or influenced agents or employees, or have otherwise induced them or other persons bound to secrecy to disclose the secret information, only civil tort law might be applicable.

(ii) *What Information Can Be a Trade Secret?*

97. Although a legal definition of a trade secret rarely exists, several countries (following the example of France) differentiate between *manufacturing* (or *industrial*) secrets and *commercial* secrets, which could have consequences for the applicability of criminal law. The first category of trade secrets is related to information of purely *technical* character, like production methods, chemical formulae, blueprints or prototypes. Such information could constitute a patentable invention but, generally, patentability of the information in question, in particular, novelty in a patent law sense, is not required for the secret to be protectable. *Commercial secrets* include sales methods, distribution methods, contract forms, business schedules, details of price agreements, consumer profiles, advertising strategies and lists of suppliers or clients. Usually, the subject matter of trade secrets is rather broadly defined, and the final determination of what information can be a trade secret will depend on the specific circumstances of each individual case. For example, in the Unfair Competition Prevention Act of Japan, a trade secret is defined as any information relating to a production method, a sales method or any other information on technology or business that is unknown to the public. A similar definition is contained in the Uniform Trade Secrets Act of the United States of America, which has been adopted by about 20 States.

98. There are several lines of inquiry that serve to determine what information constitutes a trade secret: the extent to which the information is known to the public or within a particular trade or industry, the amount of effort and money expended by the trader in developing

the secret information, the value of that information to the trader and to his competitors, the extent of measures taken by the trader to guard the secrecy of the information and the ease or difficulty with which the information could be properly acquired by others. From a subjective point of view, the trader involved must have a *considerable interest* in keeping certain information as a trade secret. Although contractual obligations are not necessary, the trader must have shown the *intention* to have the information treated as a secret. Frequently, specific measures to maintain the secrecy of the particular information are also required. The fact that the information has been supplied confidentially will not always be sufficient. In some countries (for example, the United States of America and Japan), the efforts made by the owner of the information to keep it secret are considered by courts to be of primary importance in determining whether the information constitutes a trade secret at all.

99. From an objective point of view, the information must, in order to qualify as a trade secret, be known to a *limited group of persons* only, that is, it must not be generally known to experts or to competitors in the field. Even patent applications may be regarded as trade secrets as long as they are not published by the patent office. Therefore, external publications or other information that is readily available will not be considered secret. For example, the use or disclosure of a trade secret by a person who has acquired it in a *legitimate business transaction* and without any negligence is not deemed unfair. On the other hand, absolute secrecy is not a requirement, for the information might also be discovered independently by others. Also, business partners can be informed without loss of secrecy if it is obvious that the information has to remain secret. Factors that indicate whether the information has the necessary degree of confidentiality to constitute a protectable trade secret are whether it contains material that is not confidential if looked at in isolation, whether it has necessarily to be acquired by employees if they are to work efficiently and whether it is restricted to senior management or is also known at the junior level. Still, the most solid proof is the strict confidentiality of the information and the contractual duty to keep it secret.

(iii) *Use and Disclosure by (Former) Employees*

100. Even in countries where specific provisions on wrongful or unfair disclosure apply, *employment contracts* may serve to reinforce and

supplement the protection afforded to trade secrets under the law of unfair competition or tort law. It is generally accepted that employees have a basic right to use and exploit, for the purpose of earning their living, all skills, experience and knowledge that they may have acquired in the course of previous periods of employment, even with the help of trade secrets. Yet, an employee does have the duty, during the period of employment, to act with *good faith towards his employer* and, after the employment has come to an end, not to use or disclose any confidential information about his employer's affairs that may have come to his notice during his employment. For example, Article 85 of the Mexican Law on the Promotion and Protection of Industrial Property of 1991 provides that any person who, by reason of his work, employment, function or post, the practice of his profession or the conduct of business relations, has access to a trade secret and he has been warned that this information must be kept secret, shall abstain from revealing it without just cause and without the consent of the person keeping the secret or of its authorized user. Thus in many cases the use or disclosure of information will constitute a breach of the employment contract by the (former) employee if the information in question must remain secret. However, the distinction between using the skills, knowledge and experience legitimately acquired during employment and the prohibition on the use or disclosure of the former employer's industrial or commercial secrets is often difficult to make. Clearly, in cases where the behavior of the employee is equivalent to theft, embezzlement, industrial espionage or conspiracy with a competitor, a willful breach of confidence will be presumed.

101. Frequently, employment contracts incorporate *specific provisions* prohibiting the disclosure of business or trade secrets, but such provisions, like undertakings not to compete, must not be so restrictive of the professional abilities of the employee in the future that they constitute an undue *restraint of trade.* Criminal law, as well as civil and labor law, could create relevant duties in employment relations. For example, according to Article 237 of the Criminal Code of the Netherlands, the disclosure of trade secrets by a person employed by a trader is an offense, and Article 2622 of the Italian Civil Code forbids the disclosure of secret business information by directors, general managers and legal auditors of any type of company. Such provisions may be very important in situations where the employee is not bound by contractual clauses, or where the use of such information by former employees is not related to a *competitive action.* If the former em-

ployee can be regarded as a competitor of the former employer, for example if he has set up a company on his own in the same sector, a breach of confidence by the former employee will normally be an act of unfair competition. For example, the *inducement of customers* of the former employer to become clients of the employee in his new position will probably be deemed unfair, particularly if the employee misuses lists of customers or internal business details in order to make better offers. However, there can also be wrongful misuse of confidential information if special knowledge of the employer's activities in relation to clients' affairs is made use of to persuade those clients to transfer their business to another.

(iv) *Use and Disclosure by Competitors*

102. Competitors are usually very interested in acquiring the trade secrets of others. However, as trade secrets themselves are not fully equivalent to exclusive rights under industrial property law, the determination of the unfairness of competitors who use or disclose the trade secrets of others is based on the *means of acquiring the information.* For example, it is expressly stated in the Unfair Competition Prevention Law of Japan that the rules concerning the protection of trade secrets will not apply where a trade secret is obtained in the course of a legitimate trade activity, provided that the person obtaining the secret did not use dishonest means to do so, or did not negligently disregard the dishonesty of such means. Thus competitors who have not used any influence to bring about the disclosure of the secret information, but have merely taken advantage of the breach of contract of a former employee or partner of the competitor, will seldom be held liable. The competitor's awareness that the disclosure of the trade secret by the former employee or partner would be a breach of contract is regarded as a *minimum* level of intent for determining liability. The Mexican law, for example, makes it an offense to use a trade secret which has been disclosed by a third party where the person to whom the secret was disclosed knew that the third party was not authorized to disclose the secret. In any case, competitors are not allowed to interfere recklessly with the contractual relations of others. For example, if a competitor has bribed or otherwise *unlawfully persuaded* a (former) employee to disclose a competitor's trade secret, he will be liable for unfair competition.

103. There are many situations that will depend on the specific circumstances of the case. For example, where the use of trade secrets was part of a former business relationship between the competitors, the fact that the know-how was to be kept secret does not in itself imply that use by the competitor would always be deemed unfair. On the other hand, the possible lack of a contractual clause concerning the use of trade secrets does not preclude unfairness. If the disclosure of trade secrets by a (former) employee is willfully induced by a competitor, the competitor is committing an actionable offense, provided he should reasonably have known or suspected that disclosure of the information was a breach of contract at the time of receiving the information. Frequently, the inducement of employees to disclose trade secrets is combined with a (separate) act of unduly enticing employees away, which is consistently deemed to be a violation of unfair competition law.

(c) Taking Undue Advantage of Another's Achievement ("Free Riding")

(i) *General*

104. In addition to the likelihood of confusion, there are other circumstances that may be held relevant under various doctrines with respect to the imitation of indications, products or other marketable creations. Such circumstances involve the act of taking undue advantage of, or free riding on, another person's achievement recognized by consumers and other market participants like dealers, traders and suppliers. Frequently such achievements concern a certain indication or product but they could also be of purely technical character.

105. Protection in such cases depends on a number of requirements which vary from country to country. The unfairness of the competitive act is regarded as resulting not only from the *obvious exploitation* of the notoriety of the indication, commercial success of the product or technical achievement of the competitor *without any proper effort* being made to depart substantially from the characteristic features of that particular achievement, but also from the risk of *damage to the reputation* of the existing business. As a minimum prerequisite, the indication or the product must have a certain *distinctiveness* (which may be of a level not sufficient for protection under specific legisla-

tion). As the scope of protection may depend on the degree of distinctiveness, completely banal indications or products will not usually qualify for protection against mere imitation.

106. From a purely systematic point of view, the notion of "free riding" has a number of common features with the notions of causing confusion and misleading. Free riding on another person's market achievements can be defined as any act that a competitor or another market participant undertakes with the intention of directly exploiting another person's industrial or commercial achievement for his own business purposes *without substantially departing* from the original achievement. In that sense, free riding is the broadest form of competition by imitation. Under the principles of a free market, however, the exploitation or "appropriation" of another person's achievements is unfair only under specific circumstances. On the other hand, acts that cause confusion or mislead normally imply free riding on another person's achievements, but are generally recognized as forms of free riding that are *always* unfair.

107. When assessing the availability of protection against unfair competition for market achievements of others in the absence of confusion, it has often been stated that the *mere exploitation* of another's achievement is consistent with the principles of a free market system. Thus protection under the rules concerning unfair competition cannot simply be regarded as an alternative route to the securing of protection which would be available without the obligation to comply with the various requirements of protection imposed by specific industrial property legislation. As a certain balance of interests on the relevant market has been achieved by adopting specific legislation on patents, industrial designs, trademarks and so on, that balance must also be taken into consideration in the application of unfair competition law. As a general rule, protection under unfair competition law will be denied if the achievement that has been copied or appropriated is covered by specific industrial property legislation and the type of protection sought by resorting to unfair competition law could have been obtained, at least for a certain period of time, under that specific legislation (principle of "*preemption*").

108. As indicated above, protection *as such* may be invoked if the subject matter of specific legislation does not cover the achievement involved, for example, if the law is not applicable to achievements

made before a certain date, or if the protection granted by the special law is not broad enough to give the relief sought in the specific case. Some industrial property laws expressly provide that protection under unfair competition provisions may be invoked for achievements that are not protectable under the specific law. Some industrial property laws expressly exclude additional protection under unfair competition law for inventions, indications, signs or product shapes that are protectable under those laws. Still, it is not always clear what interests the legislation has in fact balanced by adopting the special law. Even legislative commentaries do not comprehensively clarify that question. Thus a common approach to the grant of *protection against free riding* under unfair competition law is to make such protection available only under *specific circumstances*, which must differ in some respects from the circumstances under which protection is granted by the specific legislation. The definition of those circumstances is often possible only under some sort of "catch-all" provision, and thus usually is established by case law. For the following types of free riding, specific circumstances resulting in an act of unfair competition are already recognized in many countries: dilution of the distinctive quality or advertising value of a mark, misappropriation of a reputation, slavish imitation and so-called "parasitic acts." These are dealt with in the following paragraphs.

(ii) *Dilution of the Distinctive Quality or Advertising Value of a Mark*

109. Generally, where the unauthorized use of a mark for different goods or services is not likely to cause confusion, there is neither trademark or service mark infringement nor an act of unfair competition. This follows from the "speciality principle" in trademark law, which is a consequence of the distinguishing function of trademarks and service marks. In some countries, however, such as Canada, the EC member States under the EC Directive to Approximate National Laws on Trade Marks and several States of the United States of America, marks that have acquired a certain renown are given additional protection against the so-called *dilution* of their *distinctive quality* or *advertising value*. The concept of "dilution" is understood as the watering down or gradual lessening of the ability of a mark to be immediately associated by consumers or the general public with a particular source. As some dilution can be regarded as being an inher-

ent result of the use of identical or similar marks for totally different goods or services, the main rationale behind the notion of dilution is that marks that have acquired a certain renown should be protected against the obvious desire of other market participants to take advantage of the essential "uniqueness" of a mark. The likelihood of substantial damage to the proprietor of the mark is assumed from the fact that the mark may lose its established association with certain products. The required degree of renown of the mark involved is determined by the relevant public or consumer groups. If it is a trademark for goods that appeal only to a selected group of consumers, it will have a better chance of reaching the required degree of renown than if it is one for mass-consumption goods. However, the required degree may still vary considerably from country to country.

(iii) *Exploitation of Another's Reputation*

110. Another type of misappropriation that has been recognized in recent years as being contrary to honest business practice is that of unfairly taking advantage of the reputation or "prestige" of the market achievements of other industrial or commercial enterprises. This doctrine has been particularly relevant in the appropriation of well-known indications. For example, if the quality of the genuinely marked product or service has led consumers to associate the mark with a certain origin or consistency of product quality, its unauthorized use for other goods or services, while not causing confusion as to their source, might still be considered unfair appropriation of a reputation. The doctrine may equally apply to product appearances, but in such a case the appearance must be recognized as indicating a certain degree of quality, image or prestige. Countries have different approaches to this kind of misappropriation, however. For example, whereas in France the appropriation of the prestige of another's mark or product is usually assumed to be unfair, in Spain that type of misappropriation is expressly prohibited without any further prerequisites in Article 12 of the Law Against Unfair Competition of 1991. In Germany it is required, for the appropriation by a third person to be allowed, that a secondary exploitation of the mark could not reasonably be expected. In the United States of America there is in principle no objection to appropriation unless a likelihood of confusion, for example as to "sponsorship," is established, for which purpose the prestige of the mark is taken into account.

111. Taking advantage of another's trademark or service mark may occur as a more or less veiled form of appropriation. For example, a competitor may use a generally similar, but noticeably different mark, nevertheless consciously drawing closely on the characteristic and well-known features of another's mark. Alternatively, he may use the mark in advertising his own trademarked goods with the aim of transferring the image of the well-known mark to his own goods, or again he may use another's mark with qualifying terms like "model," "type," "style," and so on (however, in some countries the term "suitable for" or other similar terms may be permissible in connection with spare parts and accessories). In this respect, it is not necessary that the market participant be a direct competitor of the proprietor of the mark, as long as there is a likelihood of damage to the exclusive image or reputation of the mark or the business involved.

(iv) *Slavish Imitation*

112. The concept of slavish imitation as a separate act of unfair competition has been developed in several countries of Europe. This kind of unfair free riding is usually regarded as an exception to the general rule of free appropriation in the area of products or indications that are not protectable or for which protection has lapsed under specific legislation, or where there is no likelihood of confusion as to the source of the products. In the absence of likelihood of confusion, the specific circumstances of the case must reveal some exceptional character for the act to be deemed unfair. Usually the unfairness is seen in the lack of research, investment, creativeness and expense on the part of the imitator, who has merely copied the achievement of another, despite the fact that alternative ways of competing effectively were available. The imitated products or indications would still have to possess a particular distinctiveness, which must not merely derive from technical features necessary for the product to function properly, but must concern aesthetic or decorative features that leave sufficient room for alternative shapes and designs.

113. Not all prerequisites of slavish imitation are equivalent in all countries, however. Apart from that, the qualifying circumstances may sometimes be combined with the concepts of dilution, misappropriation of reputation or "parasitic competition." Frequently, there has to be a marked contrast between the efforts made by the competitor to develop

his achievement, to introduce it on the market and to win some success or recognition and the efforts made by the imitator to copy and exploit that achievement for the act to be deemed unfair. One *statutory* example of a provision against this kind of unfair misappropriation is to be found in Article 5(c) of the Swiss Law Against Unfair Competition, which specifically treats as unfair any act which, by means of technical reproduction processes and without any corresponding effort, takes the marketable results of the work of another person and exploits them as such. There is a similar provision in Article 11(2) of the Spanish Law on Unfair Competition, which considers imitation of the achievements of another to be unfair if undue advantage is taken of the other's goodwill or efforts.

114. Acts of slavish imitation should be distinguished from acts of so-called "reverse engineering." The latter is generally understood to consist in examining or analyzing, by taking apart or decomposing, a product or substance in order to understand its structure, composition or operation and find out how it was made or constructed, and subsequently producing an improved version of the product or substance. The practice of reverse engineering is commonly practiced in industry in connection with the products of competitors, with the purpose of learning the technology they embody, and eventually producing a competing (improved or different but equivalent) product. In fact, it is part of the normal exercise of competition in a free market environment which, in turn, is based on broader public policy considerations. The practice of reverse engineering is, therefore, not in and of itself unfair; nevertheless, the product or other result obtained through reverse engineering may, under certain circumstances, constitute an infringement of an industrial property right. For example, if a product made after reverse engineering of a competitor's product falls under the claims of a valid patent (where appropriate, taking into account the doctrine of equivalence), that would constitute patent infringement. If a patent is not infringed, but the manner in which the original product was copied is found to be dishonest or unfair (regardless of whether reverse engineering took place), the relevant acts might still be actionable on grounds of unfair competition.

(v) *Parasitic Acts*

115. Another variety of unfair free riding recognized in some countries is the concept of "parasitic acts." This concept has many features

in common with the concept of slavish imitation. Here the mere imitation of the achievements of others is still considered inherent in a free market system, but exceptional circumstances may make the imitation unfair. For example, the imitation of one product which is not particularly new or original could possibly be allowed, but, as soon as the achievement involved is recognized as innovative or strongly appealing to consumers, the imitator has less reason to claim the fairness of his action. What tips the balance definitely against the imitator is his *systematic and methodical* appropriation of the characteristic achievements of *one particular* competitor in a routine manner.[38] Moreover, circumstances relating to the *modus operandi* of a competitor may denote unfairness: for example, ordering samples from a competitor for the purpose of imitating his products more easily and systematically may be found to be unfair parasitic behavior. Some countries[39] adopt a flexible approach in these cases, in particular, by adapting the scope of injunctions and also the time limits of protection to the particular circumstances. For example, the amortization of the innovation costs could be considered a relevant factor in determining whether or not a particular imitation is fair. As a result, protection could be restricted to identical imitations, and only for a period of time that is much shorter than under specific industrial property legislation. It is to be noted, however, that in some countries (for example, the United States of America) just copying the product of another person (even if done systematically, or in respect of one particular competitor) will not be recognized as unfair competition unless there is copying of non-functional features which are distinctive or have acquired secondary meaning.

(d) Comparative Advertising

(i) *Definition*

116. The different attitudes towards true but nevertheless discrediting statements can best be seen in the examination of *comparative advertising*. Comparative advertising may take two forms: a positive reference to another's product (claiming that one's own product is as good

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[38] This criterion applies especially in Belgium, France, Italy, the Netherlands and Switzerland.

[39] Notably Germany.

as the other) or a negative reference (claiming that one's own product is better than the other). In the first instance, where the competitor's product is usually well known, the crucial question relates to the possibility of misappropriation of another's goodwill. In the second case, where the competitor's product is criticized, it is the question of disparagement that arises. However, both forms of comparison involve an (unauthorized) *reference to a competitor*, who is either mentioned by name or implicitly identifiable as such by the public.

(ii) *The General Restrictions: "Misleading" and "Discrediting" Comparisons*

117. It goes without saying that comparative advertising has to respect the restrictions applicable to all advertisements. In particular, it must not be misleading or disparaging. Comparison based on false or misleading statements about one's own product or involving false statements about the competitor's product is forbidden in all countries.

118. It must be remembered, however, that there are differences in the evaluation of the notion of "*misleading*" and especially in that of "*discrediting*." As mentioned above, some countries,[40] consider statements claiming superiority or uniqueness (like "the best," etc.) misleading unless they can be proved correct, while others consider them harmless exaggerations. Different assessments of the notions of "discrediting" and "misappropriation" are of even greater importance. In countries with a rather permissive attitude towards true but nevertheless disparaging statements, comparative advertising is generally tolerated.[41] As long as what is said is true, the courts will not interfere, even if the reference to the competitor or his product is clearly disparaging or exploits his goodwill. In countries that traditionally put special emphasis on the protection of the "honest" businessman and his reputation, comparative advertising is either forbidden or at least severely restricted. Sometimes the mere fact that a competitor is named against his will is considered discrediting and therefore unfair competition. According to the rule that "the honest businessman has a right not to be spoken of, even if the truth is spoken," the legislation of

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[40] Notably Germany.

[41] Notably Canada, the United Kingdom and the United States of America.

some countries[42] has even expressly forbidden all comparisons that needlessly identify a competitor. The same argument has led the courts of other countries[43] to find comparative advertising more or less automatically against honest trade practice (and therefore against the general provision on unfair competition law). Although it has sometimes been stressed that true comparisons might be in the interest of consumers, doctrine and case law have in practice allowed comparisons only under very special circumstances, for example, if they have been expressly required by a customer, if they have been made to counter an illegal attack on the advertiser, or if the comparison is necessary to explain a certain system or new technical developments in general.

(iii) *The Trend Towards Admission of True Comparisons*

119. In recent years, however, this negative attitude towards comparative advertising has changed. It has been increasingly recognized that true comparisons of relevant facts can not only reduce the consumer's information search costs, but also have positive effects on the economy by improving market transparency. The courts of those countries that traditionally view comparative advertising as disparaging have gradually relaxed the strict prohibition on all statements identifying a competitor. In France, for example, price comparisons, if based on true, relevant and ample material, are allowed. More important, recent statutes on unfair competition at least indirectly allow comparative advertising.[44] At the European Community (EC) level, a new Directive[45] has been proposed that would oblige member States of the EC to allow truthful comparative advertising. On the whole, there seems to be a clear trend towards the admission of truthful comparative advertising.

(iv) *Special Dangers of Comparative Advertising*

120. On the other hand, it cannot be denied that comparative advertising can more easily be misleading or disparaging than most other

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[42] Notably Belgium and Luxembourg.

[43] Notably France, Germany, Italy and the Netherlands.

[44] Notably in Hungary, Spain and Switzerland.

[45] Proposal for a Council Directive concerning Comparative Advertising and amending Directive 84/450/EEC concerning Misleading Advertising, 1991.

forms of advertising, for example if the comparison is based on irrelevant (or not really comparable) aspects, or if the overall impression is misleading. These potential dangers require *special safeguards* against abuse. Countries that allow comparisons[46] place special emphasis on the fact that even true statements must not be unnecessarily disparaging[47] or that irrelevant facts must not be compared.[48] The 1991 EC proposal for a Directive on Comparative Advertising goes even further by expressly requiring that only relevant, objective and verifiable characteristics be compared, that the overall impression be not misleading, that there be no risk of confusion between the products compared and that the competitor and his product be in no way disparaged or discredited. Furthermore, the advertiser can be required to prove any claims made in surveys used to support the comparison.

(v) *Comparative Advertising and Trademark Law*

121. Comparison is often impossible without reference to a certain mark which refers to a particular product, service or business. In these cases, not only unfair competition law, but also *trademark law* has to be taken into account.

122. In countries where trademarks are protected solely as indications of the source of a product or service, the use of a trademark in comparative advertising may not be within the scope of trademark law. However, there are countries where the use of another's trademark in comparative advertising may be considered trademark infringement.[49] Article 13A of the Uniform Benelux Trademark Law, for example, protects the "advertising value" of trademarks against any use in potentially adverse circumstances (which can also take the form of an unwanted reference in comparative advertising). Canadian trademark law generally protects the goodwill of a trademark, while the current United Kingdom trademark law in principle forbids any reference to another's trademark. Even in the United States of America, where comparative advertising is generally allowed, the so-called "antidilution statutes" enacted by many States are in theory applicable to the use

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[46] Notably Greece, Hungary, Spain and Switzerland.

[47] As in Switzerland.

[48] As in Spain.

[49] Notably Benelux, France, the United Kingdom and the United States of America (antidilution statutes).

of another person's marks in comparative advertising, since they grant – regardless of confusion – trademark protection against all acts that are liable to injure the business reputation or that dilute the distinctive quality of a mark. However, the statutes so far have not been applied in cases of truthful comparative advertising, and there may be constitutional reasons for such an exception in cases of comparative advertising. It is noteworthy that the proposal for a EC Directive on Comparative Advertising would allow such advertising provided, in particular, that it does not cause confusion between the marks of the advertiser and those of a competitor, and that it does not discredit, denigrate or indicate contempt for a competitor's marks.

(vi) *Comparisons Made by Third Parties*

123. In many countries product testing is done by consumer organizations and/or private or public institutions like the press, television and other media. Usually two questions will arise here: are the organizations liable under unfair competition law, and may the results of their testing be used in advertising?

124. In those countries that have given up the requirement of a competitive link between plaintiff and defendant,[50] unfair competition law is applicable to these organizations too. In other countries,[51] "unfair" product tests, which have an adverse effect on a business reputation, are primarily dealt with under general civil law tort provisions.

125. There seems to be no general agreement on the question whether and under what conditions such test results may be used by advertisers. In some countries (such as Germany) that in general do not accept comparative advertising, this kind of indirect comparision is basically considered legal. In other countries (such as Belgium), it is expressly forbidden for a competitor to refer to tests conducted by consumer organizations, and in still others (such as Switzerland), such references are severely restricted. In the proposal for an EC Directive on Comparative Advertising, tests by third parties may be used only with the express consent of the person who conducted them, apart from which the advertiser would be held responsible for any advertising claim based on such surveys.

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[50] Notably Belgium, Denmark, the Netherlands, Sweden and Switzerland.

[51] Notably France and Germany.

(e) Other Acts of Unfair Competition

(i) *General*

126. As mentioned earlier, unfair competition law particularly reflects the sociological, economic and ethical conceptions of a society. Apart from the specific categories of acts already discussed which are generally considered unfair competition, there is a wide range of acts and practices that may be dealt with under unfair competition law in one country but not necessarily in another. The discussion that follows is therefore restricted to those aspects that most countries appear to consider (although perhaps with different emphasis) contrary to "honest trade practice," either in the form of an express prohibition in the specific law or, more frequently, under the general provisions on unfair competition, or in specific other laws, decrees and the like. It is to be noted that the following explanations only give examples, not an exhaustive list of these other unfair practices.

(ii) *Nuisance Advertising, Exploitation of Fear, Undue Psychological Pressure, etc.*

127. Modern competition law aims to protect all those concerned by unfair market practices. Consequently, practices that "unduly" influence the *consumer* (or try to do so) may be considered contrary to honesty in competition. In practice, however, it is difficult to determine what requirements have to be met before a practice is deemed to be "undue" in relation to the consumer. Since the very purpose of all marketing or advertising practice is to influence consumers favorably, a certain borderline of influence has to be crossed. This is often asserted in cases where the privacy of the consumer has been invaded or where he has been manipulated by means of advertising techniques.

128. For example, in many countries the delivery of *unsolicited goods* to a person who is required to pay for them unless he expressely refuses or returns them is considered unfair competition, because it plays on the fact that many consumers either tend to forget to return the goods or even feel under an obligation to keep them. On the other hand, many countries tolerate *unsolicited home visits* ("door-to-door sales") as long as they do not involve any deception or impose undue psychological pressure on the consumer. Opinions may vary on the

question of *unsolicited telephone calls*: while some countries consider them *per se* an intrusion into the privacy of the consumer, most other countries tolerate them as long as the consumer's lack of experience and his privacy are not exploited. The same is true of the *unsolicited sending of advertising material.*

129. It is further considered unfair in many countries to abuse the consumer's *superstitions, credulity, fears or feelings of charity.* For example, an advertisement that exploits elderly people's fears of ending up in a nursing home, or causes unnecessary anxiety over death or health problems can be considered contrary to "honest" trade practice. The same is true if a special situation in which the consumer is especially vulnerable is exploited for commercial purposes, for example, if victims of car accidents are pestered with offers of towing services, or if the recently bereaved are offered funeral services. Most countries, moreover, take special precautions against any abuse of children's lack of experience.

130. Apart from these special cases, often regulated in specific laws, the courts of some countries[52] have identified a group of cases under the general clause against unfair competition which can be described as "*psychological pressure to purchase*" or "exaggerated enticement." These cases are mainly seen in connection with special marketing practices, however, like the offering of free goods or discounts and lotteries.

(iii) *Sales Promotion: Bonuses, Gifts, Lotteries, etc.*

131. A frequent marketing technique to attract new customers consists in the offering of bonuses, gifts and other inducements, and in the organization of competitions, lotteries or games. Such *sales promotion* can be a new and efficient channel of distribution and may thus stimulate competition. On the other hand, it may distract consumers from the merits of the principal goods or services and thereby entice them to buy something that is either not worth its price or not really needed. This is particularly true of marketing techniques like games, lotteries and other competitions, which exploit for advertising purposes a consumer's predisposition to *gambling*. Most of these are therefore regulated in one way or another, and sometimes even ex-

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[52] Especially Germany.

pressly forbidden. Additionally, they are subject to self-regulation measures. There is, however, little agreement (and little consistency) on the question of what specific practices should be considered unfair competition. For example, bonuses, or any discount or other advantage dependent on the purchase of a product, are forbidden in principle in some countries,[53] allowed in principle in others[54] and more or less strictly regulated in others. *Lotteries*, where the winning of prizes is a matter of pure chance, are generally forbidden if they are linked to the purchase of a product, and otherwise are severely restricted. *Contests* in which the outcome can be influenced to a certain extent by the participant's own skill are generally viewed more favorably, provided that no deception is involved and that the consumer is not put under any pressure to buy. On the other hand, "*pyramid*" ("snowball") sales and other such methods are often considered potentially misleading and consequently forbidden (sometimes even on pain of criminal sanctions), or are at least severely restricted, whereas *sweepstakes* are often considered legal.

132. On the whole, the courts of most countries, even those that allow the sales promotion techniques mentioned above, pay special attention to the *actual conditions* under which these sales practices take place: if the consumer is put under any psychological or other pressure to buy, if the prizes are extremely valuable and so all the more enticing, an otherwise accepted marketing practice may well be considered contrary to "honest trade practice."

(iv) *Impeding of Market Activities*

133. Finally, there are several acts which may *hinder or obstruct* a competitor in his business activities, either directly or indirectly. An example of a direct obstruction would be the *actual obstruction* of trading on a particular market location, which would normally be considered unfair. Another example would be the deliberate destruction of bottles destined to be recycled and refilled by a producer of soft drinks in order to lessen his ability to supply the market. Other (indirect) impediments are often controlled by *antitrust law* but, under certain circumstances, unfair competition law may offer some addi-

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[53] Belgium, France, Germany and Sweden.

[54] The United Kingdom and the United States of America.

tional protection. Impediments that are traditionally covered by antitrust law are *discrimination*, *boycotting* and *dumping*, but that does not preclude the application of unfair competition law, at least if the acts are perpetrated on an individual scale. For example, unreasonable interference with the business activities of competitors, sales at unreasonably low prices, like *below-cost prices*, or the imposition of fixed retail prices are practices that have been designated by the Fair Trade Commission of Japan as being prohibited by the Japanese Anti-Monopoly Act, but which might also be regarded, in theory, as forms of unfair competition. In some countries,[55] selling below cost or at an "exceptionally low profit margin" is expressly prohibited under unfair competition law. In the United Kingdom, the United States of America and other countries, "predatory pricing" with a view to damaging a competitor may be prohibited under competition law.

134. Other such unfair practices consist in *enticing away* from competitors, or in inducing the *personnel or agents* of competitors to terminate their employment or agency contracts. As indicated earlier, these acts of unfair competition are frequently accompanied by the violation of *trade secrets* but may, nevertheless, constitute separate unfair acts. Merely inducing the clients or employees of competitors to change suppliers or employers by offering better conditions is inherent in free competition and cannot therefore be regarded as unfair. However, means such as bribery or deception of clients, agents or employees, or inducement to breach a valid undertaking not to compete, will be deemed unfair, as will the systematic enticing away of personnel with a view to damaging one particular competitor.

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[55] Notably Belgium, France, Luxembourg, Spain and Switzerland (under certain conditions).

V. ENFORCEMENT OF PROTECTION

A. *General*

135. The enforcement of protection against unfair competition is as important as the substantive law of unfair competition itself, for such protection would remain futile without the availability of adequate measures to halt violations, to prevent damage, or further damage, and possibly to win compensation for damages. Therefore, most specific laws against unfair competition provide for *special sanctions* which can be imposed on the infringing party. Usually such specific sanctions take the form of *civil* and *criminal* measures. Sanctions can also be imposed by government authorities in the form of *administrative* measures.[56] Some legislation further lays down special procedural rules, specifying such matters as the persons having the *capacity to sue* or the *time limits* for bringing the action before the court.

136. Where unfair competition law is primarily based on tort law, the normal *principles of civil proceedings* will apply. Although the basic principles of tort law may normally have relatively strict requirements, in particular with respect to the likelihood of damage and proof of the defendant's intent or negligence, those requirements are often less restrictively applied in cases of unfair competition law; indeed, in practice they are sometimes presumed. However, if tort law is only a *secondary* basis for a claim of unfair competition, as compared with specific legislation against unfair competition, the regular requirements of tort law must be met.

137. Other sanctions could possibly follow from violations of the rules set by *self-regulation*. Since such rules are usually supervised by specific authorities, composed of representatives of the relevant industries, the media and consumers, the proceedings and possible sanc-

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[56] As in Australia, Bulgaria, Hungary, India, Mexico, Peru, Romania and the United States of America.

tions involved have a character that is different from administrative or civil court proceedings. Sanctions are only binding on persons who have adhered to the self-regulatory rules laid down by the authorities, but their practical importance for protection against unfair competition is fully recognized; these sanctions will therefore be dealt with separately.

B. *Civil Sanctions*

(1) *Categories of Sanctions*

138. There are several types of civil sanction, some of which, however, may not be available in every country. For example, under Article 13a of the German Law Against Unfair Competition as amended in 1987, a consumer has the right to rescind a contract that was entered into as a result of misleading advertising. The conditions for the exercise of this right are not easily met, and the remedy itself is quite unusual in unfair competition law. In practice, only a few of the broad range of sanctions are frequently applied in unfair competition proceedings. For example, *declaratory judgments*, that is, judgments stating that the plaintiff is entitled to perform a certain act or that the defendant is not entitled to do something, are rare in unfair competition proceedings.

(a) Injunction

139. In practice, the most important sanction is injunctive relief, which can be *final* but frequently takes the form of a *preliminary* injunction. This sanction is preferred by the complainant, as the infringing act can be stopped, although the actual damage may then not be easy to prove. In most cases injunctions restrain, in that they order the defendant to refrain immediately from performing a certain act of unfair competition. Injunctions may be sought for unfair acts that are likely to be committed or continued. Injunctions require neither proof of intent or bad faith nor proof of damage. Once an unfair act has been committed, the likelihood of continuation is usually presumed unless the defendant has formally undertaken to refrain from further

infringing acts. In some countries, injunctions may be enforceable with the mandatory payment of a *penalty fee* for not obeying the court order, which becomes payable without further intervention by the court.[57] In other countries, such disobedience may constitute a civil or possibly criminal contempt of court.[58]

140. Injunctions may also be accompanied by a mandatory order, demanding that the defendant *restore the status quo* preceding the violation. This can be an order to cancel applications or registrations of marks or trade names, to erase misleading or confusing indications, withdraw infringing goods from the market or to deliver up or destroy unlawful products or advertising material. Such mandatory orders are relevant in cases where the results of the acts of unfair competition cannot be eliminated by a restraining injunction. In blatant cases of unfair competition, an order to disclose the source of supply or provide a list of customers supplied is also possible. In some legislation, such as the Hungarian Act Against Unfair Trade Practices of 1990, the destruction of special instruments that served to manufacture the infringing goods can be ordered under certain circumstances. All types of mandatory orders are usually left to the court's discretion, as the measures have to be commensurate with the extent of the unfairness in the individual case, and thus a balance of interests has to be made by the court.

(b) Damages

141. Compensation for damages is available in every country. Unlike the application for an injunction, however, a common requirement determining compensation for damages is proof of *fault or intent* or at least *negligence or recklessness* on the part of the defendant. This is obvious in France, where the tort provision in Article 1382 of the Civil Code deals only with damage claims. However, French courts have been generous in the recognition of damage, including potential damage, and, as actual damage is usually hard to prove, a symbolic compensation of one franc is frequently imposed, while at the same time the cessation of the infringing act is ordered. Sometimes there is a rebuttable presumption of negligence if an act constitutes unfair com-

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[57] As in Germany and the Netherlands.

[58] As it does in Australia, India, the United Kingdom and the United States of America.

petition, as under Article 2600(3) of the Italian Civil Code. Under such provisions, the person involved must prove good faith in the sense that due diligence on his part did not establish that the competitive act was unfair. Usually, damages as a result of unfair competition are purely monetary in character but, under certain circumstances, for example following defamatory publications or infringements of publicity rights, similar compensation for moral or immaterial damages may be available in some countries. In any case, sufficient evidence of actual, and somehow assessable, financial loss must be furnished in order to substantiate the claim of damage.

142. There are several *types of monetary damage* that can be compensated. The most commonly claimed damages are *loss of profits* and the damage done by *disorder caused on the plaintiff's market.* In some countries,[59] instead of the actual damage to the plaintiff, an account of *profits gained by the defendant* may be claimed on the ground of unjust enrichment. This sanction deprives the defendant of the profits actually resulting from his unfair acts, and in some countries may exceed the actual damages of the plaintiff. It could also serve as a measure to assess the loss of profits incurred by the plaintiff.[60] A form of damages particularly known in the United States of America and most Commonwealth countries is exemplary or so-called *punitive damages.* Those damages are claimed *in addition* to actual damages in cases where the motives of the defendant have been particularly malicious. In extreme cases, even treble damages may be available. In other countries, malice or intent may influence the amount of damages awarded by the court. Finally, in blatant cases of unfair competition, the costs resulting from *attorneys' and experts' fees*, apart from court costs which are usually fixed by the court when it passes judgment, may occasionally be awarded to the successful party at the court's discretion, for example, if such costs are deemed necessary to prevent further infringements or market disorder. This possibility is of considerable importance since there are only a few countries in which attorneys' and other fees are to be paid by the losing party.

143. As a basic rule, damages are regarded as only *compensatory*, that is, the plaintiff is to be put back in the position that he would have been in if the unfair act had not been committed. However, the

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[59] Notably Spain, Switzerland and the United Kingdom.

[60] As in Japan.

amount is often difficult to determine with any precision. For loss of profits, in particular, high standards of proof may sometimes be required. Even cases of infringement of exclusive rights under intellectual property law seldom go into a full inquiry as to damages, and parties tend to settle the case once liability has been established. A common approach in such cases has also been to assess damages on the basis of a fictitious *license fee*. In legal literature, this approach has been criticized as having insufficient deterrent effect. Applying this approach in unfair competition law would only be acceptable in cases resembling a violation of industrial property rights and in classic cases of passing-off, where the parties involved are direct competitors. Thus, the amount of damages actually awarded by the courts can vary to a large extent.

(c) Rectification; Publication of the Judgment

144. Another sanction available in most countries is an order for rectification or for publication of the judgment awarded against the defendant. In some Asian countries, a specific form of rectification may involve a *letter of apology* in daily newspapers. Another frequently used kind of rectification (for example, in the United States of America) is *corrective advertising*. A rectification order is usually granted in cases of misleading or discrediting, but can also be appropriate for other methods of unfair advertising. In some countries publication of the judgment can also be ordered by the court at the expense of the defendant. Both sanctions may be claimed *in addition* to restraining injunctions, and in most countries apart from compensation for actual damage.

(2) *Right to Sue*

145. As mentioned before, protection against unfair competition serves not only the interests of competitors, but also those of consumers and the public interest. It is therefore of vital importance to the effective operation of unfair competition law that the right to sue should *not be restricted to competitors*, although they may be the most powerful group to invoke the law. However, not all market participants need an *individual* right to bring an action before a civil court. As any act

of competition has a direct influence on the market situation of individual *competitors*, at least that group cannot reasonably be deprived of their fundamental right to sue the unfair competitor. However, in many countries, direct competitive relations are not necessary for the right to sue if the indirect consequences of the unfair act would seriously *affect* the position of other participants, for example, on parallel or subsidiary markets. So in most countries merely *potential* competitive relations will suffice. Furthermore, in countries where protection against unfair competition is mainly based on tort law, every person whose interests are likely to be harmed, and this may include *individual consumers*, can usually bring an action. In such countries[61] not even a potential competitive relationship is required. Recent legislation also gives individual consumers a right to sue. Still, the risk of considerable costs may often deter them from exercising that right. Most individual consumer actions are therefore brought under available self-regulatory proceedings, the standing rules, costs and terms of which are less daunting.

146. Along with the growing tendency to consider consumer interests part of the objectives of protection against unfair competition, recent legislation in this field has provided *consumer organizations* with a separate right to have unfair acts stopped. Under Article 10*ter* of the Paris Convention, the member States must provide measures to permit federations and associations representing interested industrialists, producers or merchants to take action in the courts when acts of unfair competition are committed, insofar as the law of the country in which protection is sought allows such actions. With the inclusion of certain areas of consumer protection in unfair competition law, it should also be possible for consumer organizations to claim legal remedies against violations occurring in those areas. For example, the EC Directive on Misleading Advertising states that organizations regarded under national law as having a legitimate interest in the matter must have facilities for initiating proceedings against misleading advertising, either before a court or before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. Additionally, public officials or entities may be empowered *by law* in some countries to act as civil prosecutors on behalf of consumers before the court, as does the Consumer Ombudsman in Sweden and Norway or the Federal Office for Consumer Affairs in Mexico.

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[61] Notably France, the Netherlands and the United Kingdom.

147. There are several *alternative* ways of establishing the right to initiate civil actions. For example, to prevent a possible misuse of such rights, some countries have restricted the right to bring a civil suit to organizations that can claim the protection of their members against unfair competition as their *statutory aim*, or are officially authorized as consumer organizations. Although actual damage to individual members is not usually required, most countries have restricted the claims available to consumer organizations to an *injunction and/or rectification* in the area of misleading advertising. Only in exceptional cases may organizations claim damages on behalf of their members.

148. The position of *other organizations*, such as traders in a certain branch of industry or professional groups, is far less uniform. In some countries, such organizations may have a right to sue insofar as their statutory purpose is being seriously jeopardized by the unfair act concerned.[62] In other countries, actual injury to some of the members and the transfer of their rights to the organization might be required,[63] or such organizations have no separate right to sue at all.[64] So-called *class actions* are possible in the United States of America. Finally, civil court actions can occasionally be initiated by *authorities* responsible for the control of competitive acts, either as semi-public or governmental authorities[65] or by virtue of self-regulation.[66]

(3) *Measures to Secure Evidence of Unfair Acts and Conserve Assets*

149. It is not unusual for unfair competition claims to fail in court owing to *lack of evidence* of the act regarded as unfair. An informal but commonly used method of securing proof of the allegedly unfair act is a "trap order," that is, the acquisition of infringing goods under an assumed name, which may result in clear evidence of at least part of the unfair act. With respect to acts of misleading or discrediting, the burden of proof may be imposed on the defendant, as he is supposed to have easy access to information substantiating his statements. Most countries do not have specific means of establishing evidence,

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[62] Notably in Belgium, France, Germany and Italy.

[63] Notably in the Netherlands.

[64] Notably in Japan.

[65] Notably in France, Hungary, India and the United Kingdom.

[66] Notably in the United Kingdom.

as separate rules were deemed unnecessary when the laws against unfair competition were enacted. Those countries must therefore rely on *general principles of civil procedure law*. However, practices may vary considerably from country to country. While some rules of procedure provide adequate measures for the securing of evidence, like the disclosure of documents, expert opinions or the hearing of witnesses, they apply only to evidence of damages and not to the establishment of the unfair act itself. In some countries,[67] a conservatory or provisional "*seizure*" of goods is allowed, but this method is often restricted to the securing of monetary claims, the purpose being to sell the seized goods. This would clearly not be in the interest of the claimant.

150. Most measures under civil procedure law are available only *during trial*, and relatively few countries have civil procedure rules to secure proof *ex parte*, that is, without previous notice to the defendant of commencement of trial proceedings. However, as with infringement actions under specific industrial property legislation, there is a general tendency to ensure maximum availability of measures for securing evidence of an infringement before the defendant is able to dispose of that evidence, and also to have suppliers (or other persons recklessly participating in the unfair act) identified. This is particularly relevant to acts of confusion and misappropriation, or acts relating to the misuse of trade secrets. One example of the growing legislative awareness of the need for adequate means of collecting evidence is Article 24 of the new Spanish Act Against Unfair Competition of 1991, which provides for *ex parte* applications before the court to execute any means of determining those facts the knowledge of which is necessary to commence a proceeding, which means (according to the applicable rules of the Spanish Patent Law) may include inspection of premises and of allegedly infringing instruments.

151. Another recently accepted remedy in this area, which is known in the United Kingdom and in countries following the legal tradition of the United Kingdom, is the *Anton Piller order*. This order, the availability of which has become recognized through case law, enables a plaintiff to seek relief before a writ of summons has been served and *without notice to the defendant*. The order as issued by the court can include provisions preventing trading in certain goods or the destruction or disposal of goods, provisions permitting the plaintiff's lawyer and a limited number of other persons to enter and search the

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[67] Notably Belgium and the Netherlands.

business premises or even the private house of the defendant or provisions causing documents or goods to be delivered up to the persons serving the order or the names and addresses of the suppliers of the goods involved to be disclosed, and it can prevent the defendant from informing third parties of the existence of the proceedings. In order to obtain this relief, the plaintiff must show that he has an extremely strong case, and that the potential damages claim is likely to be very substantial. Further, clear evidence of the defendant's possession of the infringing goods must be produced before the court, and it must be shown that there is a real possibility of the goods being destroyed or disappearing before a court action (with both parties involved) can be brought. Full disclosure of all facts known to the plaintiff is required, and also security for damages that might have to be paid to the defendant. On the other hand, as the Anton Piller order can easily be abused, there are strict requirements for its issue; moreover, the nature of the order must be explained clearly to the person to whom it is addressed, it must contain only the minimum provisions necessary to achieve its purpose, and a detailed report of the material taken is to be made by the lawyers executing it.

(4) *Accelerated Proceedings*

152. Most matters of unfair competition law are brought before the court in ordinary civil proceedings. In some countries, specific court divisions or judges may have some exclusive competence, for example, in matters of commercial law. However, protection against unfair competition can only be effective if the alleged offender can be enjoined in a *speedy and informal procedure*. Accelerated proceedings have therefore been made possible in many countries for immediate relief. Although several forms of interim relief may be available, such as for the rectification of a misleading advertisement, most claims under unfair competition law involve *interlocutory injunctions*. This kind of proceeding is usually characterized by a very short term between the writ of summons and the court trial, more flexible treatment of the rules of evidence, an informal trial procedure and a relatively short term between the trial and the summary judgment.

153. For interlocutory relief, the facts of the case must reveal not only a serious question to be tried, affording some prospect of success at full trial, but also the necessity of an urgent decision. This need

can be established by the *likelihood of irreparable damage* if the defendant's allegedly unfair acts do not cease immediately. As the proceeding must remain speedy and efficient, formalities are less important and only *prima facie* proof, that is, evidence on which serious assumptions can be made, is required. Thus, in cases where the facts are beyond doubt and the urgency is obvious, courts are sometimes able to issue a cease-and-desist order without hearing the defendant. In this respect, a special form of accelerated procedure has been established under Swiss Law, allowing the issuance and execution of preliminary injunctions within a few hours in order to withdraw infringing articles temporarily from a point of sale, or even from an exhibition or auction. On the other hand, the defendant should not be deprived of his rights if the matter is doubtful. Thus, courts consider the *balance of convenience* when granting or refusing injunctions. This balance entails considering the interests of both sides, including the relative strength of each party's case, and whether the defendant, if the injunction were granted, would be adequately compensated by virtue of the plaintiff's undertaking as a security for damages. In some countries, any claim brought in an accelerated procedure must also be brought before a civil court in an ordinary proceeding, possibly within a certain time limit.

C. *Criminal Sanctions*

154. In most countries criminal sanctions are available against certain specific acts of unfair competition, frequently alongside civil sanctions, but sometimes exclusively, as in some cases of *consumer protection.* Such criminal sanctions are often provided for in respect of severe cases of unfair practice and misuse of trade secrets, but also in special areas of consumer protection like the omission or the misleading use of indications, particularly for beverages and food. Most criminal sanctions range from a fine, sometimes without any statutory maximum, to imprisonment, usually for up to two or three years. However, where civil remedies can be obtained quickly and effectively, criminal sanctions generally play a less important role in practice. One major principle of criminal law is that only a particular, precisely defined act is punishable, and so general provisions of unfair competition can only be backed by civil law sanctions.

155. Under some legal systems,[68] natural persons and legal entities or administrative authorities can also be prosecutors in criminal proceedings. In some countries,[69] a victim may demand compensation, as a result of criminal proceedings, up to a limited amount. An interesting combination of both civil and criminal sanctions is available under French law, where the party who has been harmed by an unfair act constituting a criminal offense may claim his damages as a civil party without restrictions before the criminal court that is prosecuting the unfair act.

D. *Administrative Sanctions*

156. Many laws provide for administrative sanctions, which may be additional to the civil and/or criminal sanctions already available under unfair competition law.[70] Governmental intervention may be necessary to repress certain undesirable practices if competitors are unlikely to object to them and consumers are not in a position to take action. Thus the coexistence of different types of sanction ensures that all legitimate interests receive the required protection. Administrative sanctions may, however, be restricted to some specific acts of unfair competition that are particularly prejudicial to the public interest, such as misleading acts. Yet the administrative authorities of some countries, like the Federal Trade Commission of the United States of America, have very broad discretionary powers with respect to the choice and scope of remedies.

157. In the administrative proceedings, the authority in charge is usually empowered to institute inquiries against companies suspected of engaging in unfair trade practices, and may issue appropriate orders to cease and desist from the unfair act, or take any other measure necessary to stop such acts. In some countries, the public authority itself may be invested with judicial powers similar to those of a civil court (like the Monopolies and Restrictive Trade Practices Commission in India, and the Office of Economic Competition in Hungary). In other cases the authority can initiate criminal or civil proceedings against

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[68] Notably in the United Kingdom.

[69] Notably Germany and the Netherlands.

[70] Notably in Australia, Belgium, Bulgaria, France, Hungary, India and Romania.

persons engaged in unlawful acts. The civil action can be brought in order to claim a final injunction and possibly also, although seldom, to recover damages on behalf of the complainant (as in Hungary).

158. Other administrative sanctions and proceedings are usually part of the regulation of competition in the public interest, such as provisions on colportage, pharmaceutical products, clearance sales and obligatory indications for food and beverages. However, such administrative proceedings, which normally lead to a fine, cannot be regarded as adequate remedies for the benefit of competitors.

E. *Sanctions Under Self-Regulation*

159. In some countries, a considerable proportion of the sanctions introduced to *protect consumers* stem from the voluntary self-regulation created by and for the advertising industry.[71] Where these systems function efficiently, the need for government regulation of the relevant commercial or industrial sectors is substantially reduced. In the United States of America, however, sanctions under self-regulation systems are severely limited by antitrust law because of concern that such systems might be used to restrict competition. The "codes" of self-regulation traditionally grant individual competitors or other market participants and consumers the same means of preventing or suppressing abuse, since there are normally no restrictions on the legal interests of the person entitled to start proceedings. Moreover, there are few formalities to meet regarding the form of the complaint, and decisions are taken within a short space of time.

160. Complaints under self-regulatory codes are investigated by specific bodies which, as mentioned above, may even have some semipublic character. Such bodies can require that the advertisement involved be *withdrawn or amended*, but compensation for damages is not usually possible under such self-regulatory provisions. Another effective sanction under a self-regulation code is *publication of the decision* of the relevant controlling body, including the name of the advertiser involved. Also, if the media concerned have adhered to the relevant code, they can decide not to publish advertising found to be

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[71] Notably in Italy, the Netherlands and the United Kingdom.

in breach of it, and they may possibly refuse advertisements from agencies that defy the authority of the controlling body. However, if the advertiser involved is not likely to obey, or the complainant is not satisfied, the decisions of such bodies should be subject to appeal before a civil or administrative court. In the United Kingdom, for example, the Advertising Standards Authority can ask the Director General of Fair Trading to apply for a final injunction under the Control of Misleading Advertisements Regulations 1988 (or other relevant legislation) if it is not successful in persuading the advertiser of his wrong.

ANNEX

LIST OF LEGISLATIVE TEXTS CONCERNING PROTECTION AGAINST UNFAIR COMPETITION*

National Legislation

Argentina	– Law on Commercial Loyalty No. 22802 and Regulations, 1983 – Penal Code, Article 159
Australia	– Trade Practices Act (Sections 1-6, 52-55A, 75B-87A), 1974
Austria	– Federal Law Against Unfair Competition, 1923
Belgium	– Law on Trade Practices and Consumer Information and Protection, 1991
Bolivia	– Code of Commerce, Articles 66 to 71 – Penal Code, Articles 235 to 238
Brazil	– Code of Industrial Property (Law 7903 of 1945), Article 178 – Code of Industrial Property (Law 5772 of 1971), Articles 2(d) and 128
Bulgaria	– Law on the Protection of Competition, 1991
Canada	– Combines Investigation Act, 1976 – Competition Act, 1986 – Business Practices Act (Ontario), 1974 – Trade Practices Act (British Columbia), 1974 – Unfair Trade Practices Act (Alberta), 1975

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* The information provided is not exhaustive. Translations of the titles of the legislative texts are not official.

Chile	– Law 18223 on Consumer Protection, 1983, Article 7
China	– Law on Protection Against Unfair Competition, September 1993
Colombia	– Code of Commerce (Law 410) of 1971, Title I, Articles 75 to 77 – Penal Code, Articles 236, 238 and 280
Costa Rica	– Central American Convention for the Protection of Industrial Property, Articles 65 to 71
Denmark	– Marketing Practices Act, 1974
Ecuador	– Civil Code, Article 2331
Egypt	– Business Names Act, 1951
El Salvador	– Code of Commerce, 1970, Articles 488 to 497 – Central American Convention for the Protection of Industrial Property, Articles 65 to 71
Ethiopia	– Commercial Code, 1960 (Art. 1-149)
Finland	– Law No. 1061 on Unethical Conduct in Business Dealings, 1978 – Law No. 38 on Consumer Protection, 1978
France	– Civil Code, Article 1382 – Law No. 73-1193 Organizing Trade and Handicrafts ("Loi Royer"), 1973 – Law No. 78-23 on the Protection and Information of Consumers of Goods and Services, 1978 – Decree No. 78-464 on the Application of Chapter IV of Law No. 78-23, 1978 – Law No. 89-421 on the Information and Protection of Consumers and Certain Trade Practices, 1989 – Law No. 88-14 on Judicial Actions of Authorized Consumer Associations and on Consumer Information, 1988

	– Decree No. 88-586 on the Application of Article 2 of Law No. 88-14, 1989 – Law No. 92-60 to Strengthen Consumer Protection (comparative advertising), 1992
Germany	– Law Against Unfair Competition, 1909 – Bonus Ordinance, 1932 – Discounts Law (with Implementing Decree), 1933 – Foodstuff and Consumer Goods Law, 1974 – Medicine Advertising Law, 1975
Greece	– Law No. 146 Against Unfair Competition, 1913/1914 – Ordinance No. 5206/89 on Misleading Advertising, 1990 – Consumer Protection Law, 1991
Guatemala	– Central American Convention for the Protection of Industrial Property, Articles 65 to 71
Honduras	– Industrial Property Law, 1993, Articles 159 to 163
Hungary	– Law on the Prohibition of Unfair Market Behavior, 1990
India	– Monopolies and Restrictive Trade Practices Act, 1969 (Sections 1-18, 31-44, 48-67) – Consumer Protection Act (with Notifications), 1986 – Trade and Merchandise Marks Act, 1958
Ireland	– Consumer Information Act, 1978
Israel	– Consumer Protection Act No. 5741, 1981
Italy	– Civil Code (Articles 2595-2601), 1942
Jamaica	– The Fair Competition Act, 1993, Section 37
Japan	– Unfair Competition Prevention Law, 1934 – Civil Code, Articles 703, 704 and 709 – Act Against Unjustifiable Premiums and Misleading Representations, 1962

Luxembourg	– Law to Regulate Certain Trade Practices and to Repress Unfair Competition, 1986
Mexico	– Law on the Promotion and Protection of Industrial Property, 1991, Articles 213 to 227 – Federal Law on Consumer Protection, 1992, Article 32
Netherlands	– Civil Code, 1992 (Articles 6:162 and 6:194 to 6:196)
New Zealand	– Fair Trading Act 1986
Nicaragua	– Central American Convention for the Protection of Industrial Property, Articles 65 to 71
Nigeria	– Companies and Allied Matters Decree, 1990
Paraguay	– Law on Marks (No. 751), 1979, Articles 69 to 72
Peru	– Law on the Repression of Unfair Competition, No. 26122 of 1992 – Norms on Advertising for Consumer Protection, Legislative Decree 691 of 1991, – Consumer Protection Law, Legislative Decree 716 of 1991 – Penal Code 1991, Articles 238, 239, 240 and 241
Philippines	– Act No. 3740 to Penalize Fraudulent Advertising, Mislabeling or Misbranding of any Product, Stocks, Bonds, etc., 1936
Poland	– Law on the Repression of Unfair Competition, 1993
Portugal	– Industrial Property Code No. 39.679, 1938 (Articles 211-213)
Republic of Korea	– Unfair Competition Prevention Law, 1986 – Monopoly Regulation and Fair Trade Law, No. 3320 of 1980 (Articles 15 and 16)

Romania	– Law on the Repression of Unfair Competition, 1991
Russian Federation	– USSR Council of Ministers Resolution No. 835 on Measures to Demonopolize the Economy, 1990
Spain	– Law on Unfair Competition, 1991 – General Law on Advertising, 1988
Sweden	– Act on the Protection of Trade Secrets, 1990 – Marketing Practices Law, 1975 – Law No. 1418 on Market Distribution, 1975
Switzerland	– Federal Law Against Unfair Competition, 1986
United Kingdom	– Trade Descriptions Act, 1968 – Fair Trading Act, 1973 – Consumer Protection Act, 1987 – Consumer Arbitration Agreements Act, 1988 – Unsolicited Goods and Services Act, 1971 and 1975 – Consumer Transactions (Restriction on Statements) Order, 1976 – Business Advertisements (Disclosure) Order, 1977 – Cancellation of Contracts Concluded away from Business Premises Regulations, 1987 – Control of Misleading Advertisements Regulations, 1988
United States of America	– USC 15, Chapter 22, 1946 (Section 1125(a) and 1126(h) and (i)) "Lanham Act" – Federal Trade Commission Act, 1914 (Section 5a-c) – Model State Trademark Act, 1964 – Uniform Deceptive Trade Practices Act, 1964 – Uniform Trade Secrets Act, 1979 – Uniform Consumer Sales Practices Act, 1971 – Massachusetts Consumer Protection Act, Massachusetts General Laws, Ch. 93A1

	– New York General Business Code, 1954 (/ 349-350i, 368a-e) – California Business & Professions Code (/14330/17000, /17200, /17500)
Venezuela	– Law to Promote and Protect the Exercise of Free Competition, 1991, Article 17
Zaire	– Legislative Ordinance No. 41/63 on Unfair Competition, 1950

Regional Legislation

European Communities	– Council Directive 84/450 concerning Misleading Advertising, 1984 – Proposal for a Council Directive concerning Comparative Advertising and amending Directive 84/450/EEC concerning Misleading Advertising, 1991

Agreement Relating to the Creation of an African Intellectual Property Organization (OAPI), Annex V, Article 17; Bangui, 1977

General Inter-American Convention on Trademark and Commercial Protection, Articles 20 to 23; Washington, 1929

Central American Convention for the Protection of Industrial Property, Articles 65 to 71; 1968.

Forrest-046

Forrest-046

WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Junta de Andalucia Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A. v. Andalucía.Com Limited

Case No. D2006-0749

1. The Parties

The Complainant is Junta de Andalucia, Consejeria de Turismo, Comercio y Deporte, Turismo Andaluz, S.A., Malaga, Spain, represented by Landwell, PricewaterhouseCoopers, Sevilla, Spain.

The Respondent is Andalucia.Com Limited, Kingston, United Kingdom of Great Britain and Northern Ireland, represented by Norton Rose, London, United Kingdom of Great Britain and Northern Ireland.

2. The Domain Name and Registrar

The disputed domain name <andalucia.com> is registered with Total Registrations.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on June 14, 2006. On June 20 and 23, 2006, the Center transmitted by email to Total Registrations a request for registrar verification in connection with the domain name at issue. On June 26, 2006, Total Registrations transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details for the administrative, billing, and technical contact. In response to a notification by the Center that the Complaint was administratively deficient, the Complainant filed an amendment to the Complaint on June 29, 2006.

The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and

A mark consisting of the stylised word ANDALUCIA below a badge shaped logo comprising a stylised letter “A” in yellow on a part yellow and part blue background. The Spanish registration dates from June 10, 1991, and covers Classes 6: 12: 14: 16: 18: 24 – 25: 28 – 29: 32 – 35: 37 – 39 and 41 – 42. Complaint, Annex 3.

In addition, Complainant has registered other word marks in Spain incorporating the word “Andalucia”:

CALIDAD DE ANDALUCIA JUNTA DE ANDALUCIA	32 & 33
ALIMENTOS DE ANDALUCIA	32: 33: 38: 41
COYUNTURA ECONOMICA DE ANDALUCIA	16
FORO DEL TURISMO DE ANDALUCIA	16
ALTUR FERIA INTERNACIONAL DE TURISMO ANDALUZ	41
TURISMO ANDALUZ	16
JUNTA DE ANDALUCIA	1 to 45
EL EURO INFORMACION JUNTA DE ANDALUCIA CONSEJERIA DE ECONOMICA Y HACIENDA	35: 36: 38: 42
ITER JUNTA DE ANDALUCIA CONSEJERIA DE MEDIO AMBIENTE	16: 41 – 42
RESERVA NATURAL CONCERTADA JUNTA DE ANDALUCIA	9: 14: 16: 25: 36: 39: 41 to 43
PARQUE ARIURBANO JUNTA DE ANDALUCIA	9: 14:l 16: 25: 36: 39l 41 – 43
MONUMNTO NATURALE JUNTA DE ANDALUCIA	9: 14:l 16: 25: 36: 39l 41 – 43
GRAN ENCICLOPEDIA DE ANDALUCIA JUNTA DE ANDALUCIA	9: 16: 38: 41
A TURISMO DE ANDALUCIA	6: 12: 14: 16: 18: 24 – 25: 28 – 29: and 32 - 34

On March 30, 2004, Complainant filed a Community trademark, comprising a logo and the words JUNTA DE ANDALUCIA in classes 9: 14: 16: 25: 29-36: 38: and 41-45.

Complainant also points out that “Andalucia” is part of the name of institutions in the region which belong to the Junta de Andalucia, including the Andalucian Parliament, the Board of Governors of Andalucia, and the Andalucia Institute for Statistics, to name only a few. “Andalucia” is also part of the name of many public service companies such as Radio Television de Andalucia.

Complainant has spent in excess of Euros 67 million from 2001 through 2004 in the promotion of the region of Andalucia, including the promotion of public and tourist interest events, using such means as television and radio advertisements, posters, meeting with tour operators, and establishing a presence at fairs and international tourist events. Complaint, Annexes 11 and 12. This promotion has continued into 2005 and 2006. Complaint, Annex 12.

Complainant’s motives in promoting tourism are not merely cultural or altruistic, but are the equivalent of those of commercial ventures: the goals include the increase of revenues for Andalucian businesses and thereby achieving a corresponding increase in the tax revenues of Complainant.

B. Respondent’s Facts

Christopher Chaplow is the founder of the Andalucia.Com group of companies and managing director of Andalucia.Com Limited, the Respondent in these proceedings. Mr. Chaplow is a shareholder in Andalucia.Com Ltd, which in turn owns Andalucia Web Solutions Ltd. in the UK and Andalucia.com SL in Spain. Andalucia Web Solutions Ltd. owns AndWebSol SL in Spain, which runs Andalucia Web Solutions. The domain name <andalucia.com> is owned by Andalucia.com Ltd. and Andalucia.com SL pays an annual license fee to make commercial use of the domain name. Affidavit of Christopher John Chaplow (the “ChaplowAffidavit”), Response, Annex 1, at paragraph 5.

The aim of the business enterprise as Christopher John Chaplow states in the Affidavit (at paragraph 54) was and is “to provide good information that tourists and later non-Spaniards who have established residence in Andalucia would find interesting ” Response

On October 14, 1997, Respondent received an email from the webmaster at “www.caan.es”, the website of the Comunidad Autonimo de Andalucia, the correct political title of the region of Andalucia of which Junta de Andalucia is the governing body. The webmaster requested a link from Complainant’s website to the website at “www.caan.es” and added, “PS – Congratulations on your site”. Response, Annex 1, paragraph 35.

In March 1999, Respondent saw a paid banner on Yahoo inviting the user to visit “Andalucia”. By clicking on the link, Respondent was taken to “www.andalucia.org” where there was an “under construction” holding page. Upon performing a Whois search, Respondent found that Turismo Andaluz SA was the registrant of the domain name <andalucia.org>. This was the first time that Respondent became aware that Turismo Andaluz SA might be interested in setting up a website for the purpose of promoting tourism in Andalucia. Response, Annex 1, paragraphs 37 and 38.

In August 2000, Respondent filed for the mark ANDALUCIA.COM in Spain. On April 16, 2001, Respondent was informed that its application had been suspended because Complainant had objected that the mark was confusingly similar to Complainant’s registered marks, JUNTA DE ANDALUCIA and A ANDALUCIA. This was the first time that Respondent learned of the A ANDALUCIA mark. Response, Annex 1, paragraphs 43-45.

As Respondent’s website was directed at English speakers, Respondent decided to register the trademark ANDALUCIA.COM in the United States and the United Kingdom. On November 30, 2000, Respondent filed for a mark with the United States Patent & Trademark Office (“USPTO”). Due to an administrative error by Respondent’s trademark agents in Madrid, they were forced to refile on October 9, 2003. The mark issued on July 5, 2005. Complainant had filed for a mark with the USPTO on July 23, 2002, but did not object to Respondent’s mark. Response, Annex 1, paragraphs 46 and 48.

On January 19, 2002, Respondent applied for a UK trademark on ANDALUCIA.COM. The mark was granted on July 29, 2002. Response, Annex 1, paragraph 47.

In March 2002, Respondent noticed on the website to which the domain name <andaluciajunta.es> maintained by Complainant a link to “Guias de Hoteles [Translation: “Hotel Guide”] (Inglés)”. By clicking on the link, Respondent was taken to the Accommodation Home Page on the website to which the domain name at issue resolves. This was recorded by a Notary Public. Response, Annex 1, paragraph 50.

On June 14, 2006, Respondent received a copy of the Complaint in the present matter. Until that time, Respondent had no inkling that a dispute existed.

5. Parties’ Contentions

A. Complainant

Complainant contends that the domain name at issue is identical or confusingly similar to marks in which Complainant has rights in that Complainant registered marks well prior to the registration of the domain name at issue, that Respondent has no rights or legitimate interests in respect of the domain name at issue because Respondent knew or should have known of Complainant’s registered marks, and that Respondent has registered and is using the domain name at issue in bad faith since it has no license or other permission of the mark owner to use the mark in a domain name.

B. Respondent

Respondent contends that Complainant has no interest in a registered mark that is confusingly similar to the domain name at issue, in that Complainant’s mark is a word and design mark and that the predominant feature of Complainant’s mark is not the word, but the design, and further that in a geographic mark Complainant must establish secondary meaning as to source and that Complainant has failed to do so. Respondent contends that it has rights and legitimate interests in respect of the domain name at issue in that it has expended resources over the years in the development of the informational website to which the domain name resolves and that Complainant, knowing of Respondent’s website, failed to object for at least five years to Respondent’s use of the domain name. Respondent contends that it did not register the domain name at issue in bad faith, since at the time it registered the domain name it did not know of Complainant’s mark. Respondent contends that it did not use the domain name in bad faith, since it had no idea that Complainant objected to its use of the domain name at issue until it received a copy of the complaint in this matter.

Respondent alleges that the filing of the Complaint was done in bad faith and asks for a finding of Reverse Domain Name Hijacking.

6. Discussion and Findings

Paragraph 15(a) of the Rules instructs the Panel as to the principles the Panel is to use in determining the dispute: “A Panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.”

law marks. Rights in trademark not found). However because of the name and design mark registered in 1991, the Panel finds that none of these cases are determinative.

The Final Report of the Second WIPO Internet Domain Name Process, issued September 3, 2001, ("Second WIPO Report") dealt in part with the question of protectability for geographic indications under the UDRP. The Second WIPO Report notes that the existing international legal framework for the prohibition of false and deceptive indications of geographical source and the protection of geographical indications was developed for, and applies to, trade in goods.

In the present case both Complainant and Respondent are using the geographic indication to provide information services pertaining to the geographic region which the term describes. Can this be said to be a trademark use of a term, registered or not, when that term is used in the same manner that one might use a term in a search engine to find information that resides somewhere on the Internet? Even if a term has been registered as a mark, can it really have the status of a mark if it calls to mind not the source of goods or services, but only a geographic location?

Clearly, a geographic indication can acquire secondary meaning and serve as an indication of the source of goods or services. "Amazon" calls to mind not only the river and the geographic region through which it flows, but also the well-known online retailer. In the United States, "Sinai" is not only the geographic region of Egypt bordering Israel, but also designates kosher meats prepared by a certain American company. But could the use of the terms "Amazon" and "Sinai" really be said to be trademark use if the only way in which they are used is to provide information about the geographic regions to which they refer? Isn't this the informational equivalent of using apple to sell apples?

However, the Panel is faced with a situation where Complainant holds valid service marks issued by the Spanish trademark authorities. Can ANDALUCIA be said to be the dominant feature of those marks? Although the Panel believes it is a close call, the Panel concludes that at least as to the A ANDALUCIA word and design mark, ANDALUCIA is the dominant feature in the mark. Therefore, the Panel finds that the domain name at issue is confusingly similar to a mark in which Complainant has rights.

B. Rights or Legitimate Interests

In April 1996, Respondent registered the domain name at issue. At the time that Respondent registered the domain name, Respondent has stated under oath that he was unaware of Complainant's trademarks.

Since April 1996, Respondent has used the domain name at issue on an information site at which information is furnished concerning the region of Andalucia. Respondent's use of the domain name for this purpose was obviously open and notorious, as it was accessible by anyone with a computer and Internet access. In the summer of 1996 Respondent contacted Complainant's tourism department to seek approval for use of copyrighted text from a brochure on Respondent's website. In early 1997 Respondent applied to another agency of Complainant for a grant to help build Respondent's tourism website. In October 1997 Respondent received an email from the webmaster of the website for the political body of Andalucia requesting a link from Respondent's website and congratulating Respondent on Respondent's website.

In early 1999 Complainant wanted to register the domain name <andalucia.com>, but found that it had been previously registered. Complainant registered the domain name <andalucia.org> instead. In March 1999, Respondent saw a banner add on Yahoo inviting users to visit "Andalucia". When Respondent clicked on it, Respondent was taken to the website "www.andalucia.org" where an "under construction" holding page was posted.

In November 1999, upon learning that the domain name <andalusia.com> was then for sale, Respondent purchased the domain name for US$800 and has been using it since as gateway pages for search engine optimization.

In August 2000, Respondent filed for the registration of the mark ANDALUCIA.COM. On April 16, 2001, Respondent learned that its application had been suspended because of objection to the mark by Complainant on the grounds that the mark was confusingly similar to marks that Complainant owned, including the A ANDALUCIA word and design mark. This is the first time that Respondent learned that Complainant owned an A ANDALUCIA mark.

During the period 2000-2003, Respondent applied for and registered a word and design mark ANDALUCIA.COM in the United States and in the United Kingdom, since Respondent's website was aimed at English language speakers. Although Complainant had also filed for a word and design mark on ANDALUCIA with the USPTO, Complainant did not object to Respondent's filing.

In March 2002, Respondent discovered a link on one of Complainant's websites that linked to Respondent's website, and specifically to its listing of hotels in Andalucia.

Respondent did not know that a dispute existed until June 14, 2006, when it received a copy of the Complaint in this matter.

The panel believes that the use of a geographic indication in a domain name is analogous to the use of a generic descriptive term in a domain name. Thus it finds the cases on the use of generic descriptive terms in domain names instructive.

The WIPO Overview of WIPO Panel Views on Selected UDRP Questions ("WIPO Overview") sets out the consensus views of WIPO panelists on selected issues. Section 2.2 of the WIPO Overview specifically addresses the question, "Does a respondent automatically have a legitimate interest in a domain name comprised of a generic (dictionary) word(s)?" While the general rule is not necessarily, there is an exception, that is stated thusly: "However: If a respondent is using a generic word to describe his product/business or to profit from the generic value of the word without intending to take advantage of complainant's rights in that word, then it has a legitimate interest."

Some cases on this subject are illustrative. In *Porto Chico Stores, Inc. v. Otavio Zambon,* WIPO Case No. D2000-1270, Complainant sold clothes and cosmetics under the LOVELY GIRL trademark and used the domain name <lovelygirl.com> to resolve to a website at

7. Decision

For all the foregoing reasons, the Complaint is denied.

M. Scott Donahey
Presiding Panelist

Marino Porzio
Panelist

David Perkins
Panelist

Dated: October 13, 2006

Forrest-047

Forrest-047

WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

HER MAJESTY THE QUEEN, in right of her Government in New Zealand, as Trustee for the Citizens, Organizations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade
v.
Virtual Countries, Inc

Case No. D2002-0754

1. The Parties

The Complainant is HER MAJESTY THE QUEEN, in right of her Government in New Zealand, as Trustee for the Citizens, Organizations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade c/o The New Zealand Trade Development Board, Auckland, New Zealand.

The Respondent is Virtual Countries, Inc., Seattle, United States of America.

2. The Domain Name and Registrar

The Domain Name is <newzealand.com>.

The Registrar is Network Solutions, Inc.

to this decision.

While the Complainant acknowledged receipt of the Procedural Order, no Response has been received (in time or at all).

The Panel was properly constituted. The undersigned Panelists submitted Statements of Acceptance and Declarations of Impartiality and Independence.

No further submissions were received by WIPO or the Panel, as a consequence of which the date finally scheduled for the Panel's Decision is November 27, 2002.

4. Factual Background

The Complainant is Her Majesty The Queen, in right of her Government in New Zealand, as Trustee for the Citizens, Organizations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade. New Zealand is an Independent Constitutional Monarchy (the Complainant is its Head of State) situated in the South Pacific Ocean.

The Respondent is Virtual Countries, Inc, a company based in Seattle, USA. It registered the Domain Name in 1996, and has for several years been operating a website containing information about New Zealand at "www.newzealand.com".

The Respondent is the proprietor of US trademark registration number 2557448 (filing date February 11, 2000) for NEWZEALAND.COM for business advertising.

On June 29, 2001, the Complainant filed five trademark applications in New Zealand for the mark NEW ZEALAND in classes 22, 29, 31, 33 and 41.

In the course of 2000 and 2001, the Respondent was in communication with various third parties in relation to transfer of the Domain Name, but there is a dispute as to the nature of some of those communications and who initiated them. Some of those third parties clearly came away with the impression that the Respondent would be willing to transfer the Domain Name in return for a very large sum of money.

5. Parties' Contentions

A. Complainant

The Complainant's contentions are conveniently summarised in paragraph 75 of the Complaint which reads as follows:-

"75. The Criteria articulated in clause 4(a) of the Policy have been established:

75.1 The name NEW ZEALAND is a trade and service mark in the hands of the Complainant, as the Head of State of New Zealand. The domain name in dispute is identical with that trademark.

75.2 Virtual Countries has no rights or legitimate interests in respect of the domain name because only the Complainant as Head of the Sovereign State of New Zealand, or its agencies, can have those rights or interests.

75.3 The domain name has been registered and is being used in bad faith. Virtual Countries registered the domain name in contravention of the known and established rights to the trademark NEW ZEALAND owned by the citizens, institutions and state of New Zealand represented by New Zealand's Head of State, her Majesty the Queen in Right of her Government in New Zealand. Further, Virtual Countries' purpose was to obtain the domain name and then sell it on for a substantial profit to a third party. Its current website is mere token use designed solely to seek to legitimise its improper acquisition of the domain name."

B. Respondent

Th R d t j t th C l i t' ll ti lt d i th t N Z l d i bl f b i t d k i k lt d i th t it h i ht l iti t i t t i t f th D i N d i t t th f t th t it h th

(ii) The Respondent has no rights or legitimate interest in respect of the Domain Name; and

(iii) The Domain Name has been registered in bad faith and is being used in bad faith.

If the Complaint fails, the Panel has to have regard to paragraph 15(e) of the Rules and in particular the following sentence namely:

"If after considering the submissions the Panel finds that the Complaint was brought in bad faith, for example in an attempt at reverse domain name hijacking or was brought primarily to harass the domain name holder, the Panel shall declare in its Decision that the Complaint was brought in bad faith and constitutes and abuse of the Administrative Proceeding."

Reverse Domain Name Hijacking is defined in paragraph 1 of the Rules as meaning "using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name."

Identical or confusingly similar

The first thing that a Complainant is required to prove under paragraph 4(a) of the Policy is that the Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights.

The Domain Name, absent the generic domain suffix, is NEW ZEALAND and the name in which the Complainant claims trademark and service rights is also NEW ZEALAND. Accordingly, the Domain Name and the Complainant’s claimed trade/service mark are identical. But is NEW ZEALAND a trademark or service mark?

In paragraph 19 of the Complaint the Complainant claims that "the goods and services branded NEW ZEALAND have a single trade source, namely the State and Territory of New Zealand."

In paragraph 16 of the Complaint, the Complainant asserts that:-

"NEW ZEALAND is a trade and service mark owned collectively by all NZ citizens and their institutions represented by the Head of State that is to say the Complainant. This trademark is used to identify those goods and services produced by and for citizens, organisations and the State of New Zealand from the goods and services produced by citizens, organisations and/or States of other countries."

The Complainant has no trademark registrations of the name and has not produced in evidence details of any such registrations in the name of anybody else whom she represents. In passing, the Panel observes that the trademark and service mark applications for NEW ZEALAND filed in New Zealand by the Complainant of themselves are no indication that the Complainant has any relevant rights in the name and the Panel ignores them. On their face they are open to the objection that they are deceptive unless the specifications are restricted to goods/services from New Zealand; yet, if the specifications are so limited, the inherent descriptiveness of the name will be highlighted.

The Complainant in her representative capacity (as identified above) claims common law rights in the name. In other words, NEW ZEALAND is claimed to be a trademark or service mark in which the Complainant has unregistered rights.

The primary function of a trademark or service mark is to identify the proprietor as the source of the goods or services to which the mark has been applied and, in so doing, to distinguish the proprietor’s goods or services from the goods or services from the goods or services of other traders.

The primary function of the name NEW ZEALAND is to identify a geographical location, which, while inevitably the geographical source of goods and services, is not the specific trade source of those goods and services.

As an indication of geographical origin, when properly applied to goods and services, the name NEW ZEALAND does indeed serve to distinguish goods and services emanating from New Zealand from the goods and services emanating from other geographical areas. But indications of geographical origin are not of themselves trade/service marks. They are not trade/service marks for precisely the reason that they serve to indicate geographical origin. Trade/service marks on the other hand indicate a very precise trade origin. They identify the specific trader, the source of the goods/services. Ordinarily, an indication of geographical origin cannot serve that purpose. A wine label reading "NEW ZEALAND wine", for example, indicates that the wine emanates from New Zealand, but it does not indicate which of the hundreds of New Zealand wine producers is the source of that particular wine.

Indications of geographical origin, whether they be the names of towns, cities, regions, countries or indeed continents are certainly capable of being trademarks or service marks, but only when the geographical significance of the name is displaced. This usually only occurs after long and extensive use of the name as a brand by a single trader in such a manner as to distinguish his goods and services from those of his competitors. Thus, in England, for example, to golfers, NEW ZEALAND is well known as being the name of a golf club; to the general public ICELAND is a well known supermarket chain and food brand MALVERN the name of a town is well known as a brand of mineral water and YORK the name of a city is a well known

5. By the same token New Zealand producers of wine and lamb, for example, can restrain by way of the ‘extended form’ passing off action misuse of the geographical term ‘NEW ZEALAND’ when applied to wine/lamb et cetera.

6. Since terms protectable by way of passing off actions are common law/unregistered trademarks (see 3 above), ‘SCOTCH’ in relation to whisky, ‘CHAMPAGNE’ in relation to sparkling wine from the Champagne region of France and ‘NEW ZEALAND’ in relation to anything emanating from New Zealand are all unregistered trademarks.

The fundamental flaw in this line of reasoning is that the ‘classic form’ passing off action and the ‘extended form’ passing off action are two completely different animals, albeit both variants of the tort of passing off. The ‘classic form’ passing off action is designed to prevent misrepresentations as to trade origin and therefore serves to protect trade/service marks, such marks being indications of trade origin, whereas the ‘extended form’ passing off action serves to protect product descriptions in relation to which groups of traders have a shared goodwill. Self-evidently, product descriptions, which are available for use by all traders in such products, cannot constitute trade/service marks.

The Panel finds that the Complainant has failed to prove that ‘NEW ZEALAND’ is a trade/service mark in which the Complainant has rights.

If support is needed for this conclusion of the Panel, one need look no further than the New Zealand Government’s response dated March 4, 2002, to the WIPO Secretariat questionnaire on the protection of country names in the domain name system. The following paragraph is of particular interest:-

"New Zealand law, custom or practice does not preclude the use of country names under any circumstances. New Zealand does not see any reason why the domain names should be excepted from this general rule."

Respondent’s Rights or Legitimate Interests

In light of the foregoing finding, it is unnecessary for the Panel to address this topic. However, the Panel cannot but observe that the Respondent is the proprietor of a trademark registration in the United States in respect of the Domain Name and that the Domain Name is connected to a website, which, although sketchy and badly in need of being updated, appears to the Panel at one time to have been a genuine website concerned with New Zealand. Accordingly, even if the Complainant does have trademark or service mark rights in respect of the Domain Name, the Panel would have required a lot more evidence than the Complainant has put before the Panel to persuade it that the Respondent has no rights or legitimate interests in respect of the Domain Name.

Bad Faith

In light of the finding under paragraph 4(a)(i) it is unnecessary for the Panel to address this topic, but, again, the Panel has nothing before it to suggest any bad faith on the part of the Respondent. Even if, as the Complainant asserts, the Respondent registered the Domain Name with a view to selling it for a very large sum of money, there is nothing to suggest that the Respondent did so in order to sell it to the Complainant or a competitor of the Complainant (paragraph 4(b)(i) of the Policy). Significantly, there is nothing to suggest that when the Respondent registered the Domain Name it intended to violate anybody’s trademark rights, nor in the view of the Panel could the Respondent sensibly have anticipated that by registering the Domain Name it would be violating any such rights. Accordingly, whether one adopts an objective test or a subjective test in assessing ‘bad faith’, the allegation has to fail.

Reverse Domain Name Hijacking

Have those responsible for this Complaint used the Policy in bad faith to attempt to deprive the Respondent, a registered domain name holder, of the Domain Name? In addressing this question, the members of the Panel were unanimous in concluding that the filing of a complaint in the knowledge that the complaint is unmeritorious constitutes ‘use of the Policy in bad faith’ within the meaning of paragraph 1 of the Rules.

Prior to reading the Respondent’s supplementary submissions, the members of the Panel were divided on the question of reverse domain name hijacking. It seemed to some of the Panel that there might just be enough case law under the Policy (e.g. the <barcelona.com> decision) to encourage those responsible for the Complaint to hold a genuine belief in the merits of the Complaint.

However, having read the Response of the New Zealand Government to the WIPO Secretariat’s questionnaire referred to above, the Panel is unanimous in its view that when the Complaint was launched, those responsible for the Complaint, the New Zealand Government, were well aware that a claim to trademark and service mark rights in respect of NEW ZEALAND was baseless. Moreover, that document makes it clear that the New Zealand Government regards the protection of country names (*qua* country names) as being outside the scope of the Policy and does not approve of the Policy being extended to cover those country names, which are not trademarks.

There might have been scope for an argument in mitigation that the limb of the New Zealand Government responsible for the Complaint is the Ministry of Foreign Affairs and Trade whereas the limb of the New Zealand Government responsible for the Response to the questionnaire was the Ministry of Economic Development but that argument has not been put to the Panel Indeed the Complainant has not responded to the allegation of reverse domain name hijacking despite the Panel’s invitation

Gordon Harris
Panelist

Panelist
Milton Mueller

Dated: November 27, 2002

Forrest-048

Forrest-048

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13 results for

Results per page:

Sort by:
Alpha-2 code
English short name

Standards
Publications
Graphical symbols
Terms & Definitions
Country codes
13

Code type

Officially assigned codes
Other codes
13

Other code types

Exceptionally rese...
13
Transitionally reserved
Indeterminately reserved
Formerly used
Unassigned

For definition of the different code types, please click here

Follow

Alpha-2 code	English short name	Remark
AC		Refers to Ascension Island and reserved at the request of Universal Postal Union (UPU)
CP		Refers to Clipperton Island and reserved at the request of International Telecommunication Union (ITU).

DG		Refers to Diego Garcia and reserved at the request of International Telecommunication Union (ITU)
EA		Refers to Ceuta, Melilla and reserved at the request of World Customs Organization (WCO).
EU		Refers to European Union and reserved at the request of ISO 4217/MA (March 1998) for ISO 6166, Securities - International securities identification numbering system (ISIN).
EZ		Refers to European OTC derivatives and reserved at the request of ISO 6166/RA, Securities - International securities identification numbering system (ISIN).
EZ		
FX	France, Metropolitan	Refers to Metropolitan France and reserved at the request of France.
IC		Refers to the Canary Islands and reserved at the request of World Customs Organization (WCO)
SU	USSR	Refers to the former USSR and reserved at the request of the Foundation for Internet Development (FID).
TA		Refers to Tristan da Cunha and reserved at the request of Universal Postal Union (UPU).
UK		Refers to the United Kingdom and reserved at the request of United Kingdom.
UN		Refers to the United Nations and reserved by the ISO 3166 Maintenance Agency.

Refine current search parameters

Forrest-050

International Organization for Standardization

International Standards for Business, Government and Society

Glossary for ISO 3166 - Codes for countries and their subdivisions

Country codes (ISO 3166-1 and ISO 3166-3)

Alpha-2 code – a two-letter code that represents a country name, recommended as the general purpose code

Alpha-3 code – a three-letter code that represents a country name, which is usually more closely related to the country name

Alpha-4 code – a four-letter code that represents a country name that is no longer in use. The structure depends on the reason why the country name was removed from ISO 3166-1 and added to ISO 3166-3.

Country names might be removed from ISO 3166-1 for various reasons

- A country might change a significant part of its name, for example Burma (BU) was changed to Myanmar (MM) in 1989. The code element for the formerly used country name is therefore BUMM.
- A country may divide into two or more new ones, for example Czechoslovakia was divided into Czech Republic and Slovakia in 1993. The code element for the formerly used country name Czechoslovakia is CSHH, HH meaning that no single successor country exists.
- Two or more countries may merge for example Democratic Yemen (YD) and Yemen Arab Republic (YE) merged into the Republic of Yemen (YE) in 1990. The code element used for the formerly used country name Democratic Yemen is YDYE.

Unassigned codes – codes that have not been assigned to country names.

Reserved codes – codes that do not represent a country name in the standard but that have been reserved for a certain use. While a code is reserved it will not be used in the standard to represent a country. There are different types of reserved codes.

- *Exceptionally reserved codes* – codes that have been reserved for a particular use at special request of a national ISO member body, governments or international organizations. For example, the code UK has been reserved at the request of the United Kingdom so that it cannot be used for any other country.
- *Transitionally reserved codes* – codes that are reserved during a transitional period while new code elements that may replace them are taken into use. This results from changes in the standard. For example, the country codes for the former Yugoslavia have been reserved when it was removed from ISO 3166-1.
- *Indeterminately reserved* – a code that has been indeterminately reserved for use in a certain way. Usually this is justified by their presence in other coding systems. For example, several codes have been reserved by the World Intellectual Property Organization (WIPO) because they have been used in its Standard ST.3.

Formerly used codes – Codes that used to be part of the standard but that are no longer in use. See alpha-4 codes above.

Subdivision codes (ISO 3166-2)

Subdivision codes – code that represents the name of a principal subdivision (e.g province or state) of countries coded in ISO 3166-1. This code is based on the two-letter code element from ISO 3166-1 followed by a separator and up to three alphanumeric characters. The characters after the separator cannot be used on their own to denote a subdivision, they must be preceded by the alpha-2 country code.

For example – ID-RI is the Riau province of Indonesia and NG-RI is the Rivers province in Nigeria.

The codes denoting the subdivision are usually obtained from national sources and stem from coding systems already in place in the country.

Forrest-051

Forrest-051

New gTLD Program

Initial Evaluation Report

Report Date: 12 July 2013

Application ID:	1-1315-58086
Applied for String:	AMAZON
Priority Number:	1156
Applicant Name:	Amazon EU S.à r.l.

Overall Initial Evaluation Summary

Initial Evaluation Result — **Pass**

Congratulations!

Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.

Background Screening Summary

Background Screening — **Eligible**

Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility up until the execution of the Registry Agreement.

Panel Summary

String Similarity — **Pass - No Contention**

The String Similarity Panel has determined that your application is consistent with the requirements in Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, and your applied-for string is not in contention with any other applied-for strings.

DNS Stability — **Pass**

The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.

Geographic Names — **Not a Geographic Name - Pass**

The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.

Registry Services — **Pass**

The Registry Services Panel has determined that the proposed registry services do not require further review.

Technical & Operational Capability — **Pass**

The Technical & Operational Capability Panel determined that:

Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.

Question	Score
24: SRS	1
25: EPP	1
26: Whois	2
27: Registration Life Cycle	1
28: Abuse Prevention and Mitigation	2
29: Rights Protection Mechanism	2
30: Security Policy	2
31: Technical Overview of Registry	1
32: Architecture	2
33: Database Capabilities	2
34: Geographic Diversity	2

35: DNS Service	1
36: IPv6 Reachability	1
37: Data Backup Policies & Procedures	1
38: Data Escrow	1
39: Registry Continuity	2
40: Registry Transition	1
41: Failover Testing	1
42: Monitoring and Fault Escalation	2
43: DNSSEC	1
44: IDNs (Optional)	1
Total	30
Minimum Required Total Score to Pass*	22

**No zero score allowed except on optional Q44*

Financial Capability Pass

The Financial Capability Panel determined that:

Your application meets the Financial Capability criteria specified in the Applicant Guidebook.

Question	Score
45: Financial Statements	1
46: Projections Template	1
47: Costs and Capital Expenditures	2
48: Funding and Revenue	2
49: Contingency Planning	2
50: Funding Critical Registry Functions	3
Total	11
Minimum Required Total Score to Pass**	8

***No zero score allowed on any question*

Disclaimer: Please note that these Initial Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. All applications are subjected to due diligence at contracting time, which may include an additional review of the Continued Operations Instrument for conformance to Specification 8 of the Registry Agreement with ICANN. 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>.

Forrest-052

New gTLD Program
Initial Evaluation Report
Report Date: 22 March 2013

Application ID:	1-1318-83995
Applied for String:	アマゾン
Priority Number:	24
Applicant Name:	Amazon EU S.à r.l.

Overall Initial Evaluation Summary

Initial Evaluation Result	Pass

Congratulations!

Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.

Background Screening Summary

Background Screening	Eligible

Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility up until the execution of the Registry Agreement.

Panel Summary

String Similarity	Pass - No Contention

The String Similarity Panel has determined that your application is consistent with the requirements in Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, and your applied-for string is not in contention with any other applied-for strings.

DNS Stability	Pass

The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.

Geographic Names	Not a Geographic Name - Pass

The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.

Registry Services	Pass

The Registry Services Panel has determined that the proposed registry services do not require further review.

Technical & Operational Capability	Pass

The Technical & Operational Capability Panel determined that:

Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.

Question	Score
24: SRS	1
25: EPP	1
26: Whois	2
27: Registration Life Cycle	1
28: Abuse Prevention and Mitigation	2
29: Rights Protection Mechanism	2
30: Security Policy	2
31: Technical Overview of Registry	1
32: Architecture	2
33: Database Capabilities	2
34: Geographic Diversity	2

35: DNS Service	1
36: IPv6 Reachability	1
37: Data Backup Policies & Procedures	1
38: Data Escrow	1
39: Registry Continuity	2
40: Registry Transition	1
41: Failover Testing	1
42: Monitoring and Fault Escalation	2
43: DNSSEC	1
44: IDNs (Optional)	1
Total	30
Minimum Required Total Score to Pass*	22

**No zero score allowed except on optional Q44*

Financial Capability Pass

The Financial Capability Panel determined that:

Your application meets the Financial Capability criteria specified in the Applicant Guidebook.

Question	Score
45: Financial Statements	1
46: Projections Template	1
47: Costs and Capital Expenditures	2
48: Funding and Revenue	2
49: Contingency Planning	2
50: Funding Critical Registry Functions	3
Total	11
Minimum Required Total Score to Pass**	8

***No zero score allowed on any question*

Disclaimer: Please note that these Initial Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. All applications are subjected to due diligence at contracting time, which may include an additional review of the Continued Operations Instrument for conformance to Specification 8 of the Registry Agreement with ICANN. 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>.

Forrest-053

Forrest-053

New gTLD Program

Initial Evaluation Report

Report Date: 05 April 2013

Application ID:	1-1318-5591
Applied for String:	亚马逊
Priority Number:	64
Applicant Name:	Amazon EU S.à r.l.

Overall Initial Evaluation Summary

Initial Evaluation Result	Pass

Congratulations!

Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.

Background Screening Summary

Background Screening	Eligible

Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility up until the execution of the Registry Agreement.

Panel Summary

String Similarity	Pass - No Contention

The String Similarity Panel has determined that your application is consistent with the requirements in Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, and your applied-for string is not in contention with any other applied-for strings.

DNS Stability	Pass

The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.

Geographic Names	Not a Geographic Name - Pass

The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.

Registry Services	Pass

The Registry Services Panel has determined that the proposed registry services do not require further review.

Technical & Operational Capability	Pass

The Technical & Operational Capability Panel determined that:

Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.

Question	Score
24: SRS	1
25: EPP	1
26: Whois	2
27: Registration Life Cycle	1
28: Abuse Prevention and Mitigation	2
29: Rights Protection Mechanism	2
30: Security Policy	2
31: Technical Overview of Registry	1
32: Architecture	2
33: Database Capabilities	2
34: Geographic Diversity	2

35: DNS Service	1
36: IPv6 Reachability	1
37: Data Backup Policies & Procedures	1
38: Data Escrow	1
39: Registry Continuity	2
40: Registry Transition	1
41: Failover Testing	1
42: Monitoring and Fault Escalation	2
43: DNSSEC	1
44: IDNs (Optional)	1
Total	30
Minimum Required Total Score to Pass*	22

**No zero score allowed except on optional Q44*

Financial Capability Pass

The Financial Capability Panel determined that:

Your application meets the Financial Capability criteria specified in the Applicant Guidebook.

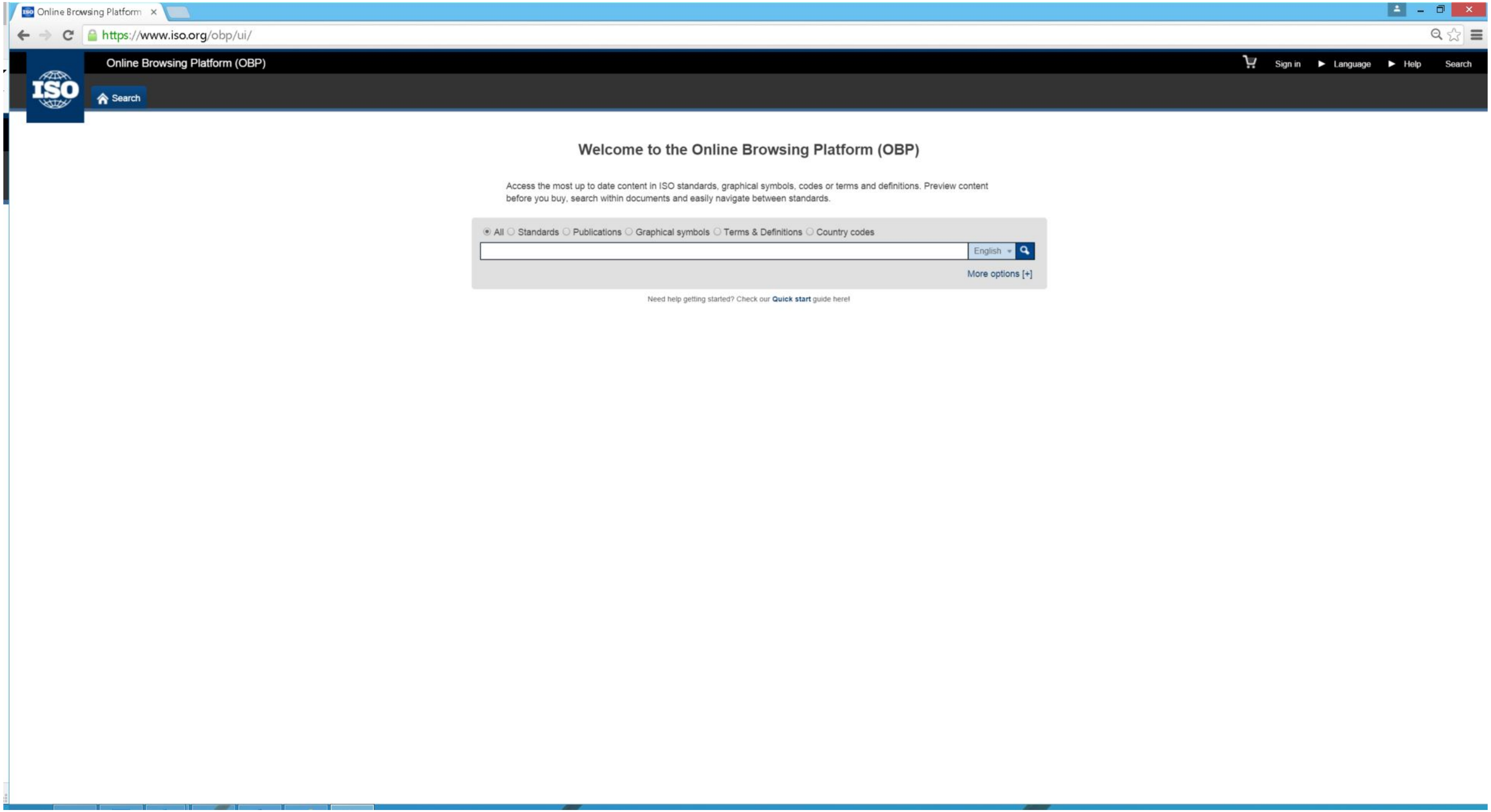
Question	Score
45: Financial Statements	1
46: Projections Template	1
47: Costs and Capital Expenditures	2
48: Funding and Revenue	2
49: Contingency Planning	2
50: Funding Critical Registry Functions	3
Total	11
Minimum Required Total Score to Pass**	8

***No zero score allowed on any question*

Disclaimer: Please note that these Initial Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. All applications are subjected to due diligence at contracting time, which may include an additional review of the Continued Operations Instrument for conformance to Specification 8 of the Registry Agreement with ICANN. 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>.

Forrest-054

Forrest-054



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Search BR ×

Standard: ISO 3166 — Codes for the representation of names of countries and their subdivisions

Committee: ISO/TC 46 ICS: 01.140.30

Alpha-2 code	BR
Short name	BRAZIL
Short name lower case	Brazil
Full name	the Federative Republic of Brazil
Alpha-3 code	BRA
Numeric code	076
Remarks	
Independent	Yes
Territory name	Fernando de Noronha Island, Martim Vaz Islands, Trindade Island
Status	Officially assigned
Remark part 1	Includes: Fernando de Noronha Island, Martim Vaz Islands, Trindade Island.

For definition of the different code types, please click here

Forrest-056

Forrest-056

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Search PE ×

Standard: ISO 3166 — Codes for the representation of names of countries and their subdivisions

Committee: ISO/TC 46 ICS: 01.140.30

Alpha-2 code	PE
Short name	PERU
Short name lower case	Peru
Full name	the Republic of Peru
Alpha-3 code	PER
Numeric code	604
Remarks	
Independent	Yes
Territory name	
Status	Officially assigned

For definition of the different code types, please click here

Additional information

Forrest-057

Forrest-057

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Search CO ×

Standard: ISO 3166 — Codes for the representation of names of countries and their subdivisions

Committee: ISO/TC 46 **ICS:** 01.140.30

Alpha-2 code	CO
Short name	COLOMBIA
Short name lower case	Colombia
Full name	the Republic of Colombia
Alpha-3 code	COL
Numeric code	170
Remarks	
Independent	Yes
Territory name	Malpelo Island, San Andrés y Providencia Islands
Status	Officially assigned
Remark part 1	Includes: Malpelo Island, San Andrés y Providencia Islands.

For definition of the different code types, please click here

Forrest-058

Forrest-058

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Standard:
ISO 3166 — Codes for the representation of names of countries and their subdivisions
Committee:
ISO/TC 46
ICS:
01.140.30

Alpha-2 code
VE
Short name
VENEZUELA (BOLIVARIAN REPUBLIC OF)
Short name lower case
Venezuela (Bolivarian Republic of)
Full name
the Bolivarian Republic of Venezuela
Alpha-3 code
VEN
Numeric code
862
Remarks
Independent
Yes
Territory name
Bird Island
Status
Officially assigned
Remark part 1
Includes: Bird Island.

For definition of the different code types, please click here

1. Additional information

Administrative language(s) alpha-2	Administrative language(s) alpha-3	Local short name
es	spa	Venezuela, Repúblic

2.Subdivisions

23 state (en) / État (fr) / estado (es)
1 federal dependency (en) / dépendance fédérale (fr) / dependencia federal (es)
1 capital district (en) / district de la capitale (fr) / distrito capital (es)

List source

IGN 1990; update PCGN 2002-10; update BET 2003 [see also list of states at http://www.venezuelatuya.com/geografia/index.htm (2003-06-13)]; http://unterm.un.org/dgaacs/unterm.nsf/

Code source

EUROPLATE + ISO/TC 46/WG 2 Secretariat (*); ISO 3166/MA (*)

Subdivision category	3166-2 code	Subdivision name	Language code	Romanization system
state	VE-Z	Amazonas	es	
state	VE-B	Anzoátegui	es	
state	VE-C	Apure	es	
state	VE-D	Aragua	es	
state	VE-E	Barinas	es	
state	VE-F	Bolívar	es	
state	VE-G	Carabobo	es	
state	VE-H	Cojedes	es	
state	VE-Y	Delta Amacuro	es	
federal dependency	VE-W*	Dependencias Federales	es	
capital district	VE-A	Distrito Capital	es	
state	VE-I	Falcón	es	
state	VE-J	Guárico	es	
state	VE-K	Lara	es	
state	VE-L	Mérida	es	
state	VE-M	Miranda	es	
state	VE-N	Monagas	es	
state	VE-O	Nueva Esparta	es	
state	VE-P	Portuguesa	es	

Subdivision category	3166-2 code	Subdivision name	Language code	Romanization system
state	VE-R	Sucre	es	
state	VE-S	Táchira	es	
state	VE-T	Trujillo	es	
state	VE-X*	Vargas	es	
state	VE-U	Yaracuy	es	
state	VE-V	Zulia	es	

3.Change history of country code

Effective date of change	Short description of change (en)	Short description of change (fr)
2015-11-27	Change of spelling of category name in fra and spa	Modification de l'orthographe du nom de catégorie en fra
2014-12-18	Alignment of the English and French short names upper and lower case with UNTERM; update of the remarks in French	Alignement de la forme courte anglaise et française en m remarques en français
2010-02-19	Change of short form country name in accordance with ISO 3166-1 NL VI-5 (2009-03-03)	Mise en conformité de la forme courte du nom du pays av
2009-03-03	Change of short name	Changement de nom abrégé

Forrest-059

Forrest-059

ICANN
The Internet Corporation for Assigned Names and Numbers

7 April 2014

Governmental Advisory Committee
Via, Ms. Heather Dryden
Chair, Governmental Advisory Committee

Re: Governmental Advisory Committee (GAC) Advice – .AMAZON (and related IDNs)

Dear Ms. Dryden:

I am pleased to inform you that the ICANN Board New gTLD Program Committee (NGPC) continues to make progress to address the open item of advice from the GAC concerning the New gTLD Program applications for .AMAZON, and related IDNs. As you are aware, in its Durban Communiqué, the GAC advised the ICANN Board that "the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)."

As previously reported, ICANN commissioned an independent, third-party expert to provide additional advice on the specific issues of application of law at issue. The analysis attached has been received and is being considered by the NGPC as it continues to deliberate on the appropriate next steps to address the GAC's advice on .AMAZON (and related IDNs).

ICANN provides this analysis to keep the parties informed and welcomes any additional information that they believe is relevant to the NGPC in making its final decision on the GAC's advice on .AMAZON (and related IDNs). ICANN has requested that Amazon EU S.à r.l. (the applicant of the .AMAZON applications identified in the GAC's advice) submit any additional information by 14 April 2014.

The NGPC is committed to giving due consideration to the complex issues at the crux of the matter, and reiterates its commitment to the most timely response possible to all interested parties including the distinguished members of the GAC. We appreciate the collaboration of the GAC in the New gTLD Program

Jérôme Passa

Contact Information Redacted

I, the undersigned Jérôme Passa, *agrégé* in law, professor at the Université Panthéon-Assas (Paris II, France), have been requested by ICANN to provide an opinion on the well-foundedness of various objections raised against the reservation of the new gTLD '.amazon'. This legal opinion is set out below.

1. In 2011, the Internet Corporation for Assigned Names and Numbers (ICANN), which is responsible for the worldwide administration of the Domain Name System (DNS), launched a new domain name system offering operators the possibility of reserving new gTLDs (generic Top Level Domains) designed to provide suffixes for new domain names.

Under this system, a company can reserve its own name or that of its trade mark or one of its trade marks, such as '.vuitton' or '.ipad', for example, as a new gTLD. Geographical names and purely generic product or service names can also be reserved in this way.

The system and, in particular, the conditions for assigning these new gTLDs are set out in a lengthy document entitled the Applicant Guidebook.

When, after an in-depth evaluation process, ICANN decides to assign a new gTLD to an applicant, the parties enter into an agreement known as a 'registry agreement' under which ICANN delegates the management of the new suffix to the beneficiary; the beneficiary thus becoming the registry operator for the new gTLD.

The beneficiary to whom the new gTLD is reserved is the only one permitted to

2. Reservation of a new gTLD may infringe prior third-party rights or, more generally, interests.

ICANN is clearly well aware of this issue since a certain number of provisions in the Applicant Guidebook are aimed at preventing this type of infringement.

The beneficiary of a prior right or interest, for example, can object to the assignment of a gTLD (Applicant Guidebook, 3.2.1).

In addition, on issues affecting its member states, ICANN's Governmental Advisory Committee (GAC), an inter-governmental committee made up of representatives of national governments and intergovernmental organisations, can issue advice to ICANN's board on applications for new gTLDs (Applicant Guidebook, section 3.1).

The advice of the GAC, which may suggest that ICANN refuse to reserve a given gTLD (as in the case of '.amazon as we shall see below) is sent to the applicant which has a right of reply.

3. In view of the objections raised by the GAC and various member states, this concern to protect prior third-party rights and interests has led ICANN to consider the legitimacy and opportuneness of assigning the new gTLD '.amazon' to its applicant, namely the Amazon company .

The undersigned has been consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be **bound**:

- to assign the new gTLD in question to its applicant, or, to the contrary,
- to refuse to assign it in order to protect prior rights as mentioned above.

In essence, the answer lies in whether or not a prior right actually exists and, where this is the case, in the nature and function of the right and the scope of protection conferred upon it by the rules of law.

Consequently, the undersigned will limit his opinion to the provisions of applicable international **intellectual property** agreements, to the fundamental principles governing this area of law and, where applicable, to the rules of supranational law constituted by the provisions of the applicable European Union legislation in the field of intellectual property.

With a few individual exceptions there will be no reference to the provisions of the

4. Amazon, a US corporation and owner of the *Amazon* trade mark for various products and services in a wide range of countries, has made an application for the new gTLD '.amazon'.

Objections have been raised against this application by various Latin American countries, including Brazil and Peru, through which the River Amazon flows and whose territories form part of the river's 5.5 million km^2 plain, known as Amazonia.

These objections were passed on by the GAC which recommended that ICANN reject Amazon's application.

The issues currently facing ICANN are:

- whether the rules and principles cited in support of these objections and reiterated in the unfavourable advice issued by the GAC are of such nature as to oblige ICANN to reject the application filed by Amazon (A) or, to the contrary,

- whether the rules and principles cited by Amazon in its response of 23 August 2013 to the GAC's advice oblige it to reserve the new gTLD '.amazon' (B).

A.- Concerning the objections to the assignment of the new gTLD '.amazon'

5. Though the term 'amazon' does not appear to correspond to the name of the Amazonia region in any language, and in particular in Spanish, Portuguese or English, an objection against the reservation of the new gTLD '.amazon' for Amazon might, in principle, nevertheless be raised on the basis of the notion of 'geographical indication' as defined in intellectual property law.

Indeed, where a geographical indication is protected on this basis it is protected not simply against the use of identical names but also, in most legal systems, against the use of names which imitate or invoke it. This is only logical since the use of a name which is merely similar may also be designed to take advantage of the reputation of the geographical indication or result in a reduction in its attractiveness in the eyes of the public.

Thus, if the names 'Amazonia' and 'Amazonas' were geographical indications, it would, given the evident similarity of the names in question, be possible to protect them against the use of the name 'Amazon'.

Indeed, the geographical name of a place can constitute a geographical indication and be recognised and protected as such under intellectual property law only if there exists in the public mind a link between the place in question and particular qualities or a reputation for specific products of that place because these qualities or this reputation are attributed to this geographical origin.

Thus, Article 22(1) of the TRIPS Agreement, which forms Annex I C of the Agreement establishing the World Trade Organisation and is binding on a great number of states, provides that “geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

Both European Union law and certain international conventions draw a distinction between such geographical indications based on the strength of the link between the geographical origin and the characteristics and qualities of the product in question. For example, the various European regulations on geographical indications draw a distinction between appellations of origin and geographical indications in the strict sense of the term.

Appellations of origin are the geographical names with the closest link between geographical origin and product characteristics or qualities. For example, Article 5(1) of Regulation (EU) No 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs[1] provides that “‘designation of origin’ is a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.”

This definition is based closely on that given in Article 2(1) of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, an international convention which came into effect in 1966 and which defines the term ‘appellation of origin’ as “the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment including natural and human factors.”

Geographical indications in the strict sense of the term differ from appellations of origin in that the link between the qualities or character of a product and its locality of origin is more tenuous. Indeed, Article 5(2) of the aforementioned EU Regulation provides that "'geographical indication' is a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristics is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area." The effect of geographical provenance on product characteristics is thus required, but not specified, and may therefore relate to both natural or human factors.

7. In many legal systems the protection of geographical indications in its wider sense is dependent on the completion of certain formalities in the country or region – such as the European Union – of origin of the products in question. This may be through either statutory recognition or registration with an administrative authority. In both cases, the formalities will define the geographical area in which the products in question must be produced, manufactured or processed and specify the production or manufacturing conditions to be fulfilled in order for the products to be identified under the geographical indication in question.

However, in certain legal systems – including under French law, for example[2] – a geographical name which is not – or not yet – recognised either by statute or by registration can still be afforded a certain degree of protection where the products from the geographical area in question are deemed to have special characteristics or qualities.

8. Under intellectual property law, a geographical name enjoys no status, regime or particular protection where it designates a place which is not specially known by the public for its products and services, whatever they may be. This is the case where this place is not the origin of any particular products or services or where the products or services originating in it do not or are not deemed to have any particular characteristics due to this origin in the minds of the public.

Such conclusion clearly results from the law governing geographical indications. It also emerges from the rules governing the relationships – frequent in practice – between trade marks and geographical names in most legal systems and in particular under EU and French law.

For example, it has been held in France – and the solution would be the same in most legal systems – that a trade mark registered for clothing can validly consist of or contain the name 'Boston' even if the products in question are not manufactured in Boston as long as this US city has no particular reputation for clothing[3], which would only be the case if clothing made in Boston possessed particular characteristics or qualities because of its origin or a reputation in the minds of the public.

In this example the name 'Boston' is a **neutral geographical name** for clothing which has no impact under trade mark law.

It is also accepted that a trade mark consisting exclusively of the geographical name of a place will be refused or invalidated as being devoid of distinctive character if the place is the place of origin of the products covered by the trade mark, in this case the trade mark being, in effect, deemed to be descriptive of one of the characteristics of the products in question, i.e. their geographical provenance.

It has, however, also been held, notably by the General Court of the European Union, that this solution applies only where the geographical name has a certain reputation for the products in question in the minds of the public.

Thus in a judgment dealing with the trade mark *Port Louis*, consisting of the name of the capital of Mauritius, registered for textile products, the General Court underlined that "the registration as a Community trade mark of names designating certain geographical places already reputed or known for the category of products in question and which consequently have a link with this category in the eyes of interested parties"[4] is not possible. The fact that the trade mark owner's clothing comes or may come from this place is of no relevance and the trade mark is not considered to be descriptive since the town in question has no particular reputation for this category of products.

As in the case of the name 'Boston' dealt with above, the geographical name is neutral and therefore has no impact on the conditions of validity of the trade mark.

9. Supposing that, given its very large surface area and the fact that it comprises parts of various different countries, Amazonia constitutes the geographical area of a geographical indication within the legal meaning of the term – though this is already be disputed in view of the aforementioned definition of Article 22 (1) of the TRIPS Agreement which refers to

It is my view that the geographical names ‘Amazonie’, ‘Amazonia’ and ‘Amazonas’ do not constitute a geographical indication within the meaning of intellectual property law and in particular within the meaning of Article 22 (1) of the TRIPS Agreement, nor do they appear likely to become so in the near future for any specific products. However, ICANN may have specific information on this last point which might lead it to reach a different conclusion.

In consequence, I do not believe that assignment of the new gTLD ‘.amazon’ to the Amazon company could be rejected on the basis of international or even local law on geographical indications.

10. Even supposing, hypothetically, that the geographical names ‘Amazonie’, ‘Amazonia’ and ‘Amazonas’ constituted geographical indications for specific products, this geographical indication would not necessarily justify the rejection of the application for assignment of the gTLD to the Amazon company.

As has already been pointed out, it is true that the fact that the name ‘Amazon’ and the name of the geographical indication are not identical is unlikely to prevent the application of the law governing geographical indications.

However, legal recognition of a geographical indication does not in any away imply that the geographical indication enjoys absolute protection, that is to say, protection against **any type** of use of an identical or similar name by a third party.

11. On one hand, indeed, Article 22 of the TRIPS Agreement provides only for protection against use as an indication of the geographical provenance of a product where this use misleads the public as to the geographical origin of the product.

On this point, “in respect of geographical indications” Article 22 2(a) requires parties to the Agreement to provide the legal means for interested parties to prevent “the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.”.

However, given the nature of the Amazon company’s activities and the fact that the *Amazon* sign is neither used nor designed to be used by it as an indication of the geographical

Article 22 2(b) of the Agreement also requires the parties to protect geographical indications against "any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention". However, in order for an "act of competition contrary to honest practices in industrial or commercial matters" within the meaning of this last provision (sub-section 2) and an act "of such a nature as to create confusion (…) with the establishment, the goods, or the industrial or commercial activities, of a competitor" (sub-section 3 (i)) or "indications or allegations the use of which (…) is liable to mislead the public as to the (…) characteristics" or the quality "of the goods" (sub-section 3(iii)) to exist, the name identical or similar to the geographical indication must, as above, necessarily be used as the indication of the geographical provenance of products.

To summarize, the legal protection afforded to a geographical indication – supposing that such geographical indication exists – by the provisions of the TRIPS Agreement and the Paris Convention does not, <u>on its own</u>, justify a rejection of the Amazon's company application.

12. On the other hand, unlike the TRIPS Agreement, some legal systems do not limit the protection of geographical indications to cases in which an identical or similar name is used by a third party to indicate the geographical provenance of a product.

Thus, in the case of appellations of origin, Article 3 of the aforementioned Lisbon Agreement provides that "protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation" or the like".

Even though the Agreement does not specify what such "usurpation or imitation" consists of, its general nature and wording suggest that the protection extends beyond cases in which a third party uses an identical or similar sign to indicate the geographical provenance of a product. Given the broad language used in this provision, it is difficult however to know exactly what the conditions and terms of this protection are.

The provisions of the above mentioned European regulations protecting geographical indications of agricultural and food products[5], wines[6] and spirits[7] are, however, more specific on this point.

This is the case, in particular, of Article 13(1) of the aforementioned Regulation (EU) b). any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or similar, including when those products are used as an ingredient;

c). any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

d). any other practice liable to mislead the consumer as to the true origin of the product.”

A joint reading of sub-sections a) and b) of this provision reveals that geographical names registered under the Regulation are protected against any direct or indirect commercial use of a sign identical or similar (imitation or evocation) to the protected name for products comparable to those covered by the registration or for an product or service where this use takes advantage of the reputation of the protected name.

Though, where not otherwise stipulated, protection extends to uses which do not indicate a geographical provenance, a number of conditions must nevertheless be fulfilled. Either the sign in dispute must be used for products comparable to those covered by the registration or – unlike for a comparable product – the use in dispute must take advantage of the reputation of the protected name.

Though the trade mark *Champagne* registered and exploited by Yves-Saint-Laurent for a luxury perfume, i.e. in a non-geographical manner, was invalided and prohibited in France on the basis of comparable statutory provisions, it was because the use of this trade mark allowed its owner to take advantage of the reputation and prestige of the renown appellation of origin *Champagne* for a sparkling wine from the Champagne region[9].

Supposing that ICANN were required to take account of the provisions of European Union law, even though I do not believe this to be so particularly since in this case the geographical names in question – Amazonia, Amazonas and Amazonie – is not registered under any EU regulation, the reservation of the gTLD ‘.amazon’ would not in any case infringe a prior geographical indication, if one existed.

For, firstly, it would not in all likelihood be for the use of products comparable to

Beyond the law of geographical indications, the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

Finally, the fact that neither the name 'Amazon' nor that of the Amazonia region appears in any language on the ISO 3166 list is irrelevant. It is true that the country and region names on this list, whether they are reproduced, imitated or translated into a foreign language, cannot be reserved[10]. However, the fact that there is no bar to reserving the TLD '.amazon' on this ground does not mean that it could not be rejected on other grounds put forward by the objecting states or that Amazon could not claim a right to reserve it. On this last point, it is clear that no one can claim a TLD simply because the name it consists of is not included on the ISO list.

B.- Concerning the arguments put forward by the Amazon company in support of the assignment of the new gTLD '.amazon'

14. In response to the advice of the GAC reiterating the arguments of the objecting states, the Amazon company cites a certain number of rules of international law which, it claims, mean it must be assigned the TLD '.amazon'.

15. Firstly, and principally, the Amazon company cites its trade mark *Amazon* which is registered in almost 150 states around the world, including Brazil and Peru.

In substance, it contends that the intellectual property rights it holds in the name *Amazon* as a result of these registrations give it a *right to* the TLD '.amazon' and that ICANN is therefore obliged to assign the TLD to it.

In support of this argument Amazon cites Article 16(1) of the TRIPS Agreement which gives the owner of a registered trade mark "the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trade mark is registered (…)."

An intellectual property right is therefore, like any property, a right to exclude third parties and, in this case, a right to exclude unauthorised third parties from the scope of protection which the law grants to the owner of the intellectual property right.

Binding as against third parties, an intellectual property right never affords its owner **the right to exploit or to use the subject matter of its right.**

We know, for example, that a patent does not confer upon its owner the right to exploit the invention. Firstly, the exploitation of the invention may, for example, require him to obtain marketing approval as is the case for the marketing of pharmaceutical products. Secondly, if the patented invention in question represents an improvement of a prior invention which is itself also covered by a patent valid for the same territory, the patented invention cannot legally be exploited without the authorisation of the holder of the prior patent.

We also know that the holder of a copyright in a work is not necessarily able to exploit the work simply on the basis of this right. Firstly, its exploitation may come up against an administrative or legal prohibition based on reasons of public policy or a third party's right to privacy, for example. Secondly, if this work is derived from a prior work which is itself also protected, it cannot legally be exploited without the consent of the holder of the rights in the first work.

These simple examples demonstrate that an intellectual property right does not grant its owner a **right *to* use** the intangible subject matter in question. The right grants him ownership, ownership which is always binding on unauthorised third parties, but not, unless misinterpreting the notion of intellectual property, the possibility to exploit the subject matter of its ownership in any circumstances.

15-2. The same applies under trade mark law.

A trade mark right – the right associated with the registration of a trade mark – grants the owner a monopoly binding on third parties within the limits defined by law.

However, the holder cannot invoke this right as *a right to use* the sign, even for the products and services specified in the registration, or even as the right to use the sign in particular forms, such as a new gTLD.

A few months earlier, the Court of Justice had already adopted the same solution with regard to Community designs[13].

15-3. The exclusive right held by the Amazon company in its trade mark *Amazon* in various Member States under Article 16(1) of the TRIPS Agreement does not therefore necessarily give it **the right per se either to use it or to use the *Amazon* sign in any other form it may choose, such as a new TLD**.

In my belief, therefore, the Amazon company is wrong in citing its registered trademarks and its rights under Article 16(1) of the TRIPS Agreement and in deducing that ICANN is therefore obliged to assign it the new TLD to allow it to exploit, as a TLD, the *Amazon* sign which forms the subject matter of these trade marks.

The *Amazon* trade marks held by the applicant do not in legal terms give it a *right to* the new TLD '.amazon'. The fact that the objecting states did not cite any trade marks in support of their arguments is irrelevant in this respect.

Moreover, I would also add that all these *Amazon* trade marks, which are each subject to the principle of territoriality, are legally effective on a national – or regional in the case of a Community trade mark – territory only, in particular, if Amazon holds one of them and that in consequence none of these trade marks would be binding on ICANN, which is responsible for the assignments of new TLDs worldwide in any event.

15-4. At the very most, the Amazon company's trademarks permit it to claim a **legitimate interest for applying for assignment** of '.amazon'.

However, this interest does not in any way guarantee it assignment of this new TLD in legal terms for there are other considerations to be taken into account in the ICANN decision.

16. The same can be said of the arguments put forward by Amazon based on Article 8 of the Paris Convention for the Protection of Industrial Property.

This very succinct article provides for the protection of trade names in the states party to the Convention without the need for any filing or registration formality.

17. Finally, in this case Amazon cannot effectively rely on the provisions of international human rights law and, in particular, – supposing it were applicable to and binding on ICANN – the European Convention on Human Rights (ECHR).

It is true that Article 1 of the First Additional Protocol to the ECHR provides for an entitlement "to the peaceful enjoyment of (…) possessions", while in its *Anheuser-Busch/Portugal* judgment of 11 January 2007[14] the European Court of Human held that this provision "applies to intellectual property as such".

However, Amazon cannot use this argument to claim a right to the registration of the new TLD '.amazon'.

Indeed, **firstly**, filing an application for assignment of this new TLD in no way guarantees it the assignment of the TLD.

In the aforementioned judgment, the European Court of Human Rights held that, given all the economic rights and interests attached to such an application, the owner of an application for registration of a trade mark is the holder of a substantial interest protected by Article 1 of the First Additional Protocol but that the Trade Mark Office's rejection of the application did not constitute interference in the applicant's right to the peaceful enjoyment of his possessions and thus a breach of Article 1 – thereby thankfully guaranteeing the freedom of offices to refuse trade mark or patent applications.

Supposing that an application for assignment of a new gTLD corresponding to a trade mark held by the applicant were to be qualified as a possession within the meaning of Article 1 of the First Additional Protocol, as is the case with an application for the registration of a trade mark – which in my view could be disputed –, according to the European Court's analysis ICANN's rejection of this application would not constitute a breach of the peaceful enjoyment of this possession.

Secondly, the Amazon company's *Amazon* trade marks undeniably constitute goods within the meaning of the aforementioned provision.

However, given its subject matter and purpose, a registered trade mark does not in any way guarantee its holder (as set out in section 15 2 et seq. above) a **right to** the assignment of

18. Therefore, there exists no provision in either international intellectual property law or in the field of fundamental rights which could oblige ICANN to assign the gTLD '.amazon' to the Amazon company.

Conclusion

As regards the application for assignment of the new gTLD '.amazon' filed by the Amazon company:

i) **there is no rule of international, or even regional or national, law applicable in the field of geographical indications which obliges ICANN to reject the application;**

ii) **there is no rule of international, or even regional or national, law applicable in the field of intellectual property and in particular of trade marks or in the field of fundamental rights, which obliges ICANN to accept this application.**

Jérôme Passa

Paris, March 31st , 2014

Forrest-060

Forrest-060

        - Your language questions
    - Get premium
- French
    - Dictionary
    - Grammar
- German
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exact

- Dictionary
- Synonyms

- Latin Keyboard
- Arabic Keyboard
- Russian Keyboard

Line breaks: exact
Pronunciation: /ɪɡˈzakt/
/ɛɡˈzakt/

Definition of *exact* in English:

adjective

1Not approximated in any way; precise: *the exact details were still being worked out*
More example sentences

- Astrophysicists can search for shadows by applying Newton's method, a mathematical way to refine approximate solutions into exact ones.
- Instead of using exact results, we approximated the chop zone probabilities by bounding the number of indel events, and the indel lengths per event.
- Generally, however, the difference between the exact and approximate solutions is not large, and overall trends are maintained.
- Get more examples

1.1Accurate or correct in all details: *an exact replica, two feet tall, was constructed*
More example sentences

- The apartment was extremely close to being an exact replica of the Scott's.
- I felt like a monkey in a cage to be correctly exact.
- The member did not read out correctly either the exact quote of what the Minister said or what is written here on the Order Paper.
- Get more examples

Synonyms
precise, accurate, correct, faithful, close, true, veracious, literal, strict, unerring, faultless, errorless, error-free, perfect, impeccable;
explicit, detailed, minute, meticulous, thorough, blow-by-blow;
British inch-perfect
informal on the nail, on the mark, on the beam, on the button
British informal spot on, bang on
North American informal on the money
View synonyms
1.2(Of a person) accurate and careful about minor details: *she was an exact, clever manager*
More example sentences

[with object] Back to top
1Demand and obtain (something) from someone: *he exacted promises that another Watergate would never be allowed to happen*
More example sentences

- In a hierarchical conception of reality, the particular human being cannot defend his or her rights by demanding or exacting them independently of the whole.
- Recovery was permitted only in cases in which money was exacted under an unlawful demand by a public authority where the payment was made under a mistake of fact of under compulsion of some kind.
- The associated fighting exacted a terrible price of more than 3.5 million deaths, mainly from starvation and disease, according to aid agency estimates; the worst death toll since the Second World War.
- Get more examples

Synonyms
demand, require, insist on, command, call for, impose, request, ask for, expect, look for;
extract, compel, force, wring, wrest, squeeze, obtain
archaic constrain
View synonyms
1.1Inflict (revenge) on someone: *she exacts a cruel revenge for his rejection*
More example sentences

- Never take a slight personally, just sit back and wait until you can exact your cruel verbal revenge.
- His mind conjured the most amazing, most subtle and cruel plan to exact his revenge.
- Using as his model the ten plagues of the Pharaohs from the Old Testament, he exacts his cruel revenge on the nine medical people involved using rats, bats, locusts, and hail, among others.
- Get more examples

Synonyms
inflict, impose, deliver, administer, issue, apply
View synonyms

Derivatives

exactable
Pronunciation: /ɪɡˈzaktəb(ə)l/
/ɛɡˈzaktəb(ə)l/
adjective
exactitude
Pronunciation: /ɪɡˈzaktɪtjuːd/
/ ˈ kt tj d/

Origin

Late Middle English (as a verb): from Latin *exact-* 'completed, ascertained, enforced', from the verb *exigere*, from *ex-* 'thoroughly' + *agere* 'perform'. The adjective dates from the mid 16th century and reflects the Latin *exactus* 'precise'.

Words that rhyme with exact

abreact, abstract, act, attract, bract, compact, contract, counteract, diffract, enact, extract, fact, humpbacked, impact, interact, matter-of-fact, pact, protract, redact, refract, retroact, subcontract, subtract, tact, tract, transact, unbacked, underact, untracked
Definition of **exact** in:

- US English dictionary
- English synonyms
- US English synonyms

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Most popular in the world

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK
- the US
- the world

1. racism
2. translate
3. perfect
4. India
5. Erse

Most popular in the US

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK
- the US
- the world

1. revenant
2. supercalifragilisticexpialidocious

3 f

2. egregious
3. revenant
4. discombobulate
5. gruntled

Most popular in Canada

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK
- the US
- the world

1. revenant
2. racism
3. gruntled
4. translate
5. unthaw

Most popular in Australia

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK
- the US
- the world

1 A t li

- the world

1. traductor
2. transcripción fonética
3. revenant
4. way
5. glade

Most popular in Malaysia

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK
- the US
- the world

1. lepak
2. communication
3. hipster
4. translate
5. bi-

Most popular in India

- Australia
- Canada
- India
- Malaysia
- Pakistan
- Spain
- the UK

th US

- the UK
- the US
- the world

1. perfect
2. sentence
3. swag
4. stride
5. OK

= trending
How did mountains get their names?
Something’s afoot: investigating the names for shoes
The origins of dog breed names
Different than, different from, or different to?
15 ways to say ‘maybe’
TEST YOURSELF
Adding endings to words that end in 'Y'
1) Which is the correct spelling?

- ✓ ○ wealthiest
- ✗ ○ wealthyest

2) Which is the correct spelling?

- ✗ ○ tidyness
- ✓ ○ tidiness

3) Which is the correct spelling?

- ✗ ○ frizzyness
- ✓ ○ frizziness

4) Which is the correct spelling?

- ✓ ○ hungriest

8) Which is the correct spelling?

- ✗ ○ suppliing
- ✓ ○ supplying

9) Which is the correct spelling?

- ✗ ○ puppys
- ✓ ○ puppies

10) Which is the correct spelling?

- ✓ ○ dizzying
- ✗ ○ dizzieing

Next 0/0
More about adding endings to words that end in 'Y'
Word of the day veronique
Pronunciation: ˌvɛrəˈniːk
adjective
denoting a dish prepared or garnished with grapes…
Find out what it means
See full definition
SIGN UP TO WORD OF THE DAY

Related Words

exact exact *in* accurate exact *in* exact exact *in* precise overexact

Nearby words

b b i

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Forrest-061

Forrest-061

▼ Country or area & region codes

Countries or area codes
Composition of regions
Countries or area codes added or changed

UNdata A world of information
Enter search terms Go

Français

revised 31 October 2013

Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings

Geographical region and composition

001 **World**

002 Africa a/

014 *Eastern Africa*
017 *Middle Africa*
015 *Northern Africa*
018 *Southern Africa*
011 *Western Africa*

019 **Americas**

419 **Latin America and the Caribbean**
029 *Caribbean*
013 *Central America*
005 *South America*

021 **N th A i** b/

057 *Micronesia*
061 *Polynesia*

Selected economic and other groupings

...	**Developed and developing regions** **c/**
199	**Least developed countries**
432	**Landlocked developing countries**
722	**Small island developing states**

Numerical code	Geographical region and composition of each region
002	**Africa** a/
014	***Eastern Africa***
108	Burundi
174	Comoros
262	Djibouti
232	Eritrea
231	Ethiopia
404	Kenya
450	Madagascar
454	Malawi
480	Mauritius
175	Mayotte
508	Mozambique
638	Réunion
646	Rwanda
690	Seychelles
706	Somalia
728	South Sudan
800	Uganda
834	United Republic of Tanzania
894	Zambia
716	Zimbabwe

732	Western Sahara
018	***Southern Africa***
072	Botswana
426	Lesotho
516	Namibia
710	South Africa
748	Swaziland
011	***Western Africa***
204	Benin
854	Burkina Faso
132	Cabo Verde
384	Cote d'Ivoire
270	Gambia
288	Ghana
324	Guinea
624	Guinea-Bissau
430	Liberia
466	Mali
478	Mauritania
562	Niger
566	Nigeria
654	Saint Helena
686	Senegal
694	Sierra Leone
768	Togo
019	**Americas**
419	**Latin America and the Caribbean**
029	***Caribbean***
660	Anguilla
028	Antigua and Barbuda
533	Aruba
044	Bahamas
052	Barbados

670	Saint Vincent and the Grenadines
534	Sint Maarten (Dutch part)
780	Trinidad and Tobago
796	Turks and Caicos Islands
850	United States Virgin Islands
013	***Central America***
084	Belize
188	Costa Rica
222	El Salvador
320	Guatemala
340	Honduras
484	Mexico
558	Nicaragua
591	Panama
005	***South America***
032	Argentina
068	Bolivia (Plurinational State of)
076	Brazil
152	Chile
170	Colombia
218	Ecuador
238	Falkland Islands (Malvinas)
254	French Guiana
328	Guyana
600	Paraguay
604	Peru
740	Suriname
858	Uruguay
862	Venezuela (Bolivarian Republic of)
021	***Northern America*** b/
060	Bermuda
124	Canada
304	Greenland
666	Saint Pierre and Miquelon
840	United States of America

034	***Southern Asia***
004	Afghanistan
050	Bangladesh
064	Bhutan
356	India
364	Iran (Islamic Republic of)
462	Maldives
524	Nepal
586	Pakistan
144	Sri Lanka
035	***South-Eastern Asia***
096	Brunei Darussalam
116	Cambodia
360	Indonesia
418	Lao People's Democratic Republic
458	Malaysia
104	Myanmar
608	Philippines
702	Singapore
764	Thailand
626	Timor-Leste
704	Viet Nam
145	***Western Asia***
051	Armenia
031	Azerbaijan
048	Bahrain
196	Cyprus
268	Georgia
368	Iraq
376	Israel
400	Jordan
414	Kuwait
422	Lebanon
512	Oman
634	Qatar
682	Saudi Arabia
275	State of Palestine

154	***Northern Europe***
248	Åland Islands
830	Channel Islands
208	Denmark
233	Estonia
234	Faeroe Islands
246	Finland
831	Guernsey
352	Iceland
372	Ireland
833	Isle of Man
832	Jersey
428	Latvia
440	Lithuania
578	Norway
680	Sark
744	Svalbard and Jan Mayen Islands
752	Sweden
826	United Kingdom of Great Britain and Northern Ireland

039	***Southern Europe***
008	Albania
020	Andorra
070	Bosnia and Herzegovina
191	Croatia
292	Gibraltar
300	Greece
336	Holy See
380	Italy
470	Malta
499	Montenegro
620	Portugal
674	San Marino
688	Serbia
705	Slovenia
724	Spain
807	The former Yugoslav Republic of Macedonia

054	***Melanesia***
242	Fiji
540	New Caledonia
598	Papua New Guinea
090	Solomon Islands
548	Vanuatu
057	***Micronesia***
316	Guam
296	Kiribati
584	Marshall Islands
583	Micronesia (Federated States of)
520	Nauru
580	Northern Mariana Islands
585	Palau
061	***Polynesia***
016	American Samoa
184	Cook Islands
258	French Polynesia
570	Niue
612	Pitcairn
882	Samoa
772	Tokelau
776	Tonga
798	Tuvalu
876	Wallis and Futuna Islands
	Developed and developing regions c/
	Developing regions
002	Africa
019	Americas excluding Northern America (numerical code 021)
029	Caribbean
013	Central America
005	South America
142	Asia excluding Japan
009	Oceania excluding Australia and New Zealand (numerical code 053)

174	Comoros
180	Democratic Republic of the Congo
262	Djibouti
226	Equatorial Guinea
232	Eritrea
231	Ethiopia
270	Gambia
324	Guinea
624	Guinea Bissau
332	Haiti
296	Kiribati
418	Lao People's Democratic Republic
426	Lesotho
430	Liberia
450	Madagascar
454	Malawi
466	Mali
478	Mauritania
508	Mozambique
104	Myanmar
524	Nepal
562	Niger
646	Rwanda
678	Sao Tome and Principe
686	Senegal
694	Sierra Leone
090	Solomon Islands
706	Somalia
728	South Sudan
729	Sudan
626	Timor-Leste
768	Togo
798	Tuvalu
800	Uganda
834	United Republic of Tanzania
548	Vanuatu
887	Yemen
894	Zambia

454	Malawi
466	Mali
496	Mongolia
524	Nepal
562	Niger
600	Paraguay
498	Republic of Moldova
646	Rwanda
728	South Sudan
748	Swaziland
762	Tajikistan
807	The former Yugoslav Republic of Macedonia
795	Turkmenistan
800	Uganda
860	Uzbekistan
894	Zambia
716	Zimbabwe

722 Small island developing States

016	American Samoa
660	Anguilla
028	Antigua and Barbuda
533	Aruba
044	Bahamas
052	Barbados
084	Belize
092	British Virgin Islands
132	Cabo Verde
174	Comoros
184	Cook Islands
192	Cuba
212	Dominica
214	Dominican Republic
242	Fiji
258	French Polynesia
308	Grenada
316	Guam
624	Guinea-Bissau

882	Samoa
678	Sao Tome and Principe
690	Seychelles
702	Singapore
090	Solomon Islands
670	Saint Vincent and the Grenadines
740	Suriname
626	Timor-Leste
776	Tonga
780	Trinidad and Tobago
798	Tuvalu
850	United States Virgin Islands
548	Vanuatu

a/ The designation sub-Saharan Africa is commonly used to indicate all of Africa except northern Africa, with the Sudan included in sub-Saharan Africa.

b/ The continent of North America (003) comprises Northern America (021), Caribbean (029), and Central America (013).

c/ There is no established convention for the designation of "developed" and "developing" countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania, and Europe are considered "developed" regions or areas. In international trade statistics, the Southern African Customs Union is also treated as a developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and of the Commonwealth of Independent States (code 172) in Europe are not included under either developed or developing regions.

Forrest-062

Forrest-062

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ICANN Resolutions (/resolutions) » 2010-09-25 - New gTLDs - Directions for Next Applicant Guidebook

Important note: The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

Directed Staff to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action, and Staff is provided detailed directions regarding the next version of the Draft Applicant Guidebook.

Category:

gTLDs

Meeting Date:

Sat, 25 Sep 2010

Resolution Number:

2010.09.25.02,and 2010.09.25.03

URL for Resolution:

http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2 (http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2)

Status:

Complete

Implementation Actions:

- Incorporate Board direction into next draft of applicant guidebook
  - Responsible entity: Services Staff
  - Due date: 9 Nov 2010 for posting Proposed Final Applicant Guidebook; 10 Dec 2010 for Board approval of Guidebook

  - Due date: None stated
  - Completion date: September 2011 (see http://newgtlds.icann.org/applicants/candidate-support (http://newgtlds.icann.org/applicants/candidate-support))
- Post Root Server Scaling reports for public comment.
  - Responsible entity: Services Staff
  - Due date: None stated
  - Completion date: 6 October 2010 (see http://www.icann.org/en/announcements/announcement-2-06oct10-en.htm (http://www.icann.org/en/announcements/announcement-2-06oct10-en.htm))
- Publish the High Security TLD Concept for community input.
  - Responsible entity: ICANN Staff
  - Due date: None stated
  - Completion date: RFI issued on 22 September and updated on 13 October 2010 and 16 November 2010 (see http://www.icann.org/en/announcements/announcement-22sep10-en.htm (http://www.icann.org/en/announcements/announcement-22sep10-en.htm))
- Send letter to GNSO regarding Vertical Integration.
  - Responsible entity: ICANN Board
  - Due date: 8 October 2010
  - Completion date: Overtaken by events; On 7 October 2010 the Board received notice that the VI working group would be unable to deliver recommendations supported by a consensus of members (see http://www.icann.org/en/correspondence/gomes-to-dengate-thrush-07oct10-en.pdf (http://www.icann.org/en/correspondence/gomes-to-dengate-thrush-07oct10-en.pdf))

Resolution Text:

implementation plans in communication with the community.

Whereas, one of the goals of the New gTLD program is to establish a clear and predictable process.

Whereas, ICANN seeks to mitigate risks and costs to ICANN and the broader Internet community to the extent possible.

Whereas, meeting these goals require tradeoffs and balancing of competing interests.

Whereas, in Brussels the ICANN Board resolved <http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#11 (https://wiki.icann.org/en/minutes/resolutions-25jun10-en.htm#11)> to dedicate its retreat scheduled for 24-25 September for the consideration of all the outstanding issues relating to the implementation of the New gTLD program.

Whereas, the Board held a retreat in Trondheim, Norway on 24-25 September 2010, and talked through the outstanding issues relating to the implementation of the New gTLD program in order to identify potential ways forward.

Whereas, the Board has identified certain directions to the CEO regarding items for inclusion in the forthcoming version of the Applicant Guidebook for the New gTLD program.

Whereas, the forthcoming version of the Applicant Guidebook will be posted for public comment, and ICANN will take into consideration all public comments before making final decisions on all these remaining issues by approving the final version of the Applicant Guidebook.

Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook.

Continents and UN Regions: The definition of Continent or UN Regions in the Guidebook should be expanded to include UNESCO's regional classification list which comprises: Africa, Arab States, Asia and the Pacific, Europe and North America, Latin America and the Caribbean.

Governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be borne by applicants). Also, the Board notes that the GAC proposal for free government objections is not specific as to particular objection grounds or particular government objectors (for example whether both national and local government objectors would be covered).

2.2 New gTLD Applicant Support

Support to applicants will generally include outreach and education to encourage participation across all regions, but any direct financial support for applicant fees must come from sources outside of ICANN.

Staff will publish a list of organizations that request assistance and organizations that state an interest in assisting with additional program development, for example pro-bono consulting advice, pro-bono in-kind support, or financial assistance so that those needing assistance and those willing to provide assistance can identify each other and work together.

Owing to the level of uncertainty associated with the launch of new gTLDs, the fee levels currently in the Applicant Guidebook will be maintained for all applicants.

2.3 Root Zone Scaling

Real-world experience in root zone scaling has been gained as a result of the implementation of IPv6, DNSSEC and IDNs and the hard work of RSSAC and SSAC members in tackling the underlying stability question. Staff is directed to publish its analysis of the impact of IPv6, DNSSEC and IDN deployment on the root zone so far.

Further, ICANN will periodically consult with root zone operators regarding a procedure to define, monitor and publish data on root zone stability. As part of the regular interaction with the root server operators, ICANN will invite inputs from the root server operators and other interested parties regarding any signs of stress in the system and advice as to what actions or changes in process might be appropriate.

Finally, in the event that the number of applications exceeds the maximum rate, an objective method for determining the order of application processing that conforms to the limited delegation rate (not relying primarily on time-stamping) will be defined in the Applicant Guidebook.

2.4 String Similarity

Similar strings should not be delegated through the New gTLD Program absent an in-depth policy examination of the issues, including a clear, enforceable set of operating rules to avoid possible user confusion. Community-suggested modifications raise a complex set of policy issues and cannot be considered as a straightforward implementation matter for the first round of applications. Further policy work in this area is encouraged.

2.5 Variant Management

No changes will be made to the next version of the Applicant Guidebook with respect to the handling of gTLDs containing variant characters. I.e., no variants of gTLDs will be delegated through the New gTLD Program until appropriate variant management solutions are developed.

The recent delegation of Chinese-language ccTLDs does not yet provide a generally workable approach for gTLDs; there are serious limits to extending this approach at this time. ICANN will coordinate efforts to develop long-term policy and technical development work on these issues.

The Board notes that the following scenarios are possible while evaluating variant gTLD strings:

Applicant submits a gTLD string and indicates variants to this string. The applicant, if successful, will get the to the deployment of gTLDs containing variant characters IDNs. The analysis of needed work should identify the appropriate venues (e.g., ICANN, IETF, language community, etc.) for pursuing the necessary work. The report should be published for public review.

The CEO is directed to produce for the board by the next Board meeting (28 October 2010):

A Work plan for developing the issues report.
An identification of the skills and capabilities needed by ICANN to complete the issues report and further develop ICANN's organizational ability to continue the strategic rollout of IDN TLDs.

2.6 Trademark Protection

Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark.

Substantive evaluation upon trademark registration has essentially three requirements: ℹ evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use.

Substantive review by Trademark Clearinghouse validation service provider shall require: ℹ evaluation on absolute grounds; and (ii) evaluation of use.

URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days , with one opportunity for an extension of seven days if there is a good faith basis for such an extension.

Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed.

The Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.

2.8 Mitigating Malicious Conduct

While efforts to mitigate malicious conduct will continue, the implementation work completed to date by the community and staff to address the mitigation of malicious conduct issue is sufficient to proceed to launch the first New gTLD application round. The remaining issues should not delay launch with the following specific directives incorporated:

Background check: The background check should be clarified to provide detail and specificity in response to comment. The specific reference to terrorism will be removed (and the background check criteria will be revised). These clarifications regarding the background check criteria and process shall be included in the forthcoming version of the Applicant Guidebook.

Orphan glue records: Current provisions in the guidebook require each applicant to describe proposed measures for management and removal of orphan glue records for names removed from the zone. This requirement should remain in place, and will be adjusted if SSAC makes a new recommendation in its report on this issue.

High Security Zone (HSTLD) concept: The HSTLD concept is a voluntary concept being developed by a cross-stakeholder group including the financial services industry for use in TLDs wishing to provide services on a high-security basis. Thus, the development of the concept does not impact the launch of the gTLD application process. Any publication of this concept will be shared freely with other organizations that might be interested in

The Board agrees that ultimate responsibility for the new gTLD program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

The Board will accept the 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 will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

2.10 Registry Agreement

Required Notice and consent for increased or premium renewal prices: The current provision is necessary to protect registrants from predatory pricing upon renewals and the term should be retained.

Limitation of liability: The limitation of liability should remain as is. The remedies for registry operator are limited but appropriate given that ICANN is a non-profit entity that cannot afford to be open to unlimited liability.

Collection of variable transaction fee from registries if registrars decline to pay ICANN directly: The provision for the pass-through of fees is necessary to ensure that ICANN receives adequate funding in the event that ICANN accredited registrars (as a group) fail to approve the variable accreditation fees and should remain in the agreement.

Searchable Whois: Refer to the Board Data Consumer Protection Working Group to study issues and provide information to the Board relating to access and privacy to develop recommendations for possible inclusion in the forthcoming version of the applicant guidebook.

Indemnification of ICANN: The indemnification right should remain. ICANN staff has invited the Registry Stakeholder Group to propose language more precisely defining the exceptions to registry operator’s indemnification obligations for inclusion in the next version of the Draft Registry Agreement, and such a proposal should be considered for inclusion if received in a timely fashion.

- Other resolutions to be determined.

Additional Information:

- The resolution does not address funding for the items identified therein.

Forrest-063

Forrest-063

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United Nations Statistics Division

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Country or area & region codes

Countries or area codes
Composition of regions
Countries or area codes added or changed

UNdata
A world of information
Enter search terms Go

Français

revised 31 October 2013

Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings

Geographical region and composition

001 **World**

002 Africa a/

- 014 *Eastern Africa*
- 017 *Middle Africa*
- 015 *Northern Africa*
- 018 *Southern Africa*
- 011 *Western Africa*

019 Americas

419 **Latin America and the Caribbean**

- 029 *Caribbean*
- 013 *Central America*
- 005 *South America*

021 **Northern America** b/

142 Asia

- 143 *Central Asia*
- 030 *Eastern Asia*
- 034 *Southern Asia*
- 035 *South-Eastern Asia*
- 145 *Western Asia*

150 Europe

- 151 *Eastern Europe*
- 154 *Northern Europe*
- 039 *Southern Europe*
- 155 *Western Europe*

009 Oceania

- 053 *Australia and New Zealand*
- 054 *Melanesia*
- 057 *Micronesia*
- 061 *Polynesia*

Selected economic and other groupings

...	Developed and developing regions c/
199	Least developed countries
432	Landlocked developing countries
722	Small island developing states

Numerical code	Geographical region and composition of each region
002	**Africa** a/
014	***Eastern Africa***
108	Burundi
174	Comoros
262	Djibouti
232	Eritrea
231	Ethiopia
404	Kenya
450	Madagascar
454	Malawi
480	Mauritius
175	Mayotte
508	Mozambique
638	Réunion
646	Rwanda
690	Seychelles
706	Somalia
728	South Sudan
800	Uganda
834	United Republic of Tanzania
894	Zambia
716	Zimbabwe
017	***Middle Africa***
024	Angola
120	Cameroon
140	Central African Republic
148	Chad
178	Congo
180	Democratic Republic of the Congo
226	Equatorial Guinea
266	Gabon
678	Sao Tome and Principe
015	***Northern Africa***
012	Algeria
818	Egypt
434	Libya
504	Morocco
729	Sudan
788	Tunisia
732	Western Sahara
018	***Southern Africa***
072	Botswana

426	Lesotho
516	Namibia
710	South Africa
748	Swaziland

011	***Western Africa***
204	Benin
854	Burkina Faso
132	Cabo Verde
384	Cote d'Ivoire
270	Gambia
288	Ghana
324	Guinea
624	Guinea-Bissau
430	Liberia
466	Mali
478	Mauritania
562	Niger
566	Nigeria
654	Saint Helena
686	Senegal
694	Sierra Leone
768	Togo

019	**Americas**

419	**Latin America and the Caribbean**

029	***Caribbean***
660	Anguilla
028	Antigua and Barbuda
533	Aruba
044	Bahamas
052	Barbados
535	Bonaire, Sint Eustatius and Saba
092	British Virgin Islands
136	Cayman Islands
192	Cuba
531	Curaçao
212	Dominica
214	Dominican Republic
308	Grenada
312	Guadeloupe
332	Haiti
388	Jamaica
474	Martinique
500	Montserrat
630	Puerto Rico
652	Saint-Barthélemy
659	Saint Kitts and Nevis
662	Saint Lucia
663	Saint Martin (French part)
670	Saint Vincent and the Grenadines
534	Sint Maarten (Dutch part)
780	Trinidad and Tobago
796	Turks and Caicos Islands
850	United States Virgin Islands

013	***Central America***
084	Belize
188	Costa Rica
222	El Salvador
320	Guatemala
340	Honduras
484	Mexico
558	Nicaragua
591	Panama
005	***South America***
032	Argentina
068	Bolivia (Plurinational State of)
076	Brazil
152	Chile
170	Colombia
218	Ecuador
238	Falkland Islands (Malvinas)
254	French Guiana
328	Guyana
600	Paraguay
604	Peru
740	Suriname
858	Uruguay
862	Venezuela (Bolivarian Republic of)
021	***Northern America*** b/
060	Bermuda
124	Canada
304	Greenland
666	Saint Pierre and Miquelon
840	United States of America
142	**Asia**
143	***Central Asia***
398	Kazakhstan
417	Kyrgyzstan
762	Tajikistan
795	Turkmenistan
860	Uzbekistan
030	***Eastern Asia***
156	China
344	China, Hong Kong Special Administrative Region
446	China, Macao Special Administrative Region
408	Democratic People's Republic of Korea
392	Japan
496	Mongolia
410	Republic of Korea
034	***Southern Asia***
004	Afghanistan
050	Bangladesh
064	Bhutan
356	India
364	Iran (Islamic Republic of)
462	Maldives

524	Nepal
586	Pakistan
144	Sri Lanka
035	***South-Eastern Asia***
096	Brunei Darussalam
116	Cambodia
360	Indonesia
418	Lao People's Democratic Republic
458	Malaysia
104	Myanmar
608	Philippines
702	Singapore
764	Thailand
626	Timor-Leste
704	Viet Nam
145	***Western Asia***
051	Armenia
031	Azerbaijan
048	Bahrain
196	Cyprus
268	Georgia
368	Iraq
376	Israel
400	Jordan
414	Kuwait
422	Lebanon
512	Oman
634	Qatar
682	Saudi Arabia
275	State of Palestine
760	Syrian Arab Republic
792	Turkey
784	United Arab Emirates
887	Yemen
150	**Europe**
151	***Eastern Europe***
112	Belarus
100	Bulgaria
203	Czech Republic
348	Hungary
616	Poland
498	Republic of Moldova
642	Romania
643	Russian Federation
703	Slovakia
804	Ukraine
154	***Northern Europe***
248	Åland Islands
830	Channel Islands
208	Denmark
233	Estonia
234	Faeroe Islands
246	Finland

831	Guernsey
352	Iceland
372	Ireland
833	Isle of Man
832	Jersey
428	Latvia
440	Lithuania
578	Norway
680	Sark
744	Svalbard and Jan Mayen Islands
752	Sweden
826	United Kingdom of Great Britain and Northern Ireland
039	***Southern Europe***
008	Albania
020	Andorra
070	Bosnia and Herzegovina
191	Croatia
292	Gibraltar
300	Greece
336	Holy See
380	Italy
470	Malta
499	Montenegro
620	Portugal
674	San Marino
688	Serbia
705	Slovenia
724	Spain
807	The former Yugoslav Republic of Macedonia
155	***Western Europe***
040	Austria
056	Belgium
250	France
276	Germany
438	Liechtenstein
442	Luxembourg
492	Monaco
528	Netherlands
756	Switzerland
009	**Oceania**
053	***Australia and New Zealand***
036	Australia
554	New Zealand
574	Norfolk Island
054	***Melanesia***
242	Fiji
540	New Caledonia
598	Papua New Guinea
090	Solomon Islands
548	Vanuatu
057	***Micronesia***
316	Guam

296	Kiribati
584	Marshall Islands
583	Micronesia (Federated States of)
520	Nauru
580	Northern Mariana Islands
585	Palau
061	***Polynesia***
016	American Samoa
184	Cook Islands
258	French Polynesia
570	Niue
612	Pitcairn
882	Samoa
772	Tokelau
776	Tonga
798	Tuvalu
876	Wallis and Futuna Islands
	Developed and developing regions c/
	Developing regions
002	Africa
019	Americas excluding Northern America (numerical code 021)
029	Caribbean
013	Central America
005	South America
142	Asia excluding Japan
009	Oceania excluding Australia and New Zealand
	(numerical code 053)
	Developed regions
021	Northern America
150	Europe
392	Japan
053	Australia and New Zealand
199	**Least developed countries**
004	Afghanistan
024	Angola
050	Bangladesh
204	Benin
064	Bhutan
854	Burkina Faso
108	Burundi
116	Cambodia
140	Central African Republic
148	Chad
174	Comoros
180	Democratic Republic of the Congo
262	Djibouti
226	Equatorial Guinea
232	Eritrea
231	Ethiopia
270	Gambia
324	Guinea
624	Guinea Bissau

332	Haiti
296	Kiribati
418	Lao People's Democratic Republic
426	Lesotho
430	Liberia
450	Madagascar
454	Malawi
466	Mali
478	Mauritania
508	Mozambique
104	Myanmar
524	Nepal
562	Niger
646	Rwanda
678	Sao Tome and Principe
686	Senegal
694	Sierra Leone
090	Solomon Islands
706	Somalia
728	South Sudan
729	Sudan
626	Timor-Leste
768	Togo
798	Tuvalu
800	Uganda
834	United Republic of Tanzania
548	Vanuatu
887	Yemen
894	Zambia

432	**Landlocked developing countries**
004	Afghanistan
051	Armenia
031	Azerbaijan
064	Bhutan
068	Bolivia (Plurinational State of)
072	Botswana
854	Burkina Faso
108	Burundi
140	Central African Republic
148	Chad
231	Ethiopia
398	Kazakhstan
417	Kyrgyzstan
418	Lao People's Democratic Republic
426	Lesotho
454	Malawi
466	Mali
496	Mongolia
524	Nepal
562	Niger
600	Paraguay
498	Republic of Moldova
646	Rwanda
728	South Sudan
748	Swaziland
762	Tajikistan

807	The former Yugoslav Republic of Macedonia
795	Turkmenistan
800	Uganda
860	Uzbekistan
894	Zambia
716	Zimbabwe

722	**Small island developing States**
016	American Samoa
660	Anguilla
028	Antigua and Barbuda
533	Aruba
044	Bahamas
052	Barbados
084	Belize
092	British Virgin Islands
132	Cabo Verde
174	Comoros
184	Cook Islands
192	Cuba
212	Dominica
214	Dominican Republic
242	Fiji
258	French Polynesia
308	Grenada
316	Guam
624	Guinea-Bissau
328	Guyana
332	Haiti
388	Jamaica
296	Kiribati
462	Maldives
584	Marshall Islands
480	Mauritius
583	Micronesia (Federated States of)
500	Montserrat
520	Nauru
540	New Caledonia
570	Niue
580	Northern Mariana Islands
585	Palau
598	Papua New Guinea
630	Puerto Rico
659	Saint Kitts and Nevis
662	Saint Lucia
882	Samoa
678	Sao Tome and Principe
690	Seychelles
702	Singapore
090	Solomon Islands
670	Saint Vincent and the Grenadines
740	Suriname
626	Timor-Leste
776	Tonga
780	Trinidad and Tobago
798	Tuvalu
850	United States Virgin Islands

548	Vanuatu

a/ The designation sub-Saharan Africa is commonly used to indicate all of Africa except northern Africa, with the Sudan included in sub-Saharan Africa.

b/ The continent of North America (003) comprises Northern America (021), Caribbean (029), and Central America (013).

c/ There is no established convention for the designation of "developed" and "developing" countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania, and Europe are considered "developed" regions or areas. In international trade statistics, the Southern African Customs Union is also treated as a developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and of the Commonwealth of Independent States (code 172) in Europe are not included under either developed or developing regions.

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THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

and

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

and

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

AMAZON EU S.À.R.L. (LUXEMBOURG)

International Chamber of Commerce
International Centre for Expertise

Case No.
396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

in re ".AMAZON"; アマゾン and 亚马逊 gTLD

EXPERT DETERMINATION

Prof. Alain Pellet, Independent Objector

– Objector –

vs.

AMAZON EU S.à.r.l.

– Applicant –

DEFINITIONS

AGB	ICANN gTLD Applicant Guidebook, version 2012-06-04
Amazon Community	The community defined in § 40 below
Applicant	AMAZON EU S.à.r.l.
Centre	International Centre for Expertise of the International Chamber of Commerce
Expert	Professor Luca G. Radicati di Brozolo
gTLD	Generic top level domain
IO	Independent Objector
Objection Procedures	Module 3 of the AGB
OTCA	Amazon Cooperation Treaty Organization
Procedure	New gTLD Dispute Resolution Procedure, Attachment to Module 3 of the AGB
Strings	".AMAZON", ".アマゾン" and ".亚马逊" gTLDs

1. This Expert Determination is rendered in the consolidated dispute settlement proceedings arising from the community objections to three applications for the generic top-level domain ("**gTLD**") name ".AMAZON", and the Japanese and Chinese terms for AMAZON (respectively アマゾン and 亚马逊) within the framework of the ICANN gTLD Application Process governed by the ICANN gTLD Applicant Guidebook, version 2012-06-04 (the "**AGB**").

I. INTRODUCTION

2. The three community objections at the origin of these proceedings (the "**Objections**") were filed on March 12, 2013 with the International Centre for Expertise of the International Chamber of Commerce (the "**Centre**") by the Independent Objector, Professor Alain Pellet, 12, Avenue Alphonse de Neuville, 92380 Garches, France, contact@independent-objector-newgtlds.org (the "**IO**").

3. The Objections (EXP/396/ICANN/13, EXP/397/ICANN/14 and EXP/398/ICANN/15) relate to three applications (the "**Applications**") filed by AMAZON EU S.à.r.l., 5 Rue Plaetis, Luxembourg L-2338, LU, lorna.gradden.am@valideus.com (the "**Applicant**") respectively for the ".AMAZON", ".アマゾン" and ".亚马逊" gTLDs (collectively the "**Strings**").

4. The content of all the Objections is practically identical.

5. On April 23, 2013 the Centre informed the Parties of its decision to consolidate the Objections.

6. The Applicant filed its Responses to the Objections on May 24, 2013.

7. The IO is represented in these proceedings by Ms Heloïse Bajer-Pellet, 15 Rue de la Banque, 75002 Paris, France, avocat@bajer.fr; Mr Daniel Müller, 20, Avenue Charles de Gaulle, 78290 Croissy sur Seine, France, mail@muellerdaniel.eu; Mr Phon van den Biesen, De Groene Bocht, Kaizergrecht 253, 1016 EB Amsterdam, The Netherlands, phonvandenbiesen@vdbkadvocaten.eu; and Mr Sam Wordsworth, 24 Lincoln Inn Fields, London WC2A 3EG, UK, SWordsworth@essexcourt.net.

Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "*constitution of the Panel*". The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert.

11. Following an exchange of correspondence with the IO and the Applicant (collectively the "**Parties**"), the Expert issued the Expert Mission on September 3, 2013.

12. At the request of the IO, the Expert allowed an exchange of submissions on the Applicant's challenge to the IO. The IO filed his additional written statement on August 16, 2013 whilst the Applicant filed its reply on August 22, 2013.

13. On September 9, 2013 the Centre informed the Expert that the time limit for submission of the draft expert determination was extended until October 5, 2013.

14. On the same date the Centre agreed to the Expert's request to deal with all three Objections in a single expert determination. The request was based on the consideration that the Applicant and the Objector are the same in all the consolidated proceedings and that the issues raised by all three Objections are practically identical and raise almost identical factual and legal issues.

15. In accordance with Article 19 of the the New gTLD Dispute Resolution Procedure (the "**Procedure**")**,**[1] and in the absence of any request by the Parties, no oral hearing was held.

16. The draft expert determination was submitted by the Expert for scrutiny to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

17. These proceedings are administered by the Centre pursuant to Article 3(d) of the Procedure, which is applicable by virtue of its Article 1(d).

18. The proceedings are governed, as to matters of procedure, by the Procedure and by the Rules for Expertise of the International Chamber of Commerce, as supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (Article 4(a) and 4(b)(iv) of the Procedure).

to the statements and documents submitted by the Parties. The burden of proof that the Objection should be sustained rests with the Objector in accordance with the applicable standards.

21. As agreed by the Centre, and given that the issues raised by the three Objections are for the most part identical, this Expert Determination deals with all three Objections collectively. Reference to the individual Objections will only be made insofar as they raise different issues from the other Objections.

II. THE CHALLENGE TO THE IO AND THE IO'S STANDING

(a) The Position of the Applicant

22. On April 6, 2013, after the filing of the Objections by the IO, the Applicant wrote to ICANN denouncing that *"the office of the IO exhibits a Conflict of Interest within the meaning of ICANN's Conflict of Interest Policy"*. The challenge contended that the IO's Objections were based on comments in the Early Warning Procedure by the Governments of Peru and Brazil, with whom the IO has "*special links*" due to his professional ties with them, as he has with the Governments of Bolivia and Argentina, likewise identified as opponents of the Applications. Those links are asserted to have influenced and to continue to influence the IO's decision-making process in these proceedings. For the Applicant the Objections were used to formalize the objections of the governments of Brazil and Peru, in contrast with the principle that the IO can only act on behalf of the public who uses the global internet. The conflict of interest is viewed as the reason for the alleged inconsistency between the IO's approach to this application and to the ones for similar gTLDs (for instance for ".africa", ".persiangulf" and ".islam"). According to the Applicant, allowing the Objections to proceed would damage the integrity of the gTLD dispute resolution process, because the challenges would be made public, leading to the perception that the IO is not a safety net for the public. The Applicant concluded with the request that ICANN set aside the Objection on account of the conflict of interest and, if deemed necessary, appoint another non-conflicted IO. The Applicant accepted to maintain confidentiality over its challenge, while reserving its right to raise the matter if the Objection were allowed to proceed.

23. The Applicant wrote to ICANN again on April 24 and May 18, 2013 reiterating its

does not require the IO to be independent of anyone standing to benefit from the objection and releases him from the "*universally recognized obligation to decline additional work where it would create a conflict of interest with an existing relationship*". While recognizing that the IO does not act as a judge, arbitrator or expert, the Applicant underscores that the AGB binds him to the same basic rules of ethics that apply to those offices in relation not only to ICANN and applicants, but also to any other influences. The Applicant concedes that "*a normal average social life*" does not necessarily entail a conflict of interest or lack of independence, but asserts that the IO's ties to the governments of Brazil or Peru are not merely part of such a social life.

26. *Second*, the Applicant restates that the IO can only represent the community made up of those who use the internet (referred to by the parties also as the "*internet community*") and that it is "*plainly wrong*" that he can only represent a community that is "*delineated and distinguishable from internet users in general*". The IO is granted special standing to fulfill his role within the gTLD program and, unlike "*ordinary*" objectors, does not have to prove an on-going relationship with a community. Consequently, he loses his special standing if he acts outside his role, e.g. on behalf of a community comprising particular persons or entities. In the case at hand the community represented by the IO is not the public who use the internet. The IO requests the same remedy sought by his client Peru, who is the largest financial contributor to the Amazon Cooperation Treaty Organization ("**OTCA**"). Notwithstanding that the Applications generated no reasoned or substantiated comments from the public, unlike similar applications (".gcc", ".islam", ".persiangulf" and ".africa"), the IO only objected to the Applicant's ones. The Applicant also contests that OTCA lacks the capacity to file an objection and differs in this respect from other organizations that could have objected to the strings to which the IO did not object. It adds that objections to the Applications could have been put forward by other entities. Had he followed the same criteria as for other objections, the IO would have concluded that OTCA and the governments of Brazil and Peru were in at least as good a position as the IO to file an objection. The IO's failure to demonstrate his complete independence and his apparent pursuit of the interest of particular persons or entities deprives him of standing in this case.

27. *Third*, the Applicant refers to a statement of the Centre that the decision over the IO's independence falls within the Expert's authority[2] The Applicant argues that

risks *"unjustly and unfairly los[ing] with limited, if any, scope for a remedy"*. This would result in irreparable damage to the integrity of the gTLD dispute resolution process.

(b) The position of the IO

28. In a letter to counsel for the Applicant of June 8, 2013 the IO denounced the inappropriateness of the Applicant's direct approach to ICANN on the matter of his independence, stating that it is not for ICANN to take a position on it. The IO argued that the claim concerning his alleged bias *"has to be dealt with by the Expert panel, who has full authority to decide in all impartiality"*.

29. In the Objection the IO disclosed his relations with the Governments of Brazil and Peru, but clarified that in the present proceedings he is not representing them and is acting in the sole interests of the public who use the internet and that his relation with a State has nothing to do with his decision to object or not.

30. In his additional statement of August 16, 2013 the IO noted that Article 11(4) of the Rules is not relevant to a challenge of the IO, since the IO is only a party to these proceedings. He acknowledged, however, that the absence of a general procedure concerning the IO's independence and the possibility to challenge him for the entire gTLD program does not mean that no remedy is available. The IO recalls that in his June 8 letter referred to above he recognized that the Expert has the power to assess the IO's independence and to draw the necessary conclusions with regard to the Objection. Indeed, adds the IO, *"the Expert Panel is the guardian of the integrity of the process and it has the duty to ensure that the Expert Determination is soundly based on the standards established by the Guidebook"*. Although it affects only the IO's standing, the condition that the IO must not act on behalf of any particular person or entity, but solely in the best interests of the users of the internet (Objection Procedures, Section 3.2.5), needs to be addressed by the Expert even if in Article 2(d) of the Procedure the expert determination is referred to only as a *"decision upon the merits of the objection"*. The Expert must also address the standing of the Objector (Objection Procedures, Section 3.2.2). On this point the IO concludes that the Expert has the power to address whether the IO acts in the interest of the internet public or of a particular category of persons, regardless of whether the issue pertains to standing or to the merits. The matter must be decided

the global internet", the IO cannot accept that this implies that that public is the only community that he has standing to represent. The fact that the IO is dispensed from proving the regular standing requirements for the types of objections that he can file (Objection Procedures, Section 3.2.5) does not mean that his community objections can concern only the rights and interests of a "*hypothetical*" community of internet users. This would entail a profound change in one of the four tests for community objections, the one relating to the existence of a clearly delineated community, because the public who use the internet is not such a community. Even if the community relevant here were the one of those living in the geographical region with strong links to the Amazon, it would not follow that the IO is acting on its behalf, also considering the Applicant's acknowledgment that such community would not benefit from the rejection of the Application. The AGB does not require that every string which targets a community be applied for by a representative of that community. It is irrelevant whether the Applicant intends to target a specific community or to reserve its gTLD for it. However, the operation of the gTDL must not impinge on the rights and legitimate interests of a significant portion of the community to which the string is explicitly or implicitly targeted. The IO points to Section 1.2.3.2 of the Objection Procedures, which permits community applications even if the application is not designated as community-based or aimed at a particular community. Therefore, what is relevant is not who is targeted by the applicant, but whether a particular community is targeted by the string. The IO acts for a public interest even if he invokes the interest of a particular community and mitigates the risk that in some cases a valid objection might not be raised by those entitled to do so. As such he acts as a safety net. Finally, the IO notes that his policy is not to file an objection when there is "*a single established institution*" that could do so. In the present case there is no such single institution. OTCA, in particular, could not validly have filed an objection because it is not aimed at representing the interests of the Amazon region, but at realizing the economic interest of its Member States within that region.

(c) The Determination of the Expert

32. In light of the Expert's conclusions on the merits of the Objection (Section III below), an analysis of the challenge to the IO's independence could be moot. However, the issues raised by the Applicant in this connection have been amply debated by the

35. The Expert shares this view.

36. As noted by the Parties, there is no rule explicitly dealing with the power to decide on challenges to the independence of the IO, and in particular vesting it on the Expert. Such a power is not conferred on the Expert by the Rules, Article 11(4) of which deals only with challenges to the independence of the expert panel, nor by the Objection Procedures or the Procedure, the latter of which defines the expert determination as "*the decision on the merits of the Objection*" (Article 2(d)).

37. Nonetheless, as noted by the Applicant, whether the IO has exceeded his role is a serious issue that can impact on the decision on an objection and that must be capable of being decided. This is all the more so because Section 3.4.6 of the Objection Procedures stipulates that expert determinations will be accepted by ICANN, thus in essence making them final.[3] The power to decide a challenge to the IO would therefore seem to inure to the Expert's inherent powers.

38. The issue is even less problematic if, as acknowledged by the Parties, the question of the IO's independence can be characterized as pertaining to the IO's standing. Indeed, it is indisputably within the Expert's powers to rule on the standing requirements of objectors (Objection Procedures, Section 3.2.2). There is no reason to hold that this does not hold true also for the standing of the IO.

(ii) The merits of the challenge to the IO

39. It being accepted that the Expert has jurisdiction to deal with a challenge to the IO's independence, the next question debated by the Parties that needs to be addressed is whether, as contended by the Applicant, the IO may only file objections on behalf of the community consisting of "*the public who uses the global internet*" or whether, instead, he is entitled to object on behalf of, or at least in the interest of, more strictly defined groups or communities.

40. This issue is preliminary to the one of conflict of interest. In the present case, even on the IO's admission, the Objection relates not to the interests of the internet public but to those of a particular group of individuals or entities, which will be referred to here as the "**Amazon Community**" with an expression used also by the Parties[4]. Accepting the Applicant's preliminary arguments would therefore entail that the IO

42. In the Expert's opinion such a formalistic interpretation would result in an unduly restrictive conception of the IO's role. Indeed, there is merit in the IO's position that the internet community is not clearly delineated (and perhaps even, in his words, "*hypothetical*"). This being so, the Applicant's position would entail that the IO's objections would never meet the clear delineation test. What is more, since the internet community is somewhat amorphous, if the IO's standing to object were limited to applications affecting the interests of that community his role would be seriously curtailed, because few applications would qualify as such.

43. The language of Section 3.2.5 of the Objection Procedures allows a more constructive interpretation. The statement that the IO's role is to file objections when "*no objection has been filed*" can be construed in the sense that his role is to raise objections in situations where, for whatever reason, no objection will be forthcoming, even if the application is "*highly objectionable*". This could occur, for instance, if there is nobody in a position to represent the community or if those who could raise the objection are unwilling to do so for fear of negative repercussions, lack of financial means and so on. Likewise, the statement that the IO "*does not act <u>on behalf</u> of any particular person or entities*" can be understood as permitting the IO to raise an objection in situations where, while not technically acting "*on behalf*" of anybody (in the sense that nobody has given him a mandate to act or would even want him to act), he takes into account what can be considered the interests of a given community that would be prejudiced by an application.

44. The conclusion must therefore be that the Objections' admissibility is not affected by the fact that it concerns interests possibly coinciding with those of the Amazon Community, rather than those of the broader internet community.

45. In light of this conclusion and of the asserted coincidence between the interests of the Amazon Community defended by the Objections and those of the States with which the IO has professional relations, the issue of conflict of interest raised by the Applicant becomes relevant.

46. On the subject of the IO's conflicts of interest Section 3.2.5 of the Objection Procedures requires the IO to be and to remain independent and unaffiliated "*with any of the gTLD applicants*". In this connection, it points to the "*various rules of ethics for judges and international arbitrators*" as models to assess independence. It

the Expert has jurisdiction to examine the challenge implies an acknowledgement on his part that a conflict with parties standing to benefit from his Objection is potentially fatal to the Objection.

48. The Expert has difficulty accepting the IO's assertion that a finding of conflict in circumstances such as those of the present case would preclude anybody with *"a normal average social life"* from serving as the IO. The question is not whether the existence of special ties with certain persons or entities or categories of entities (which anybody will inevitably have) prevents a person from being appointed IO.[5] Rather, it is whether the existence of such ties becomes problematic in the event that the IO raises an objection that can be correlated to the interests of those with whom the ties exist.

49. The Applicant does have a point when it contests that the IO's professional ties at issue here do not fall within the notion of normal average social life. Such a definition does not sit well with the IO's representation of two sovereign States in international judicial proceedings.

50. In any event, if regard must be had to the standards applicable to judges and arbitrators (as predicated by Section 3.2.5 of the Objection Procedures), the relevant perspective in international arbitration nowadays is an objective one. In the words of the *IBA Guidelines on Conflicts of Interest in International Arbitration* (General Standard 2(c)), it is that of *"a reasonable and informed third party"*, whilst the ICC Rules of Arbitration refer to independence *"in the eyes of the parties"* (Article 11.2). By such standards, the IO's ties to two prominent members of the Amazon Community could give rise to a presumption of conflict in this case, completely regardless of whether, in filing the Objection, the IO acted *"on behalf"* of his clients, as contended but in no way substantiated by the Applicant.

51. There is one argument that could be advanced to refute the allegation of conflict of interest. It has to do with the absence of any indication that the two Governments *"on whose behalf"* he is alleged to be acting could not have filed an objection themselves (§ 91 ff. below) and would therefore have had to rely only on the IO to do it for them. In these conditions, the lack of initiative on the part of those Governments could denote that they had no interest in the Objections and that therefore the IO's action was prompted by other considerations. In the view of the

could be different.[6] Yet, the Expert considers it paramount for the confidence in the gTLD dispute resolution process that any decision on the IO's independence be taken on purely objective criteria and bearing in mind the need to ensure the perception of complete neutrality and impartiality of the office of the IO.

53. The Expert is of the view that, objectively considered, the links between the IO and two major representatives of the Amazon Community lead to justifiable doubts as to his independence in the eyes of the Applicant and of the broader public. Given the importance of ensuring the perception of neutrality, independence and impartiality of the office of the IO and of the entire gTLD dispute resolution process, the Expert finds that the Applicant's challenge to the independence of the IO must therefore be upheld.

III. THE MERITS OF THE OBJECTION

54. The Objection Procedures do not address the consequences of an upholding of a challenge to the independence of the IO. In particular, they do not provide that, upon a finding of a conflict of interest of the IO, the IO loses standing or that another IO must be appointed for the specific case, as suggested by the Applicant; nor do they provide for any other solution. If the consequence of a finding of lack of independence were a loss of standing by the IO, any consideration on the merits of the challenge would be moot. However, given the silence of the Objection Procedures and the resulting uncertainty on the consequences of the finding that the IO lacks the requisite independence in this case, the Expert considers it appropriate to deal also with the merits of the Objections and to decide whether they would deserve to be upheld, regardless of the IO's standing.

55. In accordance with Section 3.5.4 of the Objection Procedures, objections can be sustained if the Expert ascertains the existence of substantial opposition from a significant portion of the community to which the string may be targeted. This provision applies also to objections filed by the IO.

56. For a showing of such opposition the IO must prove that:

(i) the community invoked by him is clearly delineated;

(ii) there is substantial community opposition to the Application

Strings may be explicitly or implicitly targeted.

57. The four criteria will be addressed here in the order in which they have been addressed by the IO in the Objections.

III.A Targeting: the association between the community invoked by the IO and the Strings

(a) The position of the IO

58. According to the IO, although the Applications have not been framed as community-based, since they only target the Applicant and its subsidiaries, the Strings can be implicitly linked to a specific community different from the Applicant. The test to assess the Applications' implicit target is not limited to the intended use of the Strings by the Applicant, but is primarily concerned with the expectation of the average internet users and with their perceptions of the Strings and their associations.

59. The Applications target also "*the South-American region with the same English name around the Amazon River*". The identity between the Applicant's business name and brand and the English word for the South American river is not coincidental. The Applicant itself intentionally links the Strings to the Amazon river and region in its communications. The correlation between the Strings and the Amazon river and region is corroborated by the consistent use of the term "*Amazon*" to describe and characterize the Amazon region and the community. The term "*Amazon region*" is used by the 1978 Treaty for Amazon Cooperation and by UNESCO, which has included parts of the Amazon region in the World Heritage List under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. The denomination is used also by the World Wildlife Fund.

60. In the eyes of the IO, all the foregoing demonstrates a strong association between the Amazon region and its community and the Strings.

(b) The position of the Applicant

61. The Applicant premises its argument on this point on the consideration that under

in the eyes of the public who use the global internet and holds that the Applicant will forever target Amazonia with its present and future services. The argument that the targeting test is based on the existence of a certain link or possible association by the public based on string similarity has been rejected by ICANN, which acknowledges that brand names and other strings that happen to relate to some geographic entities may also have legitimate unrelated uses. The Applicant "*clearly has 'legitimate uses'*" for its marks, global brand and company name as a gTLD string, including in local languages, which it has used since 1994. The Applicant cites the example of the ".patagonia" gTLD, that was found not to target the community of Patagonia.

(c) The Determination of the Expert

63. In the Objection Procedures (Section 3.5.4) the term "*targeting*" is used in relation to the third substantive test that must be satisfied by a community objection, i.e. the one of strong association between the invoked community and the applied-for string.

64. The Objection Procedures point to the following non-exclusive factors that can be balanced to indicate a strong association between a community and the applied-for-string: (*i*) statements contained in the application; (*ii*) other public statements by the applicant; (*iii*) associations by the public.

65. The reason for dealing with this test at the outset in the present case is that, prior to establishing whether there is a strong association between the Strings and a community, the community having the purportedly strong association must be identified. As seen above, in the context of the challenge to the IO's independence the Parties debated the IO's standing to file an objection in the interest of a community other than the internet community. In relation to the substantive test, the dispute between the Parties on the identification of the community is framed in terms of whether the community in whose interest an objection is brought can differ from the one "*targeted*" by the applicant.

66. The Applicant contends that consideration can only be given to the community "*explicitly*" targeted by the Applications, which in this case is the one revolving around the business activities of the Applicant's group and the Amazon brand. No

is not relevant whether that community is the one to which the applicant intends to direct its gTLD. The IO is persuasive in his argument that the association between a community and a string depends primarily on the expectations and perceptions of the average internet user.

68. The Applicant implies that only one community can be "*targeted*" by a gTLD and an application. The Expert finds no support in the Objection Procedures for this position, which is actually counterintuitive. If the term "*targeted*" is properly understood as meaning "*affected*", there is no reason why there cannot be more than one community affected by a given application for a gTLD. A gTLD can well have an impact on a broader range of persons or entities than the one envisaged by the applicant. The requirement invoked by the Applicant that the association between the community and the string be "*strong*" is not conclusive, since more than one of a string's possible multiple associations can be strong.

69. The Applicant's argument also risks upsetting the functioning of the gTLD objection procedure, which is aimed at protecting interests other than those of gTLD applicants. If applicants were in a position to render objections virtually impossible, in practice by determining themselves the community on whose behalf objections can be brought, in most cases no objection would be possible.

70. In light of this, the Applicant's emphasis on the intent of the party alleged to be doing the targeting and on the impossibility to target something accidentally is misplaced, because it relies on a notion that is not relevant for the strong association test. For the same reason, the insistence on the Applicant's "*legitimate uses*" for the applied-for gTLDs and on its "*strong brand recognition in the eyes of the public*" is beside the point in this context.

71. In the case at hand, therefore, the point is not the undisputed link between the Strings and the Amazon company name and brand, which quite probably exists in the perception of a large number of internet users. Rather, the point is whether there may also exist an at least equally strong association between the Strings and other communities affected by the Application, and in particular the one whose interests the IO purports to further.

72. The answer can only be affirmative. The Strings coincide with the name of the Amazon River and thereby entail an obvious association with the Amazon

III.B The clear delineation of the community invoked by the IO

(a) The position of the IO

75. The IO recalls that the AGB does not define the term "*community*". However, in requiring that the community expressing opposition be "*clearly delineated*" it lists certain non-limited factors, such as the recognition at local or global level, the level of formal boundaries and length of existence, the global distribution or the size of the community. The term community refers to a group of people living in the same place or having some characteristic in common, such as a territory, a region or place of residence, a language, a religion, an activity or values, interests or goals.

76. One of the relevant criteria is whether the group of individuals or entities can be delineated from others and whether members of the community are delineated from internet users in general and whether the community is recognized amongst its members and by the general public at global or local level. The IO quotes the description of the World Wildlife Fund which points to the Amazon's vast geographic expanse that embraces the territories of nine countries, to the features of its landscape in terms of variety of species, extension of the forests and in particular tropical ones, and the number and length of rivers, to the variety of ethnic and indigenous groups and to the link between the health of the region and the health of the planet.

77. The Amazon community can be clearly delineated from the general public by its strong link with the Amazon region. The community does not only share the geographic region. It has more far-reaching common interests and ties, including economic ones and those relating to the respect of the environment and the preservation of the indigenous culture and of the archeological and ethnological wealth. These common interests are recognized and protected through OTCA by the States which share the region and a common understanding of the specificities of the Amazon community and have put in place a process of cooperation, *inter alia* to achieve sustainable development.

78. The most interested States that share the Amazon territory have thus recognized the specificities of the region, the interests of the community and their particular needs. Their cooperation shows that the community is clearly recognized as a whole,

considered as a community. The asserted community comprises eight separate and sovereign countries with their own geography, economy, history, population and bio-diversities, which entail a diversity that rules out the idea of cohesiveness. Even the existence of common interests, ties and characteristics, assuming it could be proved factually, does not establish a community under the AGB. In any event, the alleged community is not clearly delineated because it lacks formal boundaries, which is a strict requirement under the AGB. Specific and strong links with a region are insufficient to establish clear delineation.

(c) The Determination of the Expert

80. As discussed above, the community whose clear delineation must be considered here is the Amazon Community, and not that of internet users in general, as contended by the Applicant.

81. The Expert recalls that, in accordance with Section 3.5.4 of the Objection Procedures, the factors that can be balanced to determine whether the invoked community is clearly delineated include, but are not limited to, (*i*) the level of the community's public recognition, (*ii*) the level of formal boundaries around it and what persons or entities are considered to form it, (*iii*) the length of time it has been in existence, (*iv*) its global distribution and (*v*) the number of people or entities that make it up.

82. The Expert considers that some of the factors highlighted by the IO could indicate the existence of an Amazon Community. The economic interests and ties within the Amazon region, and the community that can be considered related to it, are significant. More pertinently, the Amazon Community is characterized by its importance in terms of wealth of culture, archeology, ethnology and environment, as well as by its impact on the environment of the world as a whole. It therefore has its own specificity and interests, and its interests to a certain extent coincide with those of the broader public, in particular as concerns the environment. In general terms it can also be seen to be recognized as a community by outsiders. Moreover, the Amazon Community unquestionably has a very large population and has been in existence for a long time.

83. On the other hand, as underlined by the Applicant, the purported community is

III.C Whether there is a substantial opposition to the Strings within the community

(a) The position of the IO

85. The IO avers that the mere numerical criterion was not the intent of the drafters of the AGB, so that the Expert is not limited to a simple comparison between the number of those having expressed opposition and the overall size of the community. The word "*substantial*" can also be used to designate something of considerable importance or worth. In addition to the number of oppositions, regard must be had to their material content. Particular importance should be paid in that regard to the comments of the Governments in the Early Warning Procedure.

86. The broad meaning of the term substantial opposition is confirmed by the fact that the possibility to file community objections was granted to the IO, who has pointed out that he will abstain from filing an opposition if a single established institution is better placed to represent the community concerned. This shows that the IO's role is to defend the public interest by acting on behalf of the public for the defense of rights and interests that lack an institution which obviously could represent it. The IO also refers to Section 3.2.5 of the Objection Procedures, which makes the IO's objection conditional upon at least one comment in opposition having been made.

87. The IO acknowledges that the Application for the ".Amazon" string has triggered "*only a small number of comments*" and that those for the other two Strings have triggered "*no direct comments*". This can be explained by the limited awareness of members of the community of the new gTLD program and, in the case of the Strings in the Japanese and Chinese languages, by their language. This in itself is not enough to disqualify the Objection. Indeed, it is an essential part of the IO's mission to protect the users of the internet who are less aware of the ICANN Program and of its impact on their rights and interests. Particular importance must be accorded to the Early Warning issued by the Brazilian and Peruvian members of the GAC[7], given that Brazil shares more than half of the Amazon region and Peru is particularly interested in the protection and promotion of the interests and rights of the Amazon Community. In support of its position on the weight of the opposition the IO points also to the endorsement by Bolivia, Ecuador and Guayana. He further notes that the

to the gTLDs before any opposition could be said to be 'substantial'". The Applicant points to OTCA,[8] of which eight States are members and four are on ICANN's Governmental Advisory Committee, to the millions of people who live and do business in the region, to the many environmental groups working to preserve the region's environment and to the representatives of its indigenous peoples. The Applicant notes that, despite having knowledge of the process and the means to object, none of these potential opponents felt the need to file an objection, or even to comment or register concern regarding the Applications in the Applications Comments Forum or to oppose them in ICANN's At-Large Advisory Committee ("ALAC"), including the Regional At-Large Organization ("RALO") for Latin America and the Caribbean Islands. The Early Warning filed by the Governments of Brazil and Peru in November 2012, which was only directed at the Application for ".Amazon", only requested that the Application "*be included in the GAC early warning process*", which is not an objection. According to Section 1.1.2.4 of the AGB, it is up to governments to file an objection if they remain opposed to an application. In response to the early warning, and before the lapse of the objection period, the Applicant established contacts with the Governments involved, who have preferred to continue negotiations rather than file objections. This means that the Governments "*believe this objection does not have to succeed to protect their interests*".

(c) The Determination of the Expert

89. According to the Objection Procedures (Section 3.5.4) the factors that can be balanced to establish substantial opposition to the application within the community purported to be represented by an objector include (*i*) the number of expressions of opposition relative to the composition of the community, (*ii*) the representative nature of the entities expressing opposition, (*iii*) their stature and weight, (*iv*) their distribution or diversity, (*v*) their historical defense of the community in other contexts and (*vi*) the costs incurred by the objector to convey opposition.

90. As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community H as noted by the Applicant, beyond their

Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

92. The IO acknowledges that the Applications triggered only a small number of comments, and that actually the Applications for the Chinese and Japanese translations of "Amazon" triggered none at all. He explains this with the alleged limited awareness of the Applications within the Amazon Community. This is not entirely convincing.

93. It is not necessary here to enter into the discussion between the Parties on whether, in strict legal terms, the OTCA would have had the power to file an Objection, or to consider whether, albeit lacking formal powers, it could nonetheless have made its voice heard in a debate on the Applications' potential negative consequences. However, it is difficult to ignore the argument that there were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications.

94. These considerations lead the Expert to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community.

III.D Whether the Applications create a likelihood of material detriment to a significant portion of the Amazon community

(a) The position of the IO

95. The IO underscores that the Applications are aimed exclusively at providing "*a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation*" and that the only eligible registrants are the

community and owning its cultural heritage of the possibility of obtaining the Strings and of benefitting from the reputation linked to the name of their community and region. This would lead to a disappearance of the link between the term Amazon and the Amazon region *"with far reaching consequences for the region and its population"*, because the users of the global internet *"will probably link the [Strings] exclusively to the Applicant and its corporate entities"*. Furthermore, the global internet users' awareness of the existence and importance of the region will suffer, causing harm to the core issues of the region, and ultimately to the health of the planet which is clearly linked to the health of the Amazon.

97. The IO concludes that the launch of closed-brand gTLDs as foreseen in the Applications is very likely to interfere with the legitimate interests of the Amazon Community and to cause material harm to it and to the public who use the global internet.

(b) The position of the Applicant

98. The Applicant premises its discussion of this point by underscoring the self-standing nature of the criterion of detriment. It also notes that ICANN amended the AGB to include the qualification that the detriment should be material and to the community, and not just to the objector. It also points to ICANN's statement that there is a *"presumption"* in favor of granting new gTLDs to eligible applicants. The Applicant contests the relevance of the IO's argument that, in case of success of the Applications, *"the peoples and entities being part of the Amazon community"* would be unable to obtain the Strings, underlining that the AGB makes it clear that *"an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment"*. Moreover, the detriment to the community would be the same even if the Applications were rejected, because it would still be unable to use the Strings, since neither it nor anyone else applied for them. In relation to the Chinese and Japanese translations of "Amazon" the Applicant adds that there is no evidence that the asserted community would want to use the Chinese or Japanese domain names. The Applicant also underscores that it has used "Amazon" as a trademark in many countries, including the ones of the Amazon region, for many years with no evidence of reduced awareness of, or confusion with, the Amazon region. Indeed, even the countries in the Amazon region have granted Amazon trademark registrations or

(c) The Determination of the Expert

99. The Objection Procedures list the following factors that can be taken into account to assess whether the Application is likely to create material detriment to the rights and legitimate interests of a significant proportion of the community: (*i*) the nature and extent of the damage to the community's reputation; (*ii*) evidence that the applicant does not act, or intend to act, in accordance with the interests of the community; (*iii*) interference with core activities of the community; (*iv*) nature and extent of the concrete or economic damages to the community and (*v*) level of certainty of alleged detrimental outcomes.

100. There is no dispute that the Applicant intends to use the Strings to operate closed domains. Consequently, no one, including the Amazon Community or anyone with coinciding interests, will be allowed to use the Strings. However, as the Applicant remarks, even if the Objections were sustained the Amazon Community would still not be entitled to use the Strings, since it did not apply for them. The Expert considers that, in and of itself, the failure of the Amazon Community, or of anybody sharing its interests, to apply for the Strings can be regarded as an indication that the inability to use the Strings is not crucial to the protection of the Amazon Community's interests.

101. In any event, the Amazon Community's inability to use the Strings is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that "*[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment*" (Section 3.5.4).

102. Furthermore, the IO does not explain how the impossibility for the Amazon Community or entities or persons connected to it to use the Strings and their use by the Applicant would lead to a loss of the link between the term Amazon and the Amazon region. On the other hand, as the Applicant points out, "Amazon" has been used as a brand, trademark and domain name for nearly two decades also in the States arguably forming part of the Amazon Community. It is even registered in those States. There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

Amazon Community comes also from the lack of serious opposition to the Application by those that might be considered to have the Community's interests at heart, which has already been underscored in Section III.C above. Of course, opposition to an application and detriment are considered under two different tests in the Objection Procedures. Opposition is not necessarily evidence of detriment, just as non-opposition is not conclusive evidence of lack of detriment. However, in this case very significant potential consequences are alleged and there are many entities that could have expressed opposition had their interests been threatened. The fact that none of them was prompted to raise any objection, whether formally or at least informally, can be taken as a significant indication of lack of likelihood of detriment. It further corroborates the position that the use by the Applicant of the Strings for closed gTLDs cannot impair the interests of the Amazon Community

105. In these conditions the Expert holds that the IO has failed to satisfy its burden of proof in relation to the material detriment requirement.

IV. CONCLUSION

106. The Expert finds that he has jurisdiction to rule on the challenge to the IO's independence and that, given the need to guarantee the perception of neutrality of the gTDL dispute resolution system, the challenge must be upheld.

107. On the merits of the Objections the Expert has found that the IO has sufficiently proven the strong relation between the Strings and the Amazon Community. Instead, the IO has not shown that there is substantial opposition to the Application within that community or that the Application would lead to substantial detriment. These findings make it unnecessary to decide on the clear delineation test.

108. Since pursuant to Section 3.5.4 of the Objection Procedures all four tests must be met for a community objection to prevail, the Objections must be rejected.

V. DECISION

109. For the reasons set out above and in accordance with Art. 21(d) of the Procedure, the Panel hereby renders the following Expert Determination:

Place of the Expertise: Paris

January 27, 2014

The Expert

Professor Luca G. Radicati di Brozolo

Forrest-065

Select Language ▼

- Home
  - GAC Register of Advice
    - What is GAC Advice?
    - GAC Communiques
    - New gTLDs
      - GAC Letters on New gTLDs
      - New gTLD Principles
      - Rights Protection Mechanisms
      - Future gTLD rounds
      - New gTLD Safeguards
      - Country Names and Codes at the Second Level
      - Public Interest Commitments (PICs)
      - Specific Strings and Types of Strings
        - Geographic Names
        - Community Strings
        - Applicant Support
        - Plural Strings
        - Wine / Vin
        - Religious / Political Terms
        - Early Warnings

2013-07-18-Obj-Amazon

Date/Source Document

18 July 2013

Durban GAC Communiqué

Communication

1. GAC Objections to Specific Applications:

a. The GAC Advises the ICANN Board that:

i The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications :

1. The application for .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)

---

[3] Module 3.1: "The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.

Next Steps/Required Action

Board Action:

Item	Resp.	Start	Compl.	Status
Publish GAC Communique and notify applicants of 21-day GAC Advice Response Period	Staff		1 August	Complete
Applicants 21-day response period to GAC Advice	Applicants	1 Aug	23 Aug	In process
	Staff			

- 2013-11-20-spa
- 2014-03-27-spa
- 2014-06-25 .spa
- 2013-07-18-gTLDStrings
- 2013-04-11-gTLDStrings
- ICM Registry Application
- Security and Stability
- IGO and INGO Names
- ccTLDs
- WHOIS
- Contractual Compliance
- Human Rights
- Public Safety
- ICANN Accountability and Transparency
- ICANN Budget
- Requests from ICANN Board/Staff
- Requests for Written Briefings/Reports
- Tracking Tables

<table>
<tr><td></td><td>
<p>2: Indicates that the NGPC's current position is not consistent with GAC advice as described in the Scorecard and further discussion with the GAC is required following the relevant procedures in the ICANN Bylaws.</p>
<p>Board Scorecard:</p>
<table>
<tr><th>Summary of GAC Advice</th><th></th><th>NGPC Response</th></tr>
<tr><td>The GAC Advises the ICANN Board that:
The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications: The application for .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)</td><td></td><td>Per § 3.1 of the AGB, the applicant submitted a response to the ICANN Board. Given the volume of information presented, the NGPC continues to consider the information presented by the applicant and proposes to take action at a future NGPC meeting.</td></tr>
</table>
</td></tr>
<tr><td>Responsible Party</td><td>Board/Staff</td></tr>
<tr><td>Target Completion Date</td><td></td></tr>
<tr><td>Current Status/Communications Log</td><td>
<p>10 February 2014 Updated Scorecard:</p>
<p>.AMAZON: The NGPC continues to move forward with considering the GAC's advice in the Durban Communiqué concerning .AMAZON (and related IDNs). ICANN has commissioned an independent, third-party expert to provide additional advice on the specific issues of application of law at issue, which may focus on legal norms or treaty conventions relied on by Amazon or governments.</p>
</td></tr>
</table>

Forrest-066

Forrest-066

NEW GTLD CURRENT APPLICATION STATUS

Search gTLD applications **Search** **Reset**

Download All PICs
View All GAC Advice Responses
Contention Sets

CURRENT APPLICATION STATUS

Type
Application Status
Updates
Objections
GAC EW
Contention Sets
PICs

Apply Filters

This page reflects the current application status. Application status will be updated from time to time to reflect the various New gTLD Program processes. Except for the application statuses "Withdrawn" and "Delegated", application statuses are not final.

A change in application status is intended to inform the applicants and the community of an application's current status. A change or update is not a definite indication that an application may proceed to another phase of the program. For more information including definitions of application statuses see the applicant advisory.

Please Note: The contact information provided on this page for withdrawn and delegated applications may no longer be current. The contact information listed reflects the information provided by the applicant during the application phase of the New gTLD Program. This information is not maintained once an application has withdrawn or been delegated. Current Registry contact information for applications that have contracted with ICANN and been delegated can be found at the Registry Listing page:https://www.icann.org/resources/pages/listing-2012-02-25-en.

1 2 3 4 5 6 7 8 9 10 11 ... 55 56

▸	Prioritization Number	String [1]	Applicant	Location [2]
▸	1	天主教	Pontificium Consilium de Comunicationibus Socialibus (PCCS) (Pontifical Council for Social	VA

Executed Contract

Completed PDT

Delegated

Reset All

►	7	淡马锡	Temasek Holdings (Private) Limited	SG
►	8	世界	Stable Tone Limited	HK
►	9	сайт	CORE Association	CH
►	10	嘉里大酒店	Kerry Trading Co. Limited	HK
►	11	商店	Wild Island, LLC	US
►	12	ファッション	Amazon EU S.à r.l.	LU
►	13	كيوتل	Ooredoo	QA
►	14	موزايك	Ooredoo	QA
►	15	网址	Minds + Machines Group Limited	US
►	16	大拿	VeriSign Sarl	CH
►	17	网店	Global eCommerce TLD Asia Limited	HK
►	18	삼성	SAMSUNG SDS CO., LTD	KR
	19	号店	Wal Mart Stores Inc	US

▸	25	كاثوليك	Pontificium Consilium de Comunicationibus Socialibus (PCCS) (Pontifical Council for Social Communication)	VA
▸	26	कॉम	VeriSign Sarl	CH
▸	27	عرب	League of Arab States	EG
▸	28	网址	HU YI GLOBAL INFORMATION RESOURCES (HOLDING) COMPANY. HONGKONG LIMITED	HK
▸	29	新闻	Xinhua News Agency Guangdong Branch 新华通讯社广东分社	CN
▸	30	嘉里	Kerry Trading Co. Limited	HK
▸	31	网店	Zodiac Libra Limited	HK
▸	32	政府	Net-Chinese Co., Ltd.	TW
▸	33	닷넷	VeriSign Sarl	CH
▸	34	みんな	Charleston Road Registry Inc.	US
▸	35	中文网	TLD REGISTRY LIMITED	IE

1 2 3 4 5 6 7 8 9 10 11 55 56

Section 2.2.1.4.

8. The Geographic Names Panel has determined that the string falls within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4. The applicant was contacted to provide documentation of support/non-objection per Section 2.2.1.4.3 of the Applicant Guidebook.
9. The String Similarity Panel has determined that this string is visually similar to an existing TLD (.mil), creating a probability of user confusion.
10. Per the 4 June 2013 New gTLD Program Committee (NGPC) approved resolution to adopt the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué."
11. Per the 10 September 2013 New gTLD Program Committee (NGPC) approved resolution to adopt the "ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué."

Forrest-067

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)
and
PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)
and
PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

International Chamber of Commerce
International Centre for Expertise

Case No.
396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

in re “.AMAZON”; アマゾン and 亚马逊 gTLD

EXPERT DETERMINATION

Prof. Alain Pellet, Independent Objector

– Objector –

vs.

AMAZON EU S.à.r.l.

– Applicant –

Expert

Professor Luca G. Radicati di Brozolo

DEFINITIONS

AGB	ICANN gTLD Applicant Guidebook, version 2012-06-04
Amazon Community	The community defined in § 40 below
Applicant	AMAZON EU S.à.r.l.
Centre	International Centre for Expertise of the International Chamber of Commerce
Expert	Professor Luca G. Radicati di Brozolo
gTLD	Generic top level domain
IO	Independent Objector
Objection Procedures	Module 3 of the AGB
OTCA	Amazon Cooperation Treaty Organization
Procedure	New gTLD Dispute Resolution Procedure, Attachment to Module 3 of the AGB
Strings	".AMAZON", ".アマゾン" and ".亚马逊" gTLDs

1. This Expert Determination is rendered in the consolidated dispute settlement proceedings arising from the community objections to three applications for the generic top-level domain (“**gTLD**”) name “.AMAZON”, and the Japanese and Chinese terms for AMAZON (respectively アマゾン and 亚马逊) within the framework of the ICANN gTLD Application Process governed by the ICANN gTLD Applicant Guidebook, version 2012-06-04 (the “**AGB**”).

I. INTRODUCTION

2. The three community objections at the origin of these proceedings (the “**Objections**”) were filed on March 12, 2013 with the International Centre for Expertise of the International Chamber of Commerce (the “**Centre**”) by the Independent Objector, Professor Alain Pellet, 12, Avenue Alphonse de Neuville, 92380 Garches, France, contact@independent-objector-newgtlds.org (the “**IO**”).

3. The Objections (EXP/396/ICANN/13, EXP/397/ICANN/14 and EXP/398/ICANN/15) relate to three applications (the “**Applications**”) filed by AMAZON EU S.à.r.l., Contact Information Redacted Contact Information Redacted (the “**Applicant**”) respectively for the “.AMAZON”, “.アマゾン” and “.亚马逊” gTLDs (collectively the “**Strings**”).

4. The content of all the Objections is practically identical.

5. On April 23, 2013 the Centre informed the Parties of its decision to consolidate the Objections.

6. The Applicant filed its Responses to the Objections on May 24, 2013.

7. The IO is represented in these proceedings by Ms Heloïse Bajer-Pellet, Contact Information Redacted Mr Daniel Müller, Contact Information Redacted Mr Phon van den Biesen, Contact Information Redacted and Mr Sam Wordsworth, Contact Information Redacted Contact Information Redacted .

8. The Applicant is represented in these proceedings by Messrs. Nick Bolter and Gareth Dickson, Edwards Wildman Palmer UK LLP, Contact Information Redacted

9. On June 28, 2013 the Centre informed the Parties that on June 24, 2013 the Chairman of the Standing Committee appointed as sole member of the Panel of Experts Professor Luca G. Radicati di Brozolo, Arblit Radicati di Brozolo Sabatini, Contact Information Redacted Contact Information Redacted (the “**Expert**”), who submitted his declaration of acceptance and availability and statement of impartiality and independence on June 26, 2013.

10. The file of the case was transmitted by the Centre to the Expert on August 1, 2013.

Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "*constitution of the Panel*". The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert.

11. Following an exchange of correspondence with the IO and the Applicant (collectively the "**Parties**"), the Expert issued the Expert Mission on September 3, 2013.

12. At the request of the IO, the Expert allowed an exchange of submissions on the Applicant's challenge to the IO. The IO filed his additional written statement on August 16, 2013 whilst the Applicant filed its reply on August 22, 2013.

13. On September 9, 2013 the Centre informed the Expert that the time limit for submission of the draft expert determination was extended until October 5, 2013.

14. On the same date the Centre agreed to the Expert's request to deal with all three Objections in a single expert determination. The request was based on the consideration that the Applicant and the Objector are the same in all the consolidated proceedings and that the issues raised by all three Objections are practically identical and raise almost identical factual and legal issues.

15. In accordance with Article 19 of the the New gTLD Dispute Resolution Procedure (the "**Procedure**")**,**[1] and in the absence of any request by the Parties, no oral hearing was held.

16. The draft expert determination was submitted by the Expert for scrutiny to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

17. These proceedings are administered by the Centre pursuant to Article 3(d) of the Procedure, which is applicable by virtue of its Article 1(d).

18. The proceedings are governed, as to matters of procedure, by the Procedure and by the Rules for Expertise of the International Chamber of Commerce, as supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (Article 4(a) and 4(b)(iv) of the Procedure).

19. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings was English. Moreover, in accordance with Article 6(a) of the Procedure, all communications by the Parties, the Expert and the Centre were submitted electronically.

20. As dictated by Article 20 of the Procedure, the merits of the dispute before the Expert are to be decided by reference to the relevant standards defined by ICANN, in particular in Module 3 of the AGB (the "**Objection Procedures**"), as well as to any rules and principles that the Expert determines to be applicable, having due regard

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[1] Attachment to Module 3 of the AGB.

to the statements and documents submitted by the Parties. The burden of proof that the Objection should be sustained rests with the Objector in accordance with the applicable standards.

21. As agreed by the Centre, and given that the issues raised by the three Objections are for the most part identical, this Expert Determination deals with all three Objections collectively. Reference to the individual Objections will only be made insofar as they raise different issues from the other Objections.

II. THE CHALLENGE TO THE IO AND THE IO'S STANDING

(a) The Position of the Applicant

22. On April 6, 2013, after the filing of the Objections by the IO, the Applicant wrote to ICANN denouncing that "*the office of the IO exhibits a Conflict of Interest within the meaning of ICANN's Conflict of Interest Policy*". The challenge contended that the IO's Objections were based on comments in the Early Warning Procedure by the Governments of Peru and Brazil, with whom the IO has "*special links*" due to his professional ties with them, as he has with the Governments of Bolivia and Argentina, likewise identified as opponents of the Applications. Those links are asserted to have influenced and to continue to influence the IO's decision-making process in these proceedings. For the Applicant the Objections were used to formalize the objections of the governments of Brazil and Peru, in contrast with the principle that the IO can only act on behalf of the public who uses the global internet. The conflict of interest is viewed as the reason for the alleged inconsistency between the IO's approach to this application and to the ones for similar gTLDs (for instance for ".africa", ".persiangulf" and ".islam"). According to the Applicant, allowing the Objections to proceed would damage the integrity of the gTLD dispute resolution process, because the challenges would be made public, leading to the perception that the IO is not a safety net for the public. The Applicant concluded with the request that ICANN set aside the Objection on account of the conflict of interest and, if deemed necessary, appoint another non-conflicted IO. The Applicant accepted to maintain confidentiality over its challenge, while reserving its right to raise the matter if the Objection were allowed to proceed.

23. The Applicant wrote to ICANN again on April 24 and May 18, 2013 reiterating its challenge and soliciting a response prior to the deadline for responding to the Objection.

24. Referring to its correspondence with ICANN, in the Response to the Objection the Applicant restated that the IO lacks standing in these proceedings because of the conflict of interest. Indeed, under the AGB he has standing only to represent "*the public who use the global internet*", and cannot act on behalf of any particular entity or entities, as he is purportedly doing in these proceedings.

25. In its reply of August 22, 2013 to the IO's additional statement of August 16, 2013, the Applicant puts forward three sets of arguments. ***First***, it argues that the IO has a "*clear*" conflict of interest requiring him to recuse himself. It contests that the AGB

does not require the IO to be independent of anyone standing to benefit from the objection and releases him from the "*universally recognized obligation to decline additional work where it would create a conflict of interest with an existing relationship*". While recognizing that the IO does not act as a judge, arbitrator or expert, the Applicant underscores that the AGB binds him to the same basic rules of ethics that apply to those offices in relation not only to ICANN and applicants, but also to any other influences. The Applicant concedes that "*a normal average social life*" does not necessarily entail a conflict of interest or lack of independence, but asserts that the IO's ties to the governments of Brazil or Peru are not merely part of such a social life.

26. *Second*, the Applicant restates that the IO can only represent the community made up of those who use the internet (referred to by the parties also as the "*internet community*") and that it is "*plainly wrong*" that he can only represent a community that is "*delineated and distinguishable from internet users in general*". The IO is granted special standing to fulfill his role within the gTLD program and, unlike "*ordinary*" objectors, does not have to prove an on-going relationship with a community. Consequently, he loses his special standing if he acts outside his role, e.g. on behalf of a community comprising particular persons or entities. In the case at hand the community represented by the IO is not the public who use the internet. The IO requests the same remedy sought by his client Peru, who is the largest financial contributor to the Amazon Cooperation Treaty Organization ("**OTCA**"). Notwithstanding that the Applications generated no reasoned or substantiated comments from the public, unlike similar applications (".gcc", ".islam", ".persiangulf" and ".africa"), the IO only objected to the Applicant's ones. The Applicant also contests that OTCA lacks the capacity to file an objection and differs in this respect from other organizations that could have objected to the strings to which the IO did not object. It adds that objections to the Applications could have been put forward by other entities. Had he followed the same criteria as for other objections, the IO would have concluded that OTCA and the governments of Brazil and Peru were in at least as good a position as the IO to file an objection. The IO's failure to demonstrate his complete independence and his apparent pursuit of the interest of particular persons or entities deprives him of standing in this case.

27. *Third*, the Applicant refers to a statement of the Centre that the decision over the IO's independence falls within the Expert's authority[2]. The Applicant argues that whether the IO has exceeded his role is a serious issue, because the Expert Determination will be accepted by ICANN (Section 3.4.6 of the Objection Procedures). This means that, if the issue is not decided by the Expert, the Applicant

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[2] The Applicant refers to a letter of the Center dated July 8, 2013 in reply to a request submitted by it on this point. Actually the Center's letter of that date states that "*Whether a decision on this question [i.e. the independence of the IO] falls into the Expert Panel's scope and authority pursuant to the applicable rules and procedures, will have to be decided by the Expert Panel itself. Should the Expert Panel decide that it does fall into the scope of its work, it will then be directly on the Expert Panel to take a decision on the raised question.*"

risks "*unjustly and unfairly los[ing] with limited, if any, scope for a remedy*". This would result in irreparable damage to the integrity of the gTLD dispute resolution process.

(b) The position of the IO

28. In a letter to counsel for the Applicant of June 8, 2013 the IO denounced the inappropriateness of the Applicant's direct approach to ICANN on the matter of his independence, stating that it is not for ICANN to take a position on it. The IO argued that the claim concerning his alleged bias "*has to be dealt with by the Expert panel, who has full authority to decide in all impartiality*".

29. In the Objection the IO disclosed his relations with the Governments of Brazil and Peru, but clarified that in the present proceedings he is not representing them and is acting in the sole interests of the public who use the internet and that his relation with a State has nothing to do with his decision to object or not.

30. In his additional statement of August 16, 2013 the IO noted that Article 11(4) of the Rules is not relevant to a challenge of the IO, since the IO is only a party to these proceedings. He acknowledged, however, that the absence of a general procedure concerning the IO's independence and the possibility to challenge him for the entire gTLD program does not mean that no remedy is available. The IO recalls that in his June 8 letter referred to above he recognized that the Expert has the power to assess the IO's independence and to draw the necessary conclusions with regard to the Objection. Indeed, adds the IO, "*the Expert Panel is the guardian of the integrity of the process and it has the duty to ensure that the Expert Determination is soundly based on the standards established by the Guidebook*". Although it affects only the IO's standing, the condition that the IO must not act on behalf of any particular person or entity, but solely in the best interests of the users of the internet (Objection Procedures, Section 3.2.5), needs to be addressed by the Expert even if in Article 2(d) of the Procedure the expert determination is referred to only as a "*decision upon the merits of the objection*". The Expert must also address the standing of the Objector (Objection Procedures, Section 3.2.2). On this point the IO concludes that the Expert has the power to address whether the IO acts in the interest of the internet public or of a particular category of persons, regardless of whether the issue pertains to standing or to the merits. The matter must be decided in a single expert determination, there being no option to have separate decisions on standing and merits.

31. On the merits of the challenge, the IO posits that, pursuant to Section 3.2.5 of the Objection Procedures, he must remain independent and unaffiliated with any gTLD applicant. He considers that the Applicant's understanding that conflicts can occur where an objection is filed in furtherance of the interests of a potential community with ties to the IO "*hardly makes any sense and would ultimately exclude any person having a normal average social life to serve as the Independent Objector*". The Applicant should not be entitled to construct its case on the artificial alleged bias deriving from the IO's professional relationships when he was appointed. While accepting that the AGB directs him to act in the sole interest of "*the public who use*

the global internet", the IO cannot accept that this implies that that public is the only community that he has standing to represent. The fact that the IO is dispensed from proving the regular standing requirements for the types of objections that he can file (Objection Procedures, Section 3.2.5) does not mean that his community objections can concern only the rights and interests of a "*hypothetical*" community of internet users. This would entail a profound change in one of the four tests for community objections, the one relating to the existence of a clearly delineated community, because the public who use the internet is not such a community. Even if the community relevant here were the one of those living in the geographical region with strong links to the Amazon, it would not follow that the IO is acting on its behalf, also considering the Applicant's acknowledgment that such community would not benefit from the rejection of the Application. The AGB does not require that every string which targets a community be applied for by a representative of that community. It is irrelevant whether the Applicant intends to target a specific community or to reserve its gTLD for it. However, the operation of the gTDL must not impinge on the rights and legitimate interests of a significant portion of the community to which the string is explicitly or implicitly targeted. The IO points to Section 1.2.3.2 of the Objection Procedures, which permits community applications even if the application is not designated as community-based or aimed at a particular community. Therefore, what is relevant is not who is targeted by the applicant, but whether a particular community is targeted by the string. The IO acts for a public interest even if he invokes the interest of a particular community and mitigates the risk that in some cases a valid objection might not be raised by those entitled to do so. As such he acts as a safety net. Finally, the IO notes that his policy is not to file an objection when there is "*a single established institution*" that could do so. In the present case there is no such single institution. OTCA, in particular, could not validly have filed an objection because it is not aimed at representing the interests of the Amazon region, but at realizing the economic interest of its Member States within that region.

(c) The Determination of the Expert

32. In light of the Expert's conclusions on the merits of the Objection (Section III below), an analysis of the challenge to the IO's independence could be moot. However, the issues raised by the Applicant in this connection have been amply debated by the Parties and raise important questions of principle for the gTLD dispute resolution process. The Expert therefore deems it appropriate to address them.

(i) <u>The Expert's power to decide the challenge</u>

33. The Parties' arguments raise, as a preliminary matter, the issue whether it falls within the Expert's mandate to address the existence of the IO's alleged conflict of interest and, in the event, to draw the consequences of a finding that a conflict exists.

34. Both the Applicant and the IO concur that the Expert has authority to decide a challenge to the IO's independence.

35. The Expert shares this view.

36. As noted by the Parties, there is no rule explicitly dealing with the power to decide on challenges to the independence of the IO, and in particular vesting it on the Expert. Such a power is not conferred on the Expert by the Rules, Article 11(4) of which deals only with challenges to the independence of the expert panel, nor by the Objection Procedures or the Procedure, the latter of which defines the expert determination as "*the decision on the merits of the Objection*" (Article 2(d)).

37. Nonetheless, as noted by the Applicant, whether the IO has exceeded his role is a serious issue that can impact on the decision on an objection and that must be capable of being decided. This is all the more so because Section 3.4.6 of the Objection Procedures stipulates that expert determinations will be accepted by ICANN, thus in essence making them final.[3] The power to decide a challenge to the IO would therefore seem to inure to the Expert's inherent powers.

38. The issue is even less problematic if, as acknowledged by the Parties, the question of the IO's independence can be characterized as pertaining to the IO's standing. Indeed, it is indisputably within the Expert's powers to rule on the standing requirements of objectors (Objection Procedures, Section 3.2.2). There is no reason to hold that this does not hold true also for the standing of the IO.

(ii) The merits of the challenge to the IO

39. It being accepted that the Expert has jurisdiction to deal with a challenge to the IO's independence, the next question debated by the Parties that needs to be addressed is whether, as contended by the Applicant, the IO may only file objections on behalf of the community consisting of "*the public who uses the global internet*" or whether, instead, he is entitled to object on behalf of, or at least in the interest of, more strictly defined groups or communities.

40. This issue is preliminary to the one of conflict of interest. In the present case, even on the IO's admission, the Objection relates not to the interests of the internet public but to those of a particular group of individuals or entities, which will be referred to here as the "**Amazon Community**" with an expression used also by the Parties[4]. Accepting the Applicant's preliminary arguments would therefore entail that the IO would lack standing altogether, so that the conflict issue would not even have reason to be raised.

41. The Applicant relies on a strict reading of the statement in Section 3.2.5 of the Objection Procedures that the IO "*does not act on behalf of any particular persons or interests, but acts solely in the best interests of the public who use the internet*".

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[3] Section 3.4.6. of the AGB reads as follows: "*The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process*".

[4] This definition leaves unprejudiced whether the Amazon Community is a community within the meaning of the substantive standards for the sustainability of a community objection under Section 3.5.4 of the Objection Procedures. This issue is addressed in Section III below.

42. In the Expert's opinion such a formalistic interpretation would result in an unduly restrictive conception of the IO's role. Indeed, there is merit in the IO's position that the internet community is not clearly delineated (and perhaps even, in his words, "*hypothetical*"). This being so, the Applicant's position would entail that the IO's objections would never meet the clear delineation test. What is more, since the internet community is somewhat amorphous, if the IO's standing to object were limited to applications affecting the interests of that community his role would be seriously curtailed, because few applications would qualify as such.

43. The language of Section 3.2.5 of the Objection Procedures allows a more constructive interpretation. The statement that the IO's role is to file objections when "*no objection has been filed*" can be construed in the sense that his role is to raise objections in situations where, for whatever reason, no objection will be forthcoming, even if the application is "*highly objectionable*". This could occur, for instance, if there is nobody in a position to represent the community or if those who could raise the objection are unwilling to do so for fear of negative repercussions, lack of financial means and so on. Likewise, the statement that the IO "*does not act <u>on behalf</u> of any particular person or entities*" can be understood as permitting the IO to raise an objection in situations where, while not technically acting "*on behalf*" of anybody (in the sense that nobody has given him a mandate to act or would even want him to act), he takes into account what can be considered the interests of a given community that would be prejudiced by an application.

44. The conclusion must therefore be that the Objections' admissibility is not affected by the fact that it concerns interests possibly coinciding with those of the Amazon Community, rather than those of the broader internet community.

45. In light of this conclusion and of the asserted coincidence between the interests of the Amazon Community defended by the Objections and those of the States with which the IO has professional relations, the issue of conflict of interest raised by the Applicant becomes relevant.

46. On the subject of the IO's conflicts of interest Section 3.2.5 of the Objection Procedures requires the IO to be and to remain independent and unaffiliated "*with any of the gTLD applicants*". In this connection, it points to the "*various rules of ethics for judges and international arbitrators*" as models to assess independence. It is silent, instead, on the possible conflicts arising from the IO's relations with the persons or entities whose interests he may be deemed to further by means of a given objection.

47. This silence could be explained by the fact that the Objection Procedures deal with the IO's independence in relation to his selection process, which occurs when the potential objectors are not yet identified and possibly even identifiable. It is therefore not conclusive. Although the IO is not in the same position as a judge or an arbitrator, the requirement that he be independent of one of the parties with an interest in the outcome of the proceedings (the applicant) seems to militate in favor of imposing the same requirement with respect to the other interested party (the group in whose purported interest the objection is filed). The IO's acceptance that

the Expert has jurisdiction to examine the challenge implies an acknowledgement on his part that a conflict with parties standing to benefit from his Objection is potentially fatal to the Objection.

48. The Expert has difficulty accepting the IO's assertion that a finding of conflict in circumstances such as those of the present case would preclude anybody with "*a normal average social life*" from serving as the IO. The question is not whether the existence of special ties with certain persons or entities or categories of entities (which anybody will inevitably have) prevents a person from being appointed IO.[5] Rather, it is whether the existence of such ties becomes problematic in the event that the IO raises an objection that can be correlated to the interests of those with whom the ties exist.

49. The Applicant does have a point when it contests that the IO's professional ties at issue here do not fall within the notion of normal average social life. Such a definition does not sit well with the IO's representation of two sovereign States in international judicial proceedings.

50. In any event, if regard must be had to the standards applicable to judges and arbitrators (as predicated by Section 3.2.5 of the Objection Procedures), the relevant perspective in international arbitration nowadays is an objective one. In the words of the *IBA Guidelines on Conflicts of Interest in International Arbitration* (General Standard 2(c)), it is that of "*a reasonable and informed third party*", whilst the ICC Rules of Arbitration refer to independence "*in the eyes of the parties*" (Article 11.2). By such standards, the IO's ties to two prominent members of the Amazon Community could give rise to a presumption of conflict in this case, completely regardless of whether, in filing the Objection, the IO acted "*on behalf*" of his clients, as contended but in no way substantiated by the Applicant.

51. There is one argument that could be advanced to refute the allegation of conflict of interest. It has to do with the absence of any indication that the two Governments "*on whose behalf*" he is alleged to be acting could not have filed an objection themselves (§ 91 ff. below) and would therefore have had to rely only on the IO to do it for them. In these conditions, the lack of initiative on the part of those Governments could denote that they had no interest in the Objections and that therefore the IO's action was prompted by other considerations. In the view of the Expert, however, such an argument does not carry sufficient weight. The decision on the existence of a conflict of interest cannot be made to depend on speculations as to the reasons why an objection was made by the IO rather than by the entities that could in principle stand to benefit from them.

52. Likewise, the Expert does not believe that the conflicts between the IO and the potential beneficiaries of an objection should be assessed differently from those with applicants. Admittedly, the practical relevance of the two types of conflicts

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[5] The Applicant does not suggest that the IO should not have accepted his role at the outset because of ties of that kind.

could be different.[6] Yet, the Expert considers it paramount for the confidence in the gTLD dispute resolution process that any decision on the IO's independence be taken on purely objective criteria and bearing in mind the need to ensure the perception of complete neutrality and impartiality of the office of the IO.

53. The Expert is of the view that, objectively considered, the links between the IO and two major representatives of the Amazon Community lead to justifiable doubts as to his independence in the eyes of the Applicant and of the broader public. Given the importance of ensuring the perception of neutrality, independence and impartiality of the office of the IO and of the entire gTLD dispute resolution process, the Expert finds that the Applicant's challenge to the independence of the IO must therefore be upheld.

III. THE MERITS OF THE OBJECTION

54. The Objection Procedures do not address the consequences of an upholding of a challenge to the independence of the IO. In particular, they do not provide that, upon a finding of a conflict of interest of the IO, the IO loses standing or that another IO must be appointed for the specific case, as suggested by the Applicant; nor do they provide for any other solution. If the consequence of a finding of lack of independence were a loss of standing by the IO, any consideration on the merits of the challenge would be moot. However, given the silence of the Objection Procedures and the resulting uncertainty on the consequences of the finding that the IO lacks the requisite independence in this case, the Expert considers it appropriate to deal also with the merits of the Objections and to decide whether they would deserve to be upheld, regardless of the IO's standing.

55. In accordance with Section 3.5.4 of the Objection Procedures, objections can be sustained if the Expert ascertains the existence of substantial opposition from a significant portion of the community to which the string may be targeted. This provision applies also to objections filed by the IO.

56. For a showing of such opposition the IO must prove that:

(i) the community invoked by him is clearly delineated;

(ii) there is substantial community opposition to the Applications;

(iii) there is a strong association between the community invoked by the IO and the Strings;

(iv) the Applications create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the

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[6] Conflicts of interest of the IO with respect to an applicant entail a risk that no objection would be raised, despite the application's potential adverse impact on general interests. On the other hand, a conflict with respect to a party standing to benefit from an objection might lead to an objection being filed by the IO where none would otherwise be filed. However, the objection would still have to be assessed on its merits by a third party (the expert panel).

Strings may be explicitly or implicitly targeted.

57. The four criteria will be addressed here in the order in which they have been addressed by the IO in the Objections.

III.A Targeting: the association between the community invoked by the IO and the Strings

(a) The position of the IO

58. According to the IO, although the Applications have not been framed as community-based, since they only target the Applicant and its subsidiaries, the Strings can be implicitly linked to a specific community different from the Applicant. The test to assess the Applications' implicit target is not limited to the intended use of the Strings by the Applicant, but is primarily concerned with the expectation of the average internet users and with their perceptions of the Strings and their associations.

59. The Applications target also "*the South-American region with the same English name around the Amazon River*". The identity between the Applicant's business name and brand and the English word for the South American river is not coincidental. The Applicant itself intentionally links the Strings to the Amazon river and region in its communications. The correlation between the Strings and the Amazon river and region is corroborated by the consistent use of the term "*Amazon*" to describe and characterize the Amazon region and the community. The term "*Amazon region*" is used by the 1978 Treaty for Amazon Cooperation and by UNESCO, which has included parts of the Amazon region in the World Heritage List under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. The denomination is used also by the World Wildlife Fund.

60. In the eyes of the IO, all the foregoing demonstrates a strong association between the Amazon region and its community and the Strings.

(b) The position of the Applicant

61. The Applicant premises its argument on this point on the consideration that under the AGB only one community is targeted by an application, since the AGB requires more than a mere nexus between the applied-for string and the asserted community; it requires a "*strong association*". The IO has failed to show that the Strings target the public who use the global internet, if this is the only community that the IO is entitled to represent, nor has he proved that the Strings target any other community.

62. According to the Applicant, it is not possible to target someone accidentally, since targeting implies precision and looks to the intent of the party alleged to be doing the targeting. The Application makes no mention of the community invoked by the IO and is "*clearly targeted*" at the Applicant's brand. The IO's argument on implicit targeting is too simplistic because it ignores the Applicant's strong brand recognition

in the eyes of the public who use the global internet and holds that the Applicant will forever target Amazonia with its present and future services. The argument that the targeting test is based on the existence of a certain link or possible association by the public based on string similarity has been rejected by ICANN, which acknowledges that brand names and other strings that happen to relate to some geographic entities may also have legitimate unrelated uses. The Applicant "*clearly has 'legitimate uses'*" for its marks, global brand and company name as a gTLD string, including in local languages, which it has used since 1994. The Applicant cites the example of the ".patagonia" gTLD, that was found not to target the community of Patagonia.

(c) The Determination of the Expert

63. In the Objection Procedures (Section 3.5.4) the term "*targeting*" is used in relation to the third substantive test that must be satisfied by a community objection, i.e. the one of strong association between the invoked community and the applied-for string.

64. The Objection Procedures point to the following non-exclusive factors that can be balanced to indicate a strong association between a community and the applied-for-string: (*i*) statements contained in the application; (*ii*) other public statements by the applicant; (*iii*) associations by the public.

65. The reason for dealing with this test at the outset in the present case is that, prior to establishing whether there is a strong association between the Strings and a community, the community having the purportedly strong association must be identified. As seen above, in the context of the challenge to the IO's independence the Parties debated the IO's standing to file an objection in the interest of a community other than the internet community. In relation to the substantive test, the dispute between the Parties on the identification of the community is framed in terms of whether the community in whose interest an objection is brought can differ from the one "*targeted*" by the applicant.

66. The Applicant contends that consideration can only be given to the community "*explicitly*" targeted by the Applications, which in this case is the one revolving around the business activities of the Applicant's group and the Amazon brand. No relevance can be given to the Amazon Community which is, instead, the focus of the Objections. The IO, for his part, adopts a broader approach, which relies on the community "*implicitly*" targeted by the Applications, which in this case is the Amazon Community.

67. The Objection Procedures do not bear out the Applicant's interpretation. Although the standard of strong association is dealt with under the heading "*targeting*", the "*target*" of the objection is not considered in Section 3.5.4. This provision requires proof that the applied-for gTLD be strongly associated with the community "*represented by the objector*". The focus is therefore on the community that the objector, and in this case the IO, considers to be affected, or prejudiced, by an application (and, in this sense, targeted) and on whose behalf or interest he acts. It

is not relevant whether that community is the one to which the applicant intends to direct its gTLD. The IO is persuasive in his argument that the association between a community and a string depends primarily on the expectations and perceptions of the average internet user.

68. The Applicant implies that only one community can be "*targeted*" by a gTLD and an application. The Expert finds no support in the Objection Procedures for this position, which is actually counterintuitive. If the term "*targeted*" is properly understood as meaning "*affected*", there is no reason why there cannot be more than one community affected by a given application for a gTLD. A gTLD can well have an impact on a broader range of persons or entities than the one envisaged by the applicant. The requirement invoked by the Applicant that the association between the community and the string be "*strong*" is not conclusive, since more than one of a string's possible multiple associations can be strong.

69. The Applicant's argument also risks upsetting the functioning of the gTLD objection procedure, which is aimed at protecting interests other than those of gTLD applicants. If applicants were in a position to render objections virtually impossible, in practice by determining themselves the community on whose behalf objections can be brought, in most cases no objection would be possible.

70. In light of this, the Applicant's emphasis on the intent of the party alleged to be doing the targeting and on the impossibility to target something accidentally is misplaced, because it relies on a notion that is not relevant for the strong association test. For the same reason, the insistence on the Applicant's "*legitimate uses*" for the applied-for gTLDs and on its "*strong brand recognition in the eyes of the public*" is beside the point in this context.

71. In the case at hand, therefore, the point is not the undisputed link between the Strings and the Amazon company name and brand, which quite probably exists in the perception of a large number of internet users. Rather, the point is whether there may also exist an at least equally strong association between the Strings and other communities affected by the Application, and in particular the one whose interests the IO purports to further.

72. The answer can only be affirmative. The Strings coincide with the name of the Amazon River and thereby entail an obvious association with the Amazon Community. Leaving aside for the moment whether there is such a community (which will be addressed in the following subsection III.B), there is no doubt that not only there exists an association between the Strings and the alleged Amazon Community, but that such association is "*strong*" in the perception of internet users.

73. This is borne out by the IO's evidence. As a matter of fact, not even the Applicant seems to dispute this, since its arguments go only to the preliminary points of whether the Amazon Community can be relevant for this test and of whether it exists at all, which is the subject of the next substantive test to be addressed.

74. The Expert is thus satisfied that the IO's Objection meets the test of "*strong association*" between the Strings and the community in whose interest it is filed.

III.B The clear delineation of the community invoked by the IO

(a) The position of the IO

75. The IO recalls that the AGB does not define the term "*community*". However, in requiring that the community expressing opposition be "*clearly delineated*" it lists certain non-limited factors, such as the recognition at local or global level, the level of formal boundaries and length of existence, the global distribution or the size of the community. The term community refers to a group of people living in the same place or having some characteristic in common, such as a territory, a region or place of residence, a language, a religion, an activity or values, interests or goals.

76. One of the relevant criteria is whether the group of individuals or entities can be delineated from others and whether members of the community are delineated from internet users in general and whether the community is recognized amongst its members and by the general public at global or local level. The IO quotes the description of the World Wildlife Fund which points to the Amazon's vast geographic expanse that embraces the territories of nine countries, to the features of its landscape in terms of variety of species, extension of the forests and in particular tropical ones, and the number and length of rivers, to the variety of ethnic and indigenous groups and to the link between the health of the region and the health of the planet.

77. The Amazon community can be clearly delineated from the general public by its strong link with the Amazon region. The community does not only share the geographic region. It has more far-reaching common interests and ties, including economic ones and those relating to the respect of the environment and the preservation of the indigenous culture and of the archeological and ethnological wealth. These common interests are recognized and protected through OTCA by the States which share the region and a common understanding of the specificities of the Amazon community and have put in place a process of cooperation, *inter alia* to achieve sustainable development.

78. The most interested States that share the Amazon territory have thus recognized the specificities of the region, the interests of the community and their particular needs. Their cooperation shows that the community is clearly recognized as a whole, irrespective of the divisions of sovereign States. All this leads to the conclusion that the community is clearly delineated.

(b) The position of the Applicant

79. The Applicant points to Section 4.2.3 of the AGB which states the need for "*very stringent*" requirements for a clearly delineated community and that community implies "*more of cohesion that mere commonality of interest*". It then acknowledges that, if the IO may only represent the public who use the global internet, that class meets the requirements of clear delineation. If, on the other hand, it is accepted that the IO may act on behalf of particular persons or entities, then the IO has not shown that the community he claims to be acting for has the required cohesiveness to be

considered as a community. The asserted community comprises eight separate and sovereign countries with their own geography, economy, history, population and bio-diversities, which entail a diversity that rules out the idea of cohesiveness. Even the existence of common interests, ties and characteristics, assuming it could be proved factually, does not establish a community under the AGB. In any event, the alleged community is not clearly delineated because it lacks formal boundaries, which is a strict requirement under the AGB. Specific and strong links with a region are insufficient to establish clear delineation.

(c) The Determination of the Expert

80. As discussed above, the community whose clear delineation must be considered here is the Amazon Community, and not that of internet users in general, as contended by the Applicant.

81. The Expert recalls that, in accordance with Section 3.5.4 of the Objection Procedures, the factors that can be balanced to determine whether the invoked community is clearly delineated include, but are not limited to, (*i*) the level of the community's public recognition, (*ii*) the level of formal boundaries around it and what persons or entities are considered to form it, (*iii*) the length of time it has been in existence, (*iv*) its global distribution and (*v*) the number of people or entities that make it up.

82. The Expert considers that some of the factors highlighted by the IO could indicate the existence of an Amazon Community. The economic interests and ties within the Amazon region, and the community that can be considered related to it, are significant. More pertinently, the Amazon Community is characterized by its importance in terms of wealth of culture, archeology, ethnology and environment, as well as by its impact on the environment of the world as a whole. It therefore has its own specificity and interests, and its interests to a certain extent coincide with those of the broader public, in particular as concerns the environment. In general terms it can also be seen to be recognized as a community by outsiders. Moreover, the Amazon Community unquestionably has a very large population and has been in existence for a long time.

83. On the other hand, as underlined by the Applicant, the purported community is composed of several different countries and exhibits within itself a considerable diversity in terms of geography, economy, population and bio-diversity. This could rule out the idea of cohesiveness, that arguably lies at the core of the notion of community and might imply something more than a mere commonality of interests. Furthermore, the IO has not focused particularly on the existence of formal barriers, which is one of the possible relevant criteria for the clear delineation test.

84. The record is therefore mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied. However, in light of the conclusions on the other tests, there is no need to reach a conclusive finding on clear delineation.

III.C Whether there is a substantial opposition to the Strings within the community

(a) The position of the IO

85. The IO avers that the mere numerical criterion was not the intent of the drafters of the AGB, so that the Expert is not limited to a simple comparison between the number of those having expressed opposition and the overall size of the community. The word "*substantial*" can also be used to designate something of considerable importance or worth. In addition to the number of oppositions, regard must be had to their material content. Particular importance should be paid in that regard to the comments of the Governments in the Early Warning Procedure.

86. The broad meaning of the term substantial opposition is confirmed by the fact that the possibility to file community objections was granted to the IO, who has pointed out that he will abstain from filing an opposition if a single established institution is better placed to represent the community concerned. This shows that the IO's role is to defend the public interest by acting on behalf of the public for the defense of rights and interests that lack an institution which obviously could represent it. The IO also refers to Section 3.2.5 of the Objection Procedures, which makes the IO's objection conditional upon at least one comment in opposition having been made.

87. The IO acknowledges that the Application for the ".Amazon" string has triggered "*only a small number of comments*" and that those for the other two Strings have triggered "*no direct comments*". This can be explained by the limited awareness of members of the community of the new gTLD program and, in the case of the Strings in the Japanese and Chinese languages, by their language. This in itself is not enough to disqualify the Objection. Indeed, it is an essential part of the IO's mission to protect the users of the internet who are less aware of the ICANN Program and of its impact on their rights and interests. Particular importance must be accorded to the Early Warning issued by the Brazilian and Peruvian members of the GAC[7], given that Brazil shares more than half of the Amazon region and Peru is particularly interested in the protection and promotion of the interests and rights of the Amazon Community. In support of its position on the weight of the opposition the IO points also to the endorsement by Bolivia, Ecuador and Guayana. He further notes that the Application has not received the support of any government in the region.

(b) The position of the Applicant

88. For the Applicant, the IO has not proved substantial opposition within "*his asserted community*" or the larger one of the internet public. In its words, "*[t]here are many significant voices who could speak out in the event of genuine community opposition*

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[7] The IO acknowledged that the Early Warning related only to the ".Amazon" string, but noted that it is equally relevant for the other two Strings. The concerns expressed by the Brazilian GAC member were expressed to relate also "*to possible future or existing applications in other languages, including IDN applications*".

to the gTLDs before any opposition could be said to be 'substantial'". The Applicant points to OTCA,[8] of which eight States are members and four are on ICANN's Governmental Advisory Committee, to the millions of people who live and do business in the region, to the many environmental groups working to preserve the region's environment and to the representatives of its indigenous peoples. The Applicant notes that, despite having knowledge of the process and the means to object, none of these potential opponents felt the need to file an objection, or even to comment or register concern regarding the Applications in the Applications Comments Forum or to oppose them in ICANN's At-Large Advisory Committee ("ALAC"), including the Regional At-Large Organization ("RALO") for Latin America and the Caribbean Islands. The Early Warning filed by the Governments of Brazil and Peru in November 2012, which was only directed at the Application for ".Amazon", only requested that the Application "*be included in the GAC early warning process*", which is not an objection. According to Section 1.1.2.4 of the AGB, it is up to governments to file an objection if they remain opposed to an application. In response to the early warning, and before the lapse of the objection period, the Applicant established contacts with the Governments involved, who have preferred to continue negotiations rather than file objections. This means that the Governments "*believe this objection does not have to succeed to protect their interests*".

(c) The Determination of the Expert

89. According to the Objection Procedures (Section 3.5.4) the factors that can be balanced to establish substantial opposition to the application within the community purported to be represented by an objector include (*i*) the number of expressions of opposition relative to the composition of the community, (*ii*) the representative nature of the entities expressing opposition, (*iii*) their stature and weight, (*iv*) their distribution or diversity, (*v*) their historical defense of the community in other contexts and (*vi*) the costs incurred by the objector to convey opposition.

90. As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

91. This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The

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[8] As mentioned in the discussion on the Applicant's challenge, the Applicant is of the view that OTCA does have the power to object to the Application.

Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

92. The IO acknowledges that the Applications triggered only a small number of comments, and that actually the Applications for the Chinese and Japanese translations of "Amazon" triggered none at all. He explains this with the alleged limited awareness of the Applications within the Amazon Community. This is not entirely convincing.

93. It is not necessary here to enter into the discussion between the Parties on whether, in strict legal terms, the OTCA would have had the power to file an Objection, or to consider whether, albeit lacking formal powers, it could nonetheless have made its voice heard in a debate on the Applications' potential negative consequences. However, it is difficult to ignore the argument that there were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications.

94. These considerations lead the Expert to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community.

III.D Whether the Applications create a likelihood of material detriment to a significant portion of the Amazon community

(a) The position of the IO

95. The IO underscores that the Applications are aimed exclusively at providing "*a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation*" and that the only eligible registrants are the Applicant and its subsidiaries. If the Applications were upheld, the Strings would become closed brand gTLDs which the Applicant intends to operate without taking into account the Amazon Community's particular needs and interests. Domain names in the gTLDs in question will be "*used to support the business goals of Amazon*" and will not be offered to third parties, including the Governments and members of the targeted community.

96. This entails a risk of misappropriation, because granting exclusive rights on the Strings to a private company would prevent the use of the domains for public interest purposes related to the protection, promotion and awareness-raising on issues related to the Amazon region. The "*confiscation*" of the entire name space within the Strings by a single corporate entity would deprive the members of the

community and owning its cultural heritage of the possibility of obtaining the Strings and of benefitting from the reputation linked to the name of their community and region. This would lead to a disappearance of the link between the term Amazon and the Amazon region "*with far reaching consequences for the region and its population*", because the users of the global internet "*will probably link the [Strings] exclusively to the Applicant and its corporate entities*". Furthermore, the global internet users' awareness of the existence and importance of the region will suffer, causing harm to the core issues of the region, and ultimately to the health of the planet which is clearly linked to the health of the Amazon.

97. The IO concludes that the launch of closed-brand gTLDs as foreseen in the Applications is very likely to interfere with the legitimate interests of the Amazon Community and to cause material harm to it and to the public who use the global internet.

(b) The position of the Applicant

98. The Applicant premises its discussion of this point by underscoring the self-standing nature of the criterion of detriment. It also notes that ICANN amended the AGB to include the qualification that the detriment should be material and to the community, and not just to the objector. It also points to ICANN's statement that there is a "*presumption*" in favor of granting new gTLDs to eligible applicants. The Applicant contests the relevance of the IO's argument that, in case of success of the Applications, "*the peoples and entities being part of the Amazon community*" would be unable to obtain the Strings, underlining that the AGB makes it clear that "*an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment*". Moreover, the detriment to the community would be the same even if the Applications were rejected, because it would still be unable to use the Strings, since neither it nor anyone else applied for them. In relation to the Chinese and Japanese translations of "Amazon" the Applicant adds that there is no evidence that the asserted community would want to use the Chinese or Japanese domain names. The Applicant also underscores that it has used "Amazon" as a trademark in many countries, including the ones of the Amazon region, for many years with no evidence of reduced awareness of, or confusion with, the Amazon region. Indeed, even the countries in the Amazon region have granted Amazon trademark registrations or lower-level domain names for "Amazon". The Applicant highlights the absence of negative impact of the Amazon brand (described as "*one of the world's most recognized and trusted brands*") on the Amazon region since its introduction in 1994. Since then, only the Applicant and its group of companies have used "Amazon.com" and other "Amazon" domain names and trademarks, including in Latin America. There is no evidence that this has been detrimental to the Amazon region, nor that the elimination of the "inconsequential '.com'" would change the perception of users of the global internet in such a way that Amazonia will be removed from public consciousness and the region and the world will suffer the dire consequences presented by the IO.

(c) The Determination of the Expert

99. The Objection Procedures list the following factors that can be taken into account to assess whether the Application is likely to create material detriment to the rights and legitimate interests of a significant proportion of the community: (*i*) the nature and extent of the damage to the community's reputation; (*ii*) evidence that the applicant does not act, or intend to act, in accordance with the interests of the community; (*iii*) interference with core activities of the community; (*iv*) nature and extent of the concrete or economic damages to the community and (*v*) level of certainty of alleged detrimental outcomes.

100. There is no dispute that the Applicant intends to use the Strings to operate closed domains. Consequently, no one, including the Amazon Community or anyone with coinciding interests, will be allowed to use the Strings. However, as the Applicant remarks, even if the Objections were sustained the Amazon Community would still not be entitled to use the Strings, since it did not apply for them. The Expert considers that, in and of itself, the failure of the Amazon Community, or of anybody sharing its interests, to apply for the Strings can be regarded as an indication that the inability to use the Strings is not crucial to the protection of the Amazon Community's interests.

101. In any event, the Amazon Community's inability to use the Strings is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that "*[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment*" (Section 3.5.4).

102. Furthermore, the IO does not explain how the impossibility for the Amazon Community or entities or persons connected to it to use the Strings and their use by the Applicant would lead to a loss of the link between the term Amazon and the Amazon region. On the other hand, as the Applicant points out, "Amazon" has been used as a brand, trademark and domain name for nearly two decades also in the States arguably forming part of the Amazon Community. It is even registered in those States. There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

103. As further noted by the Applicant, it is unlikely that the loss of the ".com" after "Amazon" will change matters. More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and its specificities and importance for the world will be removed from public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. ".Amazonia" springs to mind.

104. Indirect confirmation of the absence of a risk of detriment to the interests of the

Amazon Community comes also from the lack of serious opposition to the Application by those that might be considered to have the Community's interests at heart, which has already been underscored in Section III.C above. Of course, opposition to an application and detriment are considered under two different tests in the Objection Procedures. Opposition is not necessarily evidence of detriment, just as non-opposition is not conclusive evidence of lack of detriment. However, in this case very significant potential consequences are alleged and there are many entities that could have expressed opposition had their interests been threatened. The fact that none of them was prompted to raise any objection, whether formally or at least informally, can be taken as a significant indication of lack of likelihood of detriment. It further corroborates the position that the use by the Applicant of the Strings for closed gTLDs cannot impair the interests of the Amazon Community

105. In these conditions the Expert holds that the IO has failed to satisfy its burden of proof in relation to the material detriment requirement.

IV. CONCLUSION

106. The Expert finds that he has jurisdiction to rule on the challenge to the IO's independence and that, given the need to guarantee the perception of neutrality of the gTDL dispute resolution system, the challenge must be upheld.

107. On the merits of the Objections the Expert has found that the IO has sufficiently proven the strong relation between the Strings and the Amazon Community. Instead, the IO has not shown that there is substantial opposition to the Application within that community or that the Application would lead to substantial detriment. These findings make it unnecessary to decide on the clear delineation test.

108. Since pursuant to Section 3.5.4 of the Objection Procedures all four tests must be met for a community objection to prevail, the Objections must be rejected.

V. DECISION

109. For the reasons set out above and in accordance with Art. 21(d) of the Procedure, the Panel hereby renders the following Expert Determination:

(i) The Independent Objector's Objections are dismissed and therefore the Applicant is the prevailing party in all consolidated cases;

(ii) The Applicant AMAZON EU S.à.r.l is entitled to the refund of the advance payment of costs in all consolidated cases by the Centre pursuant to Article 14(e) of the Procedure.

Place of the Expertise: Paris

January 27, 2014

The Expert

____
Professor Luca G. Radicati di Brozolo

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)
and
PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)
and
PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)
vs/
AMAZON EU S.À.R.L. (LUXEMBOURG)

International Chamber of Commerce
International Centre for Expertise

Case No.
396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15)

in re ".AMAZON"; アマゾン and 亚马逊 gTLD

EXPERT DETERMINATION

Prof. Alain Pellet, Independent Objector

– Objector –

vs.

AMAZON EU S.à.r.l.

– Applicant –

DEFINITIONS

AGB	ICANN gTLD Applicant Guidebook, version 2012-06-04
Amazon Community	The community defined in § 40 below
Applicant	AMAZON EU S.à.r.l.
Centre	International Centre for Expertise of the International Chamber of Commerce
Expert	Professor Luca G. Radicati di Brozolo
gTLD	Generic top level domain
IO	Independent Objector
Objection Procedures	Module 3 of the AGB
OTCA	Amazon Cooperation Treaty Organization
Procedure	New gTLD Dispute Resolution Procedure, Attachment to Module 3 of the AGB
Strings	".AMAZON", ".アマゾン" and ".亚马逊" gTLDs

1. This Expert Determination is rendered in the consolidated dispute settlement proceedings arising from the community objections to three applications for the generic top-level domain ("**gTLD**") name ".AMAZON", and the Japanese and Chinese terms for AMAZON (respectively アマゾン and 亚马逊) within the framework of the ICANN gTLD Application Process governed by the ICANN gTLD Applicant Guidebook, version 2012-06-04 (the "**AGB**").

I. INTRODUCTION

2. The three community objections at the origin of these proceedings (the "**Objections**") were filed on March 12, 2013 with the International Centre for Expertise of the International Chamber of Commerce (the "**Centre**") by the Independent Objector, Professor Alain Pellet, 12, Avenue Alphonse de Neuville, 92380 Garches, France, contact@independent-objector-newgtlds.org (the "**IO**").

3. The Objections (EXP/396/ICANN/13, EXP/397/ICANN/14 and EXP/398/ICANN/15) relate to three applications (the "**Applications**") filed by AMAZON EU S.à.r.l., 5 Rue Plaetis, Luxembourg L-2338, LU, lorna.gradden.am@valideus.com (the "**Applicant**") respectively for the ".AMAZON", ".アマゾン" and ".亚马逊" gTLDs (collectively the "**Strings**").

4. The content of all the Objections is practically identical.

5. On April 23, 2013 the Centre informed the Parties of its decision to consolidate the Objections.

6. The Applicant filed its Responses to the Objections on May 24, 2013.

7. The IO is represented in these proceedings by Ms Heloïse Bajer-Pellet, 15 Rue de la Banque, 75002 Paris, France, avocat@bajer.fr; Mr Daniel Müller, 20, Avenue Charles de Gaulle, 78290 Croissy sur Seine, France, mail@muellerdaniel.eu; Mr Phon van den Biesen, De Groene Bocht, Kaizergrecht 253, 1016 EB Amsterdam, The Netherlands, phonvandenbiesen@vdbkadvocaten.eu; and Mr Sam Wordsworth, 24 Lincoln Inn Fields, London WC2A 3EG, UK, SWordsworth@essexcourt.net.

Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "*constitution of the Panel*". The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert.

11. Following an exchange of correspondence with the IO and the Applicant (collectively the "**Parties**"), the Expert issued the Expert Mission on September 3, 2013.

12. At the request of the IO, the Expert allowed an exchange of submissions on the Applicant's challenge to the IO. The IO filed his additional written statement on August 16, 2013 whilst the Applicant filed its reply on August 22, 2013.

13. On September 9, 2013 the Centre informed the Expert that the time limit for submission of the draft expert determination was extended until October 5, 2013.

14. On the same date the Centre agreed to the Expert's request to deal with all three Objections in a single expert determination. The request was based on the consideration that the Applicant and the Objector are the same in all the consolidated proceedings and that the issues raised by all three Objections are practically identical and raise almost identical factual and legal issues.

15. In accordance with Article 19 of the the New gTLD Dispute Resolution Procedure (the "**Procedure**")**,**[1] and in the absence of any request by the Parties, no oral hearing was held.

16. The draft expert determination was submitted by the Expert for scrutiny to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

17. These proceedings are administered by the Centre pursuant to Article 3(d) of the Procedure, which is applicable by virtue of its Article 1(d).

18. The

Forrest-069

The Internet Corporation for Assigned Names and Numbers

ICANN

To All Prospective Applicants for New gTLDs

Since ICANN's founding ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's unique identifier system, one of its foundational principles has been to promote competition and choice in the domain-name marketplace while ensuring Internet security and stability.

We are now engaging in a detailed and lengthy consultation process with all constituencies of the global Internet community as to how best to introduce new gTLDs. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions and bottom-up policy development for more than three years. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. All this policy development work culminated with ICANN's Board of Directors deciding to adopt the community-developed policy at the ICANN Paris meeting in June 2008. You can see a thorough brief of the policy process and outcomes at http://gnso.icann.org/issues/new-gtlds/.

In October 2008, ICANN published the first Draft Applicant Guidebook for public comment. I would like to thank all of the businesses, governments, individuals, communities, and other groups that provided comment. This feedback is an essential element of the implementation planning process for introducing new gTLDs.

Over 1200 pages of feedback, from more than 300 entities, was received. We also received many more verbal responses in various meetings. These comments have been analysed and considered in the context of the GNSO policy recommendations and the ICANN Board resolution to adopt those recommendations. The second version of the Draft Applicant Guidebook has been developed to reflect and address, to the extent possible, the comments received.

As with the first Draft Applicant Guidebook, several explanatory memoranda will accompany this version to enable readers to better understand the implementation work.

In addition to comments on the various elements of the Draft Applicant Guidebook, comments were also received on a number of important broader issues relating to the introduction of new gTLDs, such as the overall demand for new gTLDs, trademark protection, security and stability concerns relating to root zone capacity, and the potential for increased malicious conduct such as phishing and spoofing as a result of new gTLDs. ICANN is taking steps to engage interested parties in dialogue on those issues. These discussions, and progressing the work to develop a final version of the Draft Applicant Guidebook, will be undertaken concurrently. From an operational perspective, it is not resource effective or efficient to stop this work while discussion is taking place on the broader range of issues. Nor is it the intent to launch the process without resolving these overarching issues. Rather, it is the intention to continue engagement with the broader community while working out other implementation details of the program.

I look forward to receiving comments on this latest version of the Draft Applicant Guidebook.

Sincerely,

Paul D Twomey

Paul Twomey
President and CEO

Draft Applicant Guidebook, Version 2

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

ICANN

Table of Contents

Draft Applicant Guidebook, v2

Module 1

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Module 1

Introduction to the gTLD Application Process

***Note for Draft Applicant Guidebook v2:** Where it is possible to provide a concise description of public comment on the first Draft Applicant Guidebook and how it has been considered in creating this draft, footnotes are included in the text. For a detailed analysis of public comment received on the first Draft Applicant Guidebook, see the summary posted at http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf.*

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the application life cycle.

For more about the origins, history and details of ICANN's policies on new gTLDs, please see http://gnso.icann.org/issues/new-gtlds/.

A glossary of relevant terms is included with the Draft Applicant Guidebook (Draft RFP).

Prospective applicants are encouraged to read and become familiar with the content of this entire module as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

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

1.1.1 Application Submission Dates

The application submission period opens at [time] UTC [date].

The application submission period closes at [time] UTC [date].

Applications may be submitted electronically through ICANN's online application system.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the due date.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. In Figure 1-1, the shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be applicable in any given case are also shown. A brief description of each stage follows.

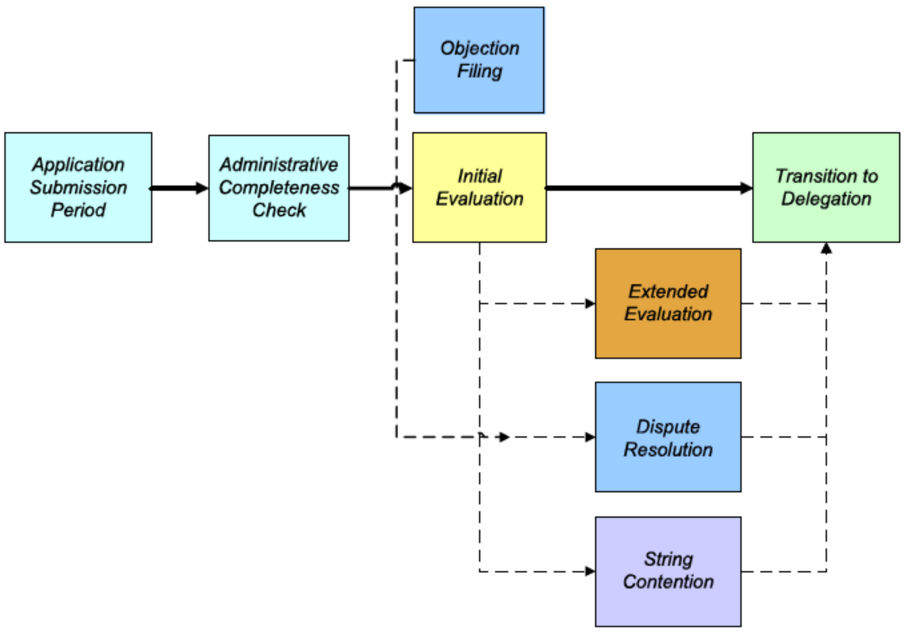

Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, applicants wishing to apply for a new gTLD can become registered users of the online application system.

Through the application system, applicants will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. The supporting documents listed in subsection 1.2.3 of this module must also be submitted through the application system.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Following the close of the application period, applicants can continue to use the application system as a resource to track the progress of their applications, although they may receive communications from ICANN through other means.

- The evaluation fees have been received.

ICANN will post at one time the applications considered complete and ready for evaluation as soon as practical after the close of the application period. Certain questions, including finance and security-related questions, have been designated by ICANN as confidential: applicant responses to these questions will not be posted. Confidential areas are indicated on the set of applicant questions at http://www.icann.org/en/topics/new-gtlds/draft-evaluation-criteria-clean-18feb09-en.pdf.

1.1.2.3 *Initial Evaluation*

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.

There are two main elements of the Initial Evaluation:

1. String reviews (concerning the applied-for gTLD string). String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS.
2. Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Applicant reviews include a determination of whether the applicant has the requisite technical, operational, and financial capability to operate a registry.

At the conclusion of the Initial Evaluation period, ICANN will post a notice of all Initial Evaluation results. Depending on the volume of applications received, ICANN may post such notices in batches over the course of the Initial Evaluation period.

1.1.2.4 *Objection Filing*

filing period. Objections that have been filed during the objection filing period will be addressed in the dispute resolution stage, which is outlined in subsection 1.1.2.6 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during the objection filing period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures (refer to Module 3).

An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

1.1.2.5 Extended Evaluation

Extended Evaluation applies only to certain applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for one additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An Extended Evaluation may also be required if the applied-for gTLD string or one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such reviews are required at the end of the Initial Evaluation period. Evaluators and any applicable experts consulted will

1.1.2.6 Dispute Resolution

Dispute resolution applies only to applicants whose applications are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing period, dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been received by ICANN. Dispute resolution service providers provide the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed may occur, at the discretion of the DRSP.

As a result of the proceeding, either the applicant will prevail (in which case the application c

GAC PRINCIPLES REGARDING NEW gTLDs

Presented by the Governmental Advisory Committee
March 28, 2007

1. Preamble

1.1 The purpose of this document is to identify a set of general public policy principles related to the introduction, delegation and operation of new generic top level domains (gTLDs). They are intended to inform the ICANN Board of the views of the GAC regarding public policy issues concerning new gTLDs and to respond to the provisions of the World Summit on the Information Society (WSIS) process, in particular "*the need for further development of, and strengthened cooperation among, stakeholders for public policies for generic top-level domains (gTLDs)*"[1] and those related to the management of Internet resources and enunciated in the Geneva and Tunis phases of the WSIS.

1.2 These principles shall not prejudice the application of the principle of national sovereignty. The GAC has previously adopted the general principle that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest. The WSIS Declaration of December 2003 also states that "*policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.*"[2]

1.3 A gTLD is a top level domain which is not based on the ISO 3166 two-letter country code list[3]. For the purposes and scope of this document, new gTLDs are defined as any gTLDs added to the Top Level Domain name space after the date of the adoption of these principles by the GAC.

1.4 In setting out the following principles, the GAC recalls ICANN's stated core values as set out in its by-laws:

> *a. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
>
> *b. 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.*
>
> *c. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*

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[1] See paragraph 64 of the WSIS Tunis Agenda, at http://www.itu.int/wsis/docs2/tunis/off/6rev1.html
[2] See paragraph 49.a) of the WSIS Geneva declaration at http://www.itu.int/wsis/docs/geneva/official/dop.html
[3] See: http://www.icann.org/general/glossary.htm#G

d. 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.

e. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

f. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

g. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

h. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

i. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

j. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

k. *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.*

2. Public Policy Aspects related to new gTLDs

When considering the introduction, delegation and operation of new gTLDs, the following public policy principles need to be respected:

Introduction of new gTLDs

2.1 New gTLDs should respect:

a) The provisions of the Universal Declaration of Human Rights[4] which seek to affirm *"fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women"*.

b) The sensitivities regarding terms with national, cultural, geographic and religious significance.

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.

---

[4] See http://www.un.org/Overview/rights.html

2.3 The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs).

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.

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.

2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.

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.

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.

2.8 Applicants should publicly document any support they claim to enjoy from specific communities.

2.9 Applicants should identify how they will limit the need for defensive registrations and minimise cyber-squatting that can result from bad-faith registrations and other abuses of the registration system

Operation of new gTLDs

2.10 A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity and validity of registry information.

2.11 ICANN and a new gTLD operator/registry should establish clear continuity plans for maintaining the resolution of names in the DNS in the event of registry failure.

These plans should be established in coordination with any contingency measures adopted for ICANN as a whole.

2.12 ICANN should continue to ensure that registrants and registrars in new gTLDs have access to an independent appeals process in relation to registry decisions related to pricing changes, renewal procedures, service levels, or the unilateral and significant change of contract conditions.

2.13 ICANN should ensure that any material changes to the new gTLD operations, policies or contract obligations be made in an open and transparent manner allowing for adequate public comment.

2.14 The GAC WHOIS principles are relevant to new gTLDs.

3. Implementation of these Public Policy Principles

3.1 The GAC recalls Article XI, section 2, no. 1 h) of the ICANN Bylaws, which state that the ICANN Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues. Insofar, therefore, as these principles provide guidance on GAC views on the implementation of new gTLDs, they are not intended to substitute for the normal requirement for the ICANN Board to notify the GAC of any proposals for new gTLDs which raise public policy issues.

3.2 ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the interpretation of these principles.

3.3 If individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them.

3.4 The evaluation procedures and criteria for introduction, delegation and operation of new TLDs should be developed and implemented with the participation of all stakeholders.

N.B. The public policy priorities for GAC members in relation to the introduction of Internationalised Domain Name TLDs (IDN TLDs) will be addressed separately by the GAC.

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Forrest-071

Convention on the Rights of Persons with Disabilities and Optional Protocol

UNITED NATIONS

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Preamble

The States Parties to the present Convention,

(*a*) *Recalling* the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(*b*) *Recognizing* that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

(*c*) *Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

(*d*) *Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

(*e*) *Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(*f*) *Recognizing* the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

(*g*) *Emphasizing* the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development, (*h*) *Recognizing also* that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(*i*) *Recognizing further* the diversity of persons with disabilities,

(*j*) *Recognizing* the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(*k*) *Concerned* that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(*l*) *Recognizing* the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

(*m*) *Recognizing* the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(*n*) *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(*o*) *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(*p*) *Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(*q*) *Recognizing* that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

(*r*) *Recognizing* that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

(*s*) *Emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

(*t*) *Highlighting* the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

(*u*) *Bearing in mind* that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

(*v*) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(*w*) *Realizing* that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

(*x*) *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(*y*) *Convinced* that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1
Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2
Definitions

For the purposes of the present Convention:

“Communication” includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

“Language” includes spoken and signed languages and other forms of non spoken languages;

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3
General principles

The principles of the present Convention shall be:

(*a*) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(*b*) Non-discrimination;

(*c*) Full and effective participation and inclusion in society;

(*d*) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(*e*) Equality of opportunity;

(*f*) Accessibility;

(*g*) Equality between men and women;

(*h*) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4
General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(*a*) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(*b*) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(*c*) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(*d*) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(*e*) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(*f*) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(*g*) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(*h*) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(*i*) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the

human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5
Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6
Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7
Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8
Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

(*a*) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(*b*) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(*c*) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(*a*) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(*b*) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(*c*) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(*d*) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9
Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(*a*) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(*b*) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

(*a*) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

(*b*) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

(*c*) To provide training for stakeholders on accessibility issues facing persons with disabilities;

(*d*) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(*e*) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

(*f*) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

(*g*) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(*h*) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10
Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11
Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12
Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The

safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13
Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14
Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. 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 or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16
Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17
Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18
Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

(*a*) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(*b*) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(*c*) Are free to leave any country, including their own;

(*d*) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19
Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(*a*) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(*b*) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(*c*) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20
Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(*a*) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(*b*) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(*c*) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(*d*) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21
Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

(*a*) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

(*b*) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

(*c*) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

(*d*) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

(*e*) Recognizing and promoting the use of sign languages.

Article 22
Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23
Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(*a*) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(*b*) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(*c*) Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24
Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(*a*) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(*b*) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(*c*) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

(*a*) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(*b*) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(*c*) Reasonable accommodation of the individual's requirements is provided;

(*d*) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(*e*) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(*a*) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(*b*) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(*c*) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25
Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(*a*) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(*b*) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(*c*) Provide these health services as close as possible to people’s own communities, including in rural areas;

(*d*) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(*e*) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(*f*) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26
Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(*a*) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(*b*) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27
Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(*a*) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(*b*) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(*c*) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(*d*) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(*e*) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(*f*) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business;

(*g*) Employ persons with disabilities in the public sector;

(*h*) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(*i*) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(*j*) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(*k*) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28
Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(*a*) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(*b*) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(*c*) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

(*d*) To ensure access by persons with disabilities to public housing programmes;

(*e*) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29
Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(*a*) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(*b*) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30
Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(*a*) Enjoy access to cultural materials in accessible formats;

(*b*) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(*c*) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(*a*) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(*b*) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(*c*) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(*d*) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(*e*) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31
Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

(*a*) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(*b*) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of

States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32
International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

(*a*) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(*b*) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(*c*) Facilitating cooperation in research and access to scientific and technical knowledge;

(*d*) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33
National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34
Committee on the Rights of Persons with Disabilities

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall

address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six 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 six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. 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 Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee’s responsibilities.

13. The members of the Committee 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 35
Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress

made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36
Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37
Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38
Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(*a*) The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(*b*) The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39
Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40
Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

2. No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41
Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42
Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43
Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44
Regional integration organizations

1. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal

confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to “States Parties” in the present Convention shall apply to such organizations within the limits of their competence.

3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45
Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46
Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 47
Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of

the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48
Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49
Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The States Parties to the present Protocol have agreed as follows:

Article 1

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;
(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
(e) It is manifestly ill-founded or not sufficiently substantiated; or when
(f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol.

Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be

submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

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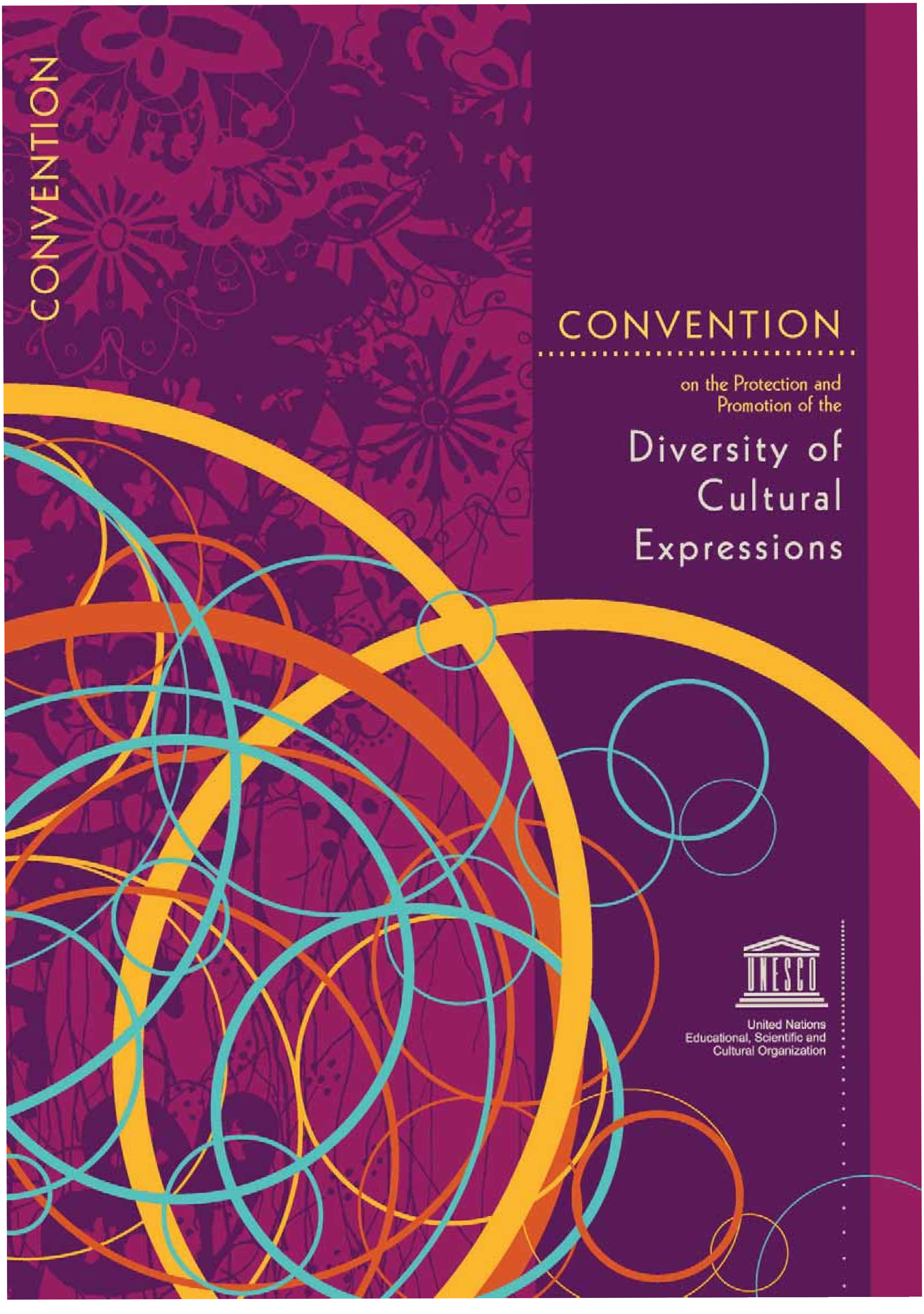

CONVENTION

CONVENTION

on the Protection and
Promotion of the

Diversity of Cultural Expressions

United Nations
Educational, Scientific and
Cultural Organization

CONVENTION

on the Protection and Promotion of the Diversity of Cultural Expressions

Paris, 20 October 2005

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005 at its 33rd session,

Affirming that cultural diversity is a defining characteristic of humanity,

Conscious that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,

Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations,

Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels,

Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments,

Emphasizing the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication,

Taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity,

Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion,

Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment, *Emphasizing* the importance of culture for social cohesion in general, and in particular its potential for the enhancement of the status and role of women in society,

Being aware that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures,

Reaffirming that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies,

Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values,

Recalling that linguistic diversity is a fundamental element of cultural diversity, and *reaffirming* the fundamental role that education plays in the protection and promotion of cultural expressions,

Taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development,

Emphasizing the vital role of cultural interaction and creativity, which nurture and renew cultural expressions and enhance the role played by those involved in the development of culture for the progress of society at large,

Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,

Being convinced that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value,

Noting that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries,

Being aware of UNESCO's specific mandate to ensure respect for the diversity of cultures and to recommend such international agreements as may be necessary to promote the free flow of ideas by word and image,

Referring to the provisions of the international instruments adopted by UNESCO relating to cultural diversity and the exercise of cultural rights, and in particular the Universal Declaration on Cultural Diversity of 2001,

Adopts this Convention on 20 October 2005.

I. Objectives and guiding principles

Article 1 – OBJECTIVES

The objectives of this Convention are:

(a) to protect and promote the diversity of cultural expressions;

(b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;

(c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;

(d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;

(e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;

(f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;

(g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;

(h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;

(i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

Article 2 – GUIDING PRINCIPLES

1. Principle of respect for human rights and fundamental freedoms

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

2. Principle of sovereignty

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.

3. Principle of equal dignity of and respect for all cultures

The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

4. Principle of international solidarity and cooperation
International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.

5. Principle of the complementarity of economic and cultural aspects of development
Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy.

6. Principle of sustainable development
Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.

7. Principle of equitable access
Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.

8. Principle of openness and balance
When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention.

II. Scope of application

Article 3 – SCOPE OF APPLICATION

This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.

III. Definitions

Article 4 – DEFINITIONS

For the purposes of this Convention, it is understood that:

1. Cultural diversity
"Cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

2. Cultural content
"Cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.

3. Cultural expressions
"Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.

4. Cultural activities, goods and services
"Cultural activities, goods and services" refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.

5. Cultural industries
"Cultural industries" refers to industries producing and distributing cultural goods or services as defined in paragraph 4 above.

6. Cultural policies and measures
"Cultural policies and measures" refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

7. Protection
"Protection" means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions.

"Protect" means to adopt such measures.

8. Interculturality
"Interculturality" refers to the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect.

IV. Rights and obligations of Parties

Article 5 – GENERAL RULE REGARDING RIGHTS AND OBLIGATIONS

1. The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

2. When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.

Article ⑥ – RIGHTS OF PARTIES AT THE NATIONAL LEVEL

1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.

2. Such measures may include the following:

(a) regulatory measures aimed at protecting and promoting diversity of cultural expressions;

(b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services;

(c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services;

(d) measures aimed at providing public financial assistance;

(e) measures aimed at encouraging non profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;

(f) measures aimed at establishing and supporting public institutions, as appropriate;

(g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;

(h) measures aimed at enhancing diversity of the media, including through public service broadcasting.

Article ⑦ – MEASURES TO PROMOTE CULTURAL EXPRESSIONS

1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:

(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.

Article ⑧ – MEASURES TO PROTECT CULTURAL EXPRESSIONS

1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.

3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.

Article 9 – INFORMATION SHARING AND TRANSPARENCY

Parties shall:

(a) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

(b) designate a point of contact responsible for information sharing in relation to this Convention;

(c) share and exchange information relating to the protection and promotion of the diversity of cultural expressions.

Article 10 – EDUCATION AND PUBLIC AWARENESS

Parties shall:

(a) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, *inter alia*, through educational and greater public awareness programmes;

(b) cooperate with other Parties and international and regional organizations in achieving the purpose of this article;

(c) endeavour to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries. These measures should be implemented in a manner which does not have a negative impact on traditional forms of production.

Article 11 – PARTICIPATION OF CIVIL SOCIETY

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.

Article 12 – PROMOTION OF INTERNATIONAL COOPERATION

Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in Articles 8 and 17, notably in order to:

(a) facilitate dialogue among Parties on cultural policy;

(b) enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices;

(c) reinforce partnerships with and among civil society, non governmental organizations and the private sector in fostering and promoting the diversity of cultural expressions;

(d) promote the use of new technologies, encourage partnerships to enhance information sharing and cultural understanding, and foster the diversity of cultural expressions;

(e) encourage the conclusion of co production and co distribution agreements.

Article 13 – INTEGRATION OF CULTURE IN SUSTAINABLE DEVELOPMENT

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

Article 14 – COOPERATION FOR DEVELOPMENT

Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector by, *inter alia*, the following means:

(a) the strengthening of the cultural industries in developing countries through:

  (i) creating and strengthening cultural production and distribution capacities in developing countries;

  (ii) facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services;

  (iii) enabling the emergence of viable local and regional markets;

  (iv) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries;

  (v) providing support for creative work and facilitating the mobility, to the extent possible, of artists from the developing world;

  (vi) encouraging appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film;

(b) capacity building through the exchange of information, experience and expertise, as well as the training of human resources in developing countries, in the public and private sector relating to, *inter alia*, strategic and management capacities, policy development and implementation, promotion and distribution of cultural expressions, small , medium and micro enterprise development, the use of technology, and skills development and transfer;

(c) technology transfer through the introduction of appropriate incentive measures for the transfer of technology and know how, especially in the areas of cultural industries and enterprises;

(d) financial support through:

  (i) the establishment of an International Fund for Cultural Diversity as provided in Article 18;

(ii) the provision of official development assistance, as appropriate, including technical assistance, to stimulate and support creativity;

(iii) other forms of financial assistance such as low interest loans, grants and other funding mechanisms.

Article 15 – COLLABORATIVE ARRANGEMENTS

Parties shall encourage the development of partnerships, between and within the public and private sectors and non profit organizations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions. These innovative partnerships shall, according to the practical needs of developing countries, emphasize the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods and services.

Article 16 – PREFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

Article 17 – INTERNATIONAL COOPERATION IN SITUATIONS OF SERIOUS THREAT TO CULTURAL EXPRESSIONS

Parties shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8.

Article 18 – INTERNATIONAL FUND FOR CULTURAL DIVERSITY

1. An International Fund for Cultural Diversity, hereinafter referred to as “the Fund”, is hereby established.

2. The Fund shall consist of funds in trust established in accordance with the Financial Regulations of UNESCO.

3. The resources of the Fund shall consist of:

(a) voluntary contributions made by Parties;

(b) funds appropriated for this purpose by the General Conference of UNESCO;

(c) contributions, gifts or bequests by other States; organizations and programmes of the United Nations system, other regional or international organizations; and public or private bodies or individuals;

(d) any interest due on resources of the Fund;

(e) funds raised through collections and receipts from events organized for the benefit of the Fund;

(f) any other resources authorized by the Fund’s regulations.

4. The use of resources of the Fund shall be decided by the Intergovernmental Committee on the basis of guidelines determined by the Conference of Parties referred to in Article 22.

5. The Intergovernmental Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by it.

6. No political, economic or other conditions that are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.

7. Parties shall endeavour to provide voluntary contributions on a regular basis towards the implementation of this Convention.

Article 19 – EXCHANGE, ANALYSIS AND DISSEMINATION OF INFORMATION

1. Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion.

2. UNESCO shall facilitate, through the use of existing mechanisms within the Secretariat, the collection, analysis and dissemination of all relevant information, statistics and best practices.

3. UNESCO shall also establish and update a data bank on different sectors and governmental, private and non profit organizations involved in the area of cultural expressions.

4. To facilitate the collection of data, UNESCO shall pay particular attention to capacity building and the strengthening of expertise for Parties that submit a request for such assistance.

5. The collection of information identified in this Article shall complement the information collected under the provisions of Article 9.

V. Relationship to other instruments

Article 20 – RELATIONSHIP TO OTHER TREATIES: MUTUAL SUPPORTIVENESS, COMPLEMENTARITY AND NON-SUBORDINATION

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Article 21 – INTERNATIONAL CONSULTATION AND COORDINATION

Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.

VI. Organs of the Convention

Article 22 – CONFERENCE OF PARTIES

1. A Conference of Parties shall be established. The Conference of Parties shall be the plenary and supreme body of this Convention.

2. The Conference of Parties shall meet in ordinary session every two years, as far as possible, in conjunction with the General Conference of UNESCO. It may meet in extraordinary session if it so decides or if the Intergovernmental Committee receives a request to that effect from at least one third of the Parties.

3. The Conference of Parties shall adopt its own rules of procedure.

4. The functions of the Conference of Parties shall be, *inter alia*:

(a) to elect the Members of the Intergovernmental Committee;

(b) to receive and examine reports of the Parties to this Convention transmitted by the Intergovernmental Committee;

(c) to approve the operational guidelines prepared upon its request by the Intergovernmental Committee;

(d) to take whatever other measures it may consider necessary to further the objectives of this Convention.

Article 23 – INTERGOVERNMENTAL COMMITTEE

1. An Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, hereinafter referred to as “the Intergovernmental Committee”, shall be established within UNESCO. It shall be composed of representatives of 18 States Parties to the Convention, elected for a term of four years by the Conference of Parties upon entry into force of this Convention pursuant to Article 29.

2. The Intergovernmental Committee shall meet annually.

3. The Intergovernmental Committee shall function under the authority and guidance of and be accountable to the Conference of Parties.

4. The Members of the Intergovernmental Committee shall be increased to 24 once the number of Parties to the Convention reaches 50.

5. The election of Members of the Intergovernmental Committee shall be based on the principles of equitable geographical representation as well as rotation.

6. Without prejudice to the other responsibilities conferred upon it by this Convention, the functions of the Intergovernmental Committee shall be:

(a) to promote the objectives of this Convention and to encourage and monitor the implementation thereof;

(b) to prepare and submit for approval by the Conference of Parties, upon its request, the operational guidelines for the implementation and application of the provisions of the Convention;

(c) to transmit to the Conference of Parties reports from Parties to the Convention, together with its comments and a summary of their contents;

(d) to make appropriate recommendations to be taken in situations brought to its attention by Parties to the Convention in accordance with relevant provisions of the Convention, in particular Article 8;

(e) to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums;

(f) to perform any other tasks as may be requested by the Conference of Parties.

7. The Intergovernmental Committee, in accordance with its Rules of Procedure, may invite at any time public or private organizations or individuals to participate in its meetings for consultation on specific issues.

8. The Intergovernmental Committee shall prepare and submit to the Conference of Parties, for approval, its own Rules of Procedure.

Article 24 – UNESCO SECRETARIAT

1. The organs of the Convention shall be assisted by the UNESCO Secretariat.

2. The Secretariat shall prepare the documentation of the Conference of Parties and the Intergovernmental Committee as well as the agenda of their meetings and shall assist in and report on the implementation of their decisions.

VII. Final clauses

Article 25 – SETTLEMENT OF DISPUTES

1. In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation.

2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.

4. Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director General of UNESCO.

Article 26 – RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION BY MEMBER STATES

1. This Convention shall be subject to ratification, acceptance, approval or accession by Member States of UNESCO in accordance with their respective constitutional procedures.

2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director General of UNESCO.

Article 27 – ACCESSION

1. This Convention shall be open to accession by all States not Members of UNESCO but members of the United Nations, or of any of its specialized agencies, that are invited by the General Conference of UNESCO to accede to it.

2. This Convention shall also be open to accession by territories which enjoy full internal self government recognized as such by the United Nations, but which have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.

3. The following provisions apply to regional economic integration organizations:

(a) This Convention shall also be open to accession by any regional economic integration organization, which shall, except as provided below, be fully bound by the provisions of the Convention in the same manner as States Parties;

(b) In the event that one or more Member States of such an organization is also Party to this Convention, the organization and such Member State or States shall decide on their responsibility for the performance of their obligations under this Convention. Such distribution of responsibility shall take effect following completion of the notification procedure described in subparagraph (c). The organization and the Member States shall not be entitled to exercise rights under this Convention concurrently. In addition, regional economic integration organizations, in matters within their competence, shall exercise their rights to vote with a number of votes equal to the number of their Member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa;

(c) A regional economic integration organization and its Member State or States which have agreed on a distribution of responsibilities as provided in subparagraph (b) shall inform the Parties of any such proposed distribution of responsibilities in the following manner:

  (i) in their instrument of accession, such organization shall declare with specificity, the distribution of their responsibilities with respect to matters governed by the Convention;

  (ii) in the event of any later modification of their respective responsibilities, the regional economic integration organization shall inform the depositary of any such proposed modification of their respective responsibilities; the depositary shall in turn inform the Parties of such modification;

(d) Member States of a regional economic integration organization which become Parties to this Convention shall be presumed to retain competence over all matters in respect of which transfers of competence to the organization have not been specifically declared or informed to the depositary;

(e) “Regional economic integration organization” means an organization constituted by sovereign States, members of the United Nations or of any of its specialized agencies, to which those States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to become a Party to it.

4. The instrument of accession shall be deposited with the Director General of UNESCO.

Article 28 – POINT OF CONTACT

Upon becoming Parties to this Convention, each Party shall designate a point of contact as referred to in Article 9.

Article 29 – ENTRY INTO FORCE

1. This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

2. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by Member States of the organization.

Article 30 – FEDERAL OR NON-UNITARY CONSTITUTIONAL SYSTEMS

Recognizing that international agreements are equally binding on Parties regardless of their constitutional systems, the following provisions shall apply to Parties which have a federal or non unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those Parties which are not federal States;

(b) with regard to the provisions of the Convention, the implementation of which comes under the jurisdiction of individual constituent units such as States, counties, provinces, or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform, as necessary, the competent authorities of constituent units such as States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 31 – DENUNCIATION

1. Any Party to this Convention may denounce this Convention.

2. The denunciation shall be notified by an instrument in writing deposited with the Director General of UNESCO.

3. The denunciation shall take effect 12 months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the Party denouncing the Convention until the date on which the withdrawal takes effect.

Article 32 – DEPOSITARY FUNCTIONS

The Director General of UNESCO, as the depositary of this Convention, shall inform the Member States of the Organization, the States not members of the Organization and regional economic integration organizations referred to in Article 27, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 26 and 27, and of the denunciations provided for in Article 31.

Article 33 – AMENDMENTS

1. A Party to this Convention may, by written communication addressed to the Director General, propose amendments to this Convention. The Director General shall circulate such communication to all Parties. If, within six months from the date of dispatch of the communication, no less than one half of the Parties reply favourably to the request, the Director General shall present such proposal to the next session of the Conference of Parties for discussion and possible adoption.

2. Amendments shall be adopted by a two thirds majority of Parties present and voting.

3. Once adopted, amendments to this Convention shall be submitted to the Parties for ratification, acceptance, approval or accession.

4. For Parties which have ratified, accepted, approved or acceded to them, amendments to this Convention shall enter into force three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the Parties. Thereafter, for each Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.

5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 23 concerning the number of Members of the Intergovernmental Committee. These amendments shall enter into force at the time they are adopted.

6. A State or a regional economic integration organization referred to in Article 27 which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered to be:

(a) Party to this Convention as so amended; and

(b) a Party to the unamended Convention in relation to any Party not bound by the amendments.

Article 34 – AUTHORITATIVE TEXTS

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, all six texts being equally authoritative.

Article 35 – REGISTRATION

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director General of UNESCO.

Annex

Conciliation Procedure

Article ① – CONCILIATION COMMISSION

A Conciliation Commission shall be created upon the request of one of the Parties to the dispute. The Commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article ② – MEMBERS OF THE COMMISSION

In disputes between more than two Parties, Parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more Parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article ③ – APPOINTMENTS

If any appointments by the Parties are not made within two months of the date of the request to create a Conciliation Commission, the Director General of UNESCO shall, if asked to do so by the Party that made the request, make those appointments within a further two month period.

Article ④ – PRESIDENT OF THE COMMISSION

If a President of the Conciliation Commission has not been chosen within two months of the last of the members of the Commission being appointed, the Director General of UNESCO shall, if asked to do so by a Party, designate a President within a further two month period.

Article ⑤ – DECISIONS

The Conciliation Commission shall take its decisions by majority vote of its members. It shall, unless the Parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the Parties shall consider in good faith.

Article ⑥ – DISAGREEMENT

A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.

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CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

Paris, 17 October 2003

MISC/2003/CLT/CH/14

CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

The General Conference of the United Nations Educational, Scientific and Cultural Organization hereinafter referred to as UNESCO, meeting in Paris, from 29 September to 17 October 2003, at its 32nd session,

Referring to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966,

Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development, as underscored in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, in the UNESCO Universal Declaration on Cultural Diversity of 2001, and in the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture,

Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage,

Recognizing that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage,

Being aware of the universal will and the common concern to safeguard the intangible cultural heritage of humanity,

Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity,

Noting the far-reaching impact of the activities of UNESCO in establishing normative instruments for the protection of the cultural heritage, in particular the Convention for the Protection of the World Cultural and Natural Heritage of 1972,

Noting further that no binding multilateral instrument as yet exists for the safeguarding of the intangible cultural heritage,

Considering that existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the intangible cultural heritage,

Considering the need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding,

Considering that the international community should contribute, together with the States Parties to this Convention, to the safeguarding of such heritage in a spirit of cooperation and mutual assistance, *Recalling* UNESCO's programmes relating to the intangible cultural heritage, in particular the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity,

Considering the invaluable role of the intangible cultural heritage as a factor in bringing human beings closer together and ensuring exchange and understanding among them,

Adopts this Convention on this seventeenth day of October 2003.

I. General provisions

Article 1 – Purposes of the Convention

The purposes of this Convention are:

(a) to safeguard the intangible cultural heritage;

(b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.

Article 2 – Definitions

For the purposes of this Convention,

1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.

3. “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

4. “States Parties” means States which are bound by this Convention and among which this Convention is in force.

5. This Convention applies mutatis mutandis to the territories referred to in Article 33 which become Parties to this Convention in accordance with the conditions set out in that Article. To that extent the expression “States Parties” also refers to such territories.

Article 3 – Relationship to other international instruments

Nothing in this Convention may be interpreted as:

(a) altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated; or

(b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.

II. Organs of the Convention

Article 4 – General Assembly of the States Parties

1. A General Assembly of the States Parties is hereby established, hereinafter referred to as “the General Assembly”. The General Assembly is the sovereign body of this Convention.

2. The General Assembly shall meet in ordinary session every two years. It may meet in extraordinary session if it so decides or at the request either of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage or of at least one-third of the States Parties.

3. The General Assembly shall adopt its own Rules of Procedure.

Article 5 – Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage

1. An Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, hereinafter referred to as “the Committee”, is hereby established within UNESCO. It shall be composed of representatives of 18 States Parties, elected by the States Parties meeting in General Assembly, once this Convention enters into force in accordance with Article 34.

2. The number of States Members of the Committee shall be increased to 24 once the number of the States Parties to the Convention reaches 50.

Article 6 – Election and terms of office of States Members of the Committee

1. The election of States Members of the Committee shall obey the principles of equitable geographical representation and rotation.

2. States Members of the Committee shall be elected for a term of four years by States Parties to the Convention meeting in General Assembly.

3. However, the term of office of half of the States Members of the Committee elected at the first election is limited to two years. These States shall be chosen by lot at the first election.

4. Every two years, the General Assembly shall renew half of the States Members of the Committee.

5. It shall also elect as many States Members of the Committee as required to fill vacancies.

6. A State Member of the Committee may not be elected for two consecutive terms.

7. States Members of the Committee shall choose as their representatives persons who are qualified in the various fields of the intangible cultural heritage.

Article 7 – Functions of the Committee

Without prejudice to other prerogatives granted to it by this Convention, the functions of the Committee shall be to:

(a) promote the objectives of the Convention, and to encourage and monitor the implementation thereof;

(b) provide guidance on best practices and make recommendations on measures for the safeguarding of the intangible cultural heritage;

(c) prepare and submit to the General Assembly for approval a draft plan for the use of the resources of the Fund, in accordance with Article 25;

(d) seek means of increasing its resources, and to take the necessary measures to this end, in accordance with Article 25;

(e) prepare and submit to the General Assembly for approval operational directives for the implementation of this Convention;

(f) examine, in accordance with Article 29, the reports submitted by States Parties, and to summarize them for the General Assembly;

(g) examine requests submitted by States Parties, and to decide thereon, in accordance with objective selection criteria to be established by the Committee and approved by the General Assembly for:

(i) inscription on the lists and proposals mentioned under Articles 16, 17 and 18;

(ii) the granting of international assistance in accordance with Article 22.

Article 8 – Working methods of the Committee

1. The Committee shall be answerable to the General Assembly. It shall report to it on all its activities and decisions.

2. The Committee shall adopt its own Rules of Procedure by a two-thirds majority of its Members.

3. The Committee may establish, on a temporary basis, whatever ad hoc consultative bodies it deems necessary to carry out its task.

4. The Committee may invite to its meetings any public or private bodies, as well as private persons, with recognized competence in the various fields of the intangible cultural heritage, in order to consult them on specific matters.

Article 9 – Accreditation of advisory organizations

1. The Committee shall propose to the General Assembly the accreditation of non-governmental organizations with recognized competence in the field of the intangible cultural heritage to act in an advisory capacity to the Committee.

2. The Committee shall also propose to the General Assembly the criteria for and modalities of such accreditation.

Article 10 – The Secretariat

1. The Committee shall be assisted by the UNESCO Secretariat.

2. The Secretariat shall prepare the documentation of the General Assembly and of the Committee, as well as the draft agenda of their meetings, and shall ensure the implementation of their decisions.

III. Safeguarding of the intangible cultural heritage at the national level

Article 11 – Role of States Parties

Each State Party shall:

(a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;

(b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.

Article 12 – Inventories

1. To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.

2. When each State Party periodically submits its report to the Committee, in accordance with Article 29, it shall provide relevant information on such inventories.

Article 13 – Other measures for safeguarding

To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to:

- (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;
- (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;
- (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;
- (d) adopt appropriate legal, technical, administrative and financial measures aimed at:
  - (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof;
  - (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;
  - (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

Article 14 – Education, awareness-raising and capacity-building

Each State Party shall endeavour, by all appropriate means, to:

- (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through:
  - (i) educational, awareness-raising and information programmes, aimed at the general public, in particular young people;
  - (ii) specific educational and training programmes within the communities and groups concerned;

    - (iii) capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and
    - (iv) non-formal means of transmitting knowledge;

- (b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this Convention;
- (c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.

Article 15 – Participation of communities, groups and individuals

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

IV. Safeguarding of the intangible cultural heritage at the international level

Article 16 – Representative List of the Intangible Cultural Heritage of Humanity

1. In order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity, the Committee, upon the proposal of the States Parties concerned, shall establish, keep up to date and publish a Representative List of the Intangible Cultural Heritage of Humanity.

2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this Representative List.

Article 17 – List of Intangible Cultural Heritage in Need of Urgent Safeguarding

1. With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.

2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this List.

3. In cases of extreme urgency – the objective criteria of which shall be approved by the General Assembly upon the proposal of the Committee – the Committee may inscribe an item of the heritage concerned on the List mentioned in paragraph 1, in consultation with the State Party concerned.

Article 18 – Programmes, projects and activities for the safeguarding of the intangible cultural heritage

1. On the basis of proposals submitted by States Parties, and in accordance with criteria to be defined by the Committee and approved by the General Assembly, the Committee shall periodically select and promote national, subregional and regional programmes, projects and

activities for the safeguarding of the heritage which it considers best reflect the principles and objectives of this Convention, taking into account the special needs of developing countries.

2. To this end, it shall receive, examine and approve requests for international assistance from States Parties for the preparation of such proposals.

3. The Committee shall accompany the implementation of such projects, programmes and activities by disseminating best practices using means to be determined by it.

V. International cooperation and assistance

Article 19 – Cooperation

1. For the purposes of this Convention, international cooperation includes, inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage.

2. Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.

Article 20 – Purposes of international assistance

International assistance may be granted for the following purposes:

(a) the safeguarding of the heritage inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding;

(b) the preparation of inventories in the sense of Articles 11 and 12;

(c) support for programmes, projects and activities carried out at the national, subregional and regional levels aimed at the safeguarding of the intangible cultural heritage;

(d) any other purpose the Committee may deem necessary.

Article 21 – Forms of international assistance

The assistance granted by the Committee to a State Party shall be governed by the operational directives foreseen in Article 7 and by the agreement referred to in Article 24, and may take the following forms:

(a) studies concerning various aspects of safeguarding;

(b) the provision of experts and practitioners;

(c) the training of all necessary staff;

(d) the elaboration of standard-setting and other measures;

(e) the creation and operation of infrastructures;

(f) the supply of equipment and know-how;

(g) other forms of financial and technical assistance, including, where appropriate, the granting of low-interest loans and donations.

Article 22 – Conditions governing international assistance

1. The Committee shall establish the procedure for examining requests for international assistance, and shall specify what information shall be included in the requests, such as the measures envisaged and the interventions required, together with an assessment of their cost.

2. In emergencies, requests for assistance shall be examined by the Committee as a matter of priority.

3. In order to reach a decision, the Committee shall undertake such studies and consultations as it deems necessary.

Article 23 – Requests for international assistance

1. Each State Party may submit to the Committee a request for international assistance for the safeguarding of the intangible cultural heritage present in its territory.

2. Such a request may also be jointly submitted by two or more States Parties.

3. The request shall include the information stipulated in Article 22, paragraph 1, together with the necessary documentation.

Article 24 – Role of beneficiary States Parties

1. In conformity with the provisions of this Convention, the international assistance granted shall be regulated by means of an agreement between the beneficiary State Party and the Committee.

2. As a general rule, the beneficiary State Party shall, within the limits of its resources, share the cost of the safeguarding measures for which international assistance is provided.

3. The beneficiary State Party shall submit to the Committee a report on the use made of the assistance provided for the safeguarding of the intangible cultural heritage.

VI. Intangible Cultural Heritage Fund

Article 25 – Nature and resources of the Fund

1. A “Fund for the Safeguarding of the Intangible Cultural Heritage”, hereinafter referred to as “the Fund”, is hereby established.

2. The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.

3. The resources of the Fund shall consist of:

   (a) contributions made by States Parties;

   (b) funds appropriated for this purpose by the General Conference of UNESCO;

   (c) contributions, gifts or bequests which may be made by:

      (i) other States;

      (ii) organizations and programmes of the United Nations system, particularly the United Nations Development Programme, as well as other international organizations;

      (iii) public or private bodies or individuals;

   (d) any interest due on the resources of the Fund;

   (e) funds raised through collections, and receipts from events organized for the benefit of the Fund;

   (f) any other resources authorized by the Fund's regulations, to be drawn up by the Committee.

4. The use of resources by the Committee shall be decided on the basis of guidelines laid down by the General Assembly.

5. The Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by the Committee.

6. No political, economic or other conditions which are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.

Article 26 – Contributions of States Parties to the Fund

1. Without prejudice to any supplementary voluntary contribution, the States Parties to this Convention undertake to pay into the Fund, at least every two years, a contribution, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly. This decision of the General Assembly shall be taken by a majority of the States Parties present and voting which have not made the declaration referred to in paragraph 2 of this Article. In no case shall the contribution of the State Party exceed 1% of its contribution to the regular budget of UNESCO.

2. However, each State referred to in Article 32 or in Article 33 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance, approval or accession, that it shall not be bound by the provisions of paragraph 1 of this Article.

3. A State Party to this Convention which has made the declaration referred to in paragraph 2 of this Article shall endeavour to withdraw the said declaration by notifying the Director-General of UNESCO. However, the withdrawal of the declaration shall not take

effect in regard to the contribution due by the State until the date on which the subsequent session of the General Assembly opens.

4. In order to enable the Committee to plan its operations effectively, the contributions of States Parties to this Convention which have made the declaration referred to in paragraph 2 of this Article shall be paid on a regular basis, at least every two years, and should be as close as possible to the contributions they would have owed if they had been bound by the provisions of paragraph 1 of this Article.

5. Any State Party to this Convention which is in arrears with the payment of its compulsory or voluntary contribution for the current year and the calendar year immediately preceding it shall not be eligible as a Member of the Committee; this provision shall not apply to the first election. The term of office of any such State which is already a Member of the Committee shall come to an end at the time of the elections provided for in Article 6 of this Convention.

Article 27 – Voluntary supplementary contributions to the Fund

States Parties wishing to provide voluntary contributions in addition to those foreseen under Article 26 shall inform the Committee, as soon as possible, so as to enable it to plan its operations accordingly.

Article 28 – International fund-raising campaigns

The States Parties shall, insofar as is possible, lend their support to international fund-raising campaigns organized for the benefit of the Fund under the auspices of UNESCO.

VII. Reports

Article 29 – Reports by the States Parties

The States Parties shall submit to the Committee, observing the forms and periodicity to be defined by the Committee, reports on the legislative, regulatory and other measures taken for the implementation of this Convention.

Article 30 – Reports by the Committee

1. On the basis of its activities and the reports by States Parties referred to in Article 29, the Committee shall submit a report to the General Assembly at each of its sessions.

2. The report shall be brought to the attention of the General Conference of UNESCO.

VIII. Transitional clause

Article 31 – Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity

1. The Committee shall incorporate in the Representative List of the Intangible Cultural Heritage of Humanity the items proclaimed “Masterpieces of the Oral and Intangible Heritage of Humanity” before the entry into force of this Convention.

2. The incorporation of these items in the Representative List of the Intangible Cultural Heritage of Humanity shall in no way prejudge the criteria for future inscriptions decided upon in accordance with Article 16, paragraph 2.

3. No further Proclamation will be made after the entry into force of this Convention.

IX. Final clauses

Article 32 – Ratification, acceptance or approval

1. This Convention shall be subject to ratification, acceptance or approval by States Members of UNESCO in accordance with their respective constitutional procedures.

2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General of UNESCO.

Article 33 – Accession

1. This Convention shall be open to accession by all States not Members of UNESCO that are invited by the General Conference of UNESCO to accede to it.

2. This Convention shall also be open to accession by territories which enjoy full internal self-government recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.

3. The instrument of accession shall be deposited with the Director-General of UNESCO.

Article 34 – Entry into force

This Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

Article 35 – Federal or non-unitary constitutional systems

The following provisions shall apply to States Parties which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this Convention, the implementation of which comes under the jurisdiction of individual constituent States, countries, provinces or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 36 – Denunciation

1. Each State Party may denounce this Convention.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of UNESCO.

3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the denouncing State Party until the date on which the withdrawal takes effect.

Article 37 – Depositary functions

The Director-General of UNESCO, as the Depositary of this Convention, shall inform the States Members of the Organization, the States not Members of the Organization referred to in Article 33, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 32 and 33, and of the denunciations provided for in Article 36.

Article 38 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the General Assembly for discussion and possible adoption.

2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.

3. Once adopted, amendments to this Convention shall be submitted for ratification, acceptance, approval or accession to the States Parties.

4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two-thirds of the States Parties. Thereafter, for each State Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that State Party of its instrument of ratification, acceptance, approval or accession.

5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 5 concerning the number of States Members of the Committee. These amendments shall enter into force at the time they are adopted.

6. A State which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered:

(a) as a Party to this Convention as so amended; and

(b) as a Party to the unamended Convention in relation to any State Party not bound by the amendments.

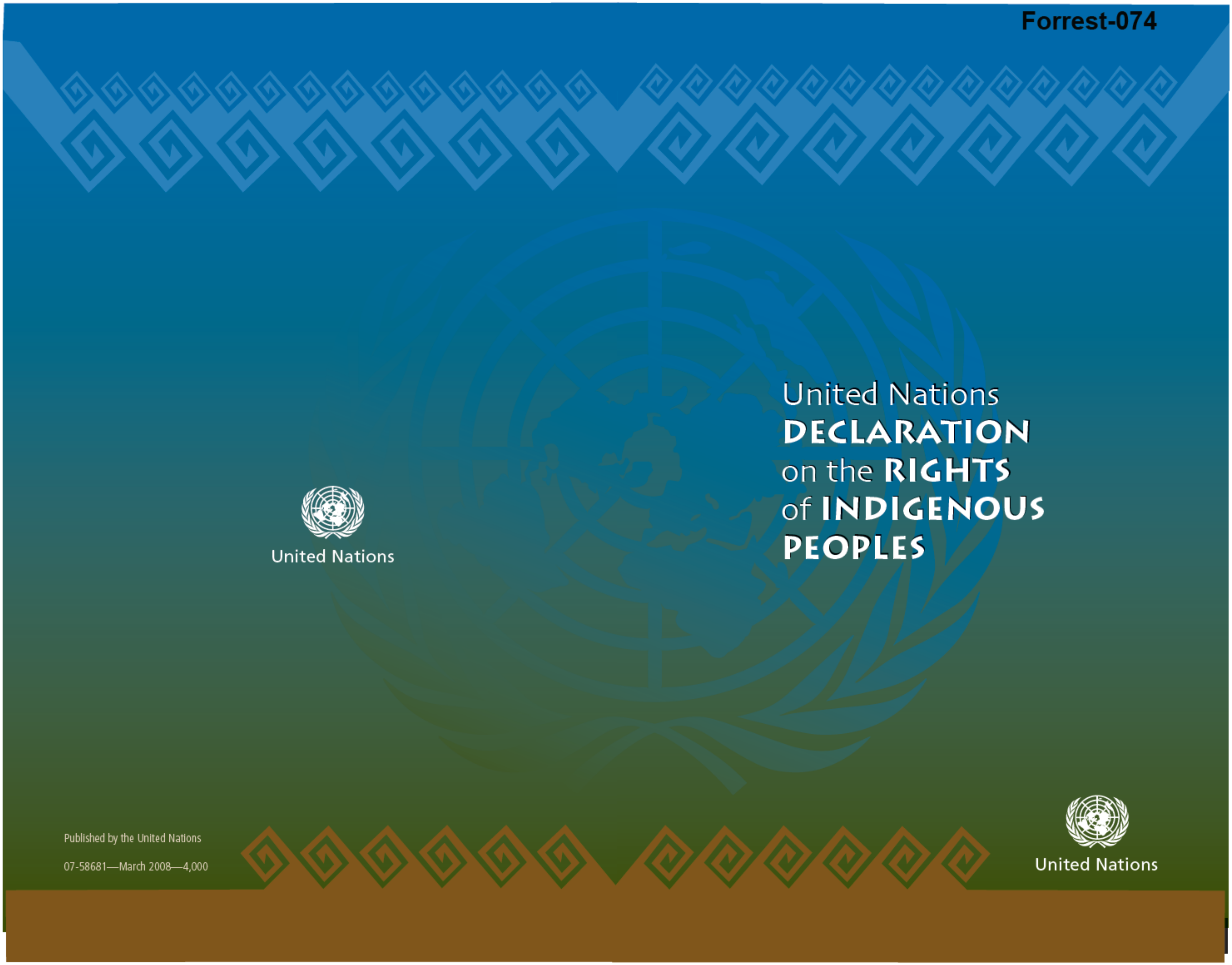
Article 39 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Article 40 – Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.

Forrest-074



United Nations

United Nations **DECLARATION** on the **RIGHTS** of **INDIGENOUS PEOPLES**

Published by the United Nations

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United Nations

United Nations Declaration
on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

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[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A.

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

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[2] See resolution 2200 A (XXI), annex.

[3] A/CONF.157/24 (Part I), chap. III.

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to

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[4] Resolution 217 A (III).

their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources

equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law

and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Forrest-075

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ICANN Resolutions (/resolutions) » 2011-06-20 - Approval of the New gTLD Program

Important note: The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

Board authorizes the President and CEO to implement the new gTLD program as described below and adopts the reasons why the GAC advice was not followed, without prejudice to the rights or obligations of GAC members with regard to public policy issues falling within their responsibilities.

Category:

gTLDs

Meeting Date:

Mon, 20 Jun 2011

Resolution Number:

2011.06.20.01, 2011.06.20.02, 2011.06.20.03

URL for Resolution:

http://www.icann.org/en/minutes/resolutions-20jun11-en.htm#1 (http://www.icann.org/en/minutes/resolutions-20jun11-en.htm#1)

Status:

Ongoing

Implementation Actions:

- Implement the new gTLD program with above-described elements.
    - Responsible entity: President and CEO
    - Due date: None provided

Whereas, on 6 September 2007, the GNSO Council approved by a supermajority vote a motion supporting the 19 recommendations, as a whole, as set out in the Final Report of the ICANN Generic Names Supporting Organisation on the Introduction of New Generic Top-Level Domains going forward to the ICANN Board <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm)>.

Whereas, the Board instructed staff to review the GNSO recommendations and determine whether they were capable of implementation, and staff engaged international technical, operational and legal expertise to support the implementation of the policy recommendations and developed implementation plans for the GNSO's policy recommendations.

Whereas, on 26 June 2008, the Board adopted the GNSO policy recommendations for the introduction of new gTLDs and directed staff to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the board and community to approve before the launching the new gTLD application process <http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171 (http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171)>.

Whereas, staff has made implementation details publicly available in the form of drafts of the gTLD Applicant Guidebook and supporting materials for public discussion and comment.

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 (http://www.icann.org/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

<http://www.icann.ord/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf (http://www.icann.org/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf)> [PDF, 103 KB].

Whereas, the ICANN 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 has fulfilled the commitments detailed in the Affirmation <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm (http://www.icann.org/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 (http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm)> includes updates resulting from public comment and from recent GAC advice.

Whereas, the draft New gTLDs Communications Plan <http://www.icann.org/en/topics/new-gtlds/new-gtlds-communications-plan-30may11-en.pdf (http://www.icann.org/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 geographic regions.

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

Resolved (2011.06.20.01), the Board authorizes the President and CEO to implement the new gTLD 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 (http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm)>, subject to the revisions agreed to with the GAC on 19 June 2011, including: (a) deletion of text in Module 3 concerning GAC 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 and GAC 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 (http://www.icann.org/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 recommendation for a fee waiver corresponding to 76 percent of the $185,000 USD evaluation fee, (b) consideration of recommendations of the ALAC and GNSO 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, and recommendations from the GNSO 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 f h dli t f l f hi t i ti t f i ti TLD h t t ti i t i th TLD

(http://www.icann.org/en/minutes/timeline-new-gtld-program-20jun11.pdf)> [PDF, 167 KB], elements of which include the New gTLD application window opening on 12 January 2012 and closing on 12 April 2012, with the New gTLD Communications Plan beginning immediately.

Resolved (2011.06.20.02), the Board and the GAC have completed good faith consultations in a timely and efficient manner under the ICANN Bylaws, Article XI, Section 2.j. As the Board and the GAC were not able to reach a mutually acceptable solution on a few remaining issues, pursuant to ICANN 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's Board and the GAC <http://www.icann.ord/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf (http://www.icann.org/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf)> [PDF, 103 KB] the reasons why the GAC advice was not followed. The Board's statement is without prejudice to the rights or obligations of GAC 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 community, including the members of the GAC, for the extraordinary work it has invested in crafting the New gTLD Program in furtherance of ICANN's mission and core values, and counts on the community's ongoing support in executing and reviewing the program.

Rationale for Resolution:

The rationale is available at: Rationale for Approval of the Launch of the New gTLD Program (http://www.icann.org/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf) [PDF, 624 KB]

Other Related Resolutions:

- Resolutions 2008.06.26.02-2008.06.26.03, adopting the GNSO policy recommendations for the introduction of new gTLDs, available at: http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171 (https://access.icann.org/en/minutes/,DanaInfo=www.icann.org+resolutions-26jun08.htm#_Toc76113171)

Rationale: Remaining areas of difference between ICANN's Board and Governmental Advisory Committee regarding implementation of the New gTLD Program

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

20 June 2011

The GAC Indicative Scorecard <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> identified twelve issue areas for discussion between ICANN's Board and GAC; those were sub-divided into 80 topics. Each topic represented a potential difference between the then-proposed implementation of new gTLDs and the GAC position. Each topic required at least discussion and clarification. In many cases substantive changes in the program were requested.

A remarkable amount of work and compromise (more than a good faith effort) has reduced the areas of disagreement down to a few. This document is intended to capture those differences and explain the ICANN Board reasons for deciding on implementation characteristics that differ from the GAC advice.

It is important to note the complexity associated with the number of issues and the amount of nuance involved, combined with many face-to-face consultations and teleconferences. In this document, the Board identifies the key differences with the intent to identify them all but recognizes there might remain other differences in detail. Additionally, the Board recognizes that the Board and GAC agree there is work left to do on certain implementation items. These are not areas of disagreement; they are areas where the Board and GAC agree on future work, either prior to launch or post-launch. These areas are listed below.

The rationale summarizes and builds on earlier documents from the Board to the GAC <http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf>.

Remaining areas of difference and Board rationale for decision:

Rationale: Remaining areas of difference between ICANN's Board and Governmental Advisory Committee regarding implementation of the New gTLD Program

a. Requirement for evidence of trademark "use"

<u>GAC Communication: Letter of 26 May 2011</u>

"The GAC maintains its advice to the Board that the requirement to provide evidence of use should be removed because it is inconsistent with trademark law in many jurisdictions, burdensome for business, disproportionate and discriminatory. The GAC notes that the principal reason the Board disagrees … is that this requirement would in its view deter gaming.

"In view of the Board's concern about this as an overriding risk that outweighs the concerns raised by the GAC if this requirement were to be imposed, the GAC asks the Board to provide a written document for the GAC's consideration by 8 June 2011, so that there is opportunity for GAC review before meeting in Singapore, which:

"a) provides a detailed, evidence-supported analysis of the gaming threat at the second level;

"b) explains why the Board believes that this requirement is the only practicable solution for addressing this threat and would successfully deter the practice of gaming;

"c) provides an analysis of the likely impact of this requirement on legitimate mark holders who would be rendered ineligible for inclusion in the Clearinghouse if this requirement is imposed;

"d) assesses the costs to business of having to furnish evidence of proof;

"e) explains the resources which ICANN will expect to be deployed by the Clearinghouse for the rigorous examination of proof of evidence.

b. Burdens of proof for URS and PDDRP

   GAC Communication: Letter of 26 May 2011
   "The GAC's advice to the Board that it reduce the burden of proof to the standard usual applicable to civil law (iv) is unchanged on the grounds that the GAC believes that this would constitute a significant reduction in the burden on business without compromising the effectiveness of the URS and the PDDRP."

   Board rationale
   The Board understands the GAC's clear advice. Both standards, preponderance of the evidence and clear and convincing evidence, are, contrary to the GAC claim, civil standards, not criminal standards and the Board believes that each applied as conditions warrant. In these cases, after significant balancing and consideration of public comment on both sides, it was decided to apply the higher standard. URS provides an extraordinary remedy – to take down names rapidly in clear-cut cases of abuse only. Similarly, the seriousness of the potential remedy in the PDDRP, potential termination of a registry agreement, warrants additional scrutiny beyond a 51% certainty of registry liability. This seriousness of the allegation involved in the PDDRP, addressing the egregious and systematic nature of the registry behavior supports the need for the clear and convincing burden of proof.

c. IOC / Red Cross requests

   GAC Communication: Letter of 26 May 2011
   "The GAC supports ICANN's continued application of very tightly drawn criteria for inclusion on the reserved names list, and the GAC is unaware of any other international non-profit organization that enjoys the level of

second level, e.g., olympic.taxis and redcross.salt.

The Board asked and received answers on this issue and the topic was discussed. The Board agrees that no other organization (or very few others) would qualify under the proposed criteria. Many organizations face these same issues. There are protections in the Guidebook that both organizations may utilize: objections and GAC Advice at the top level; URS, Sunrise, Trademark Claims, thick Whois, and PDDRP at the second level. Even with the extraordinary recognition these renowned organizations have earned, the Board is not sure a separate set of protections should be afforded them. In addition, such a reservation would unfairly penalize many entities with legitimate interests in these names: Olympic Paint, Olympic Airlines, Red Cross Salt, among many others.

There is a concern that what is being requested is creation of rights protection mechanisms on an ad hoc basis without addressing policy concerns. There has been a tremendous amount of work and community discussion about the rights protection mechanism to be included in the new gTLD program. And, while these two organizations have asked for special reserved protection, no community discussions have involved such a level of protection for special cases.

d. Need to show "affirmative" conduct in PDDRP

GAC Communication: Letter of 26 May 2011
"In PDDRP paragraph 6.1, the GAC advises that the word 'affirmative' be ***deleted***.

"A complainant must assert and prove, by clear and convincing evidence, that the registry operator's ***affirmative*** conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant's mark, causes or materially contributes to the gTLD doing one of the following:

i. taking unfair advantage of the distinctive character or the reputation malicious activity. Given the penalties in PDDRP can be severe and are directed at the registry and not the registrant, the standard was written to require affirmative conduct.

2. Post delegation disputes: effect of administrative decisions

   Brief Statement of Difference
   The GAC wants ICANN to respect any "final legally binding decision", which the GAC notes would include "an administrative decision." ICANN has committed to respect orders of Courts only.

   GAC Communication: Letter of 26 May 2011
   "According to the GACs previous input, the GAC also wants ICANN to respect a legally binding administrative decision. The reason for this is that in some jurisdictions it is not possible for the Government or Public Authority to have their administrative decision confirmed by a court. Only the other party (i.e. the applicant) can take the decision of the Government or Public Authority to court.

   "If ICANN will not include the obligation to comply with a legally binding administrative decision in the Applicant Guidebook, you will have a situation where some Governments or Public Authorities will not have the possibility to give a letter of support or non-objection. In those cases, ICANN must be willing to comply with a legally binding administrative decision made by the Government or Public Authority which provided the initial letter of support or non-objection. This commitment from ICANN should be included in the final version of the Applicant Guidebook, or at least ICANN should signal that they are willing to accept this as an amendment in the registry agreement on a case-by-case basis."

   Board Rationale
   As noted previously, the GAC is essentially asking ICANN to expand the respect afforded to court orders to also include any "final legally binding decision", which the GAC notes would include "an administrative decision." ICANN is concerned that such a provision could have a very broad scope (including "decisions" from multiple

perhaps for example through a bilateral agreement between the operator and the government.

3. Applicant support levels

   Brief Statement of Difference

   The GAC calls for a 76% fee reduction for applicants from developing countries. The Board has not agreed to that figure and is developing a program, based on JAS and other advice, to identify sources of funding for needy applicants and processes to distribute them.

   GAC Communication: Letter of 26 May 2011

   "The GAC urges the Board to coordinate and implement as a matter of urgency the decisions relating to the process and timeline issues on the support programme in order to provide equal opportunities to all applicants, particularly from developing countries.

   "For support to developing countries, the GAC is asking for a fee waiver, which corresponds to 76 percent of the US$ 185,000 application fee requirement. Further, there will be instances where additional costs will be required: for example, for auction, objections, and extended evaluation. In such events, the GAC proposes fee reduction and waivers in these processes/instances where additional costs are required. The GAC would further like to propose an additional waiver of the annual US$ 25,000 fee during the first 3 years of operation."

   Board Rationale

   The Board is committed to implementing a program to aid deserving applicants, particularly those from developing countries. The Board is working toward developing a solution for the first round. In order to get a workable program in place, in time, the Board, after listening to community input through the JAS and other places, will develop solutions for funding and distributing funds.

Rationale: Remaining areas of difference between ICANN's Board and Governmental Advisory Committee regarding implementation of the New gTLD Program

Areas of agreement: remaining work

The GAC comments on the Applicant Guidebook (15 April 2011 version) also described additional work to be done: some as a prerequisite to accepting new gTLD applications and some as post-launch study; some as joint GAC-Board work and some for the ICANN Board to take on or facilitate. In each case, the Board essentially agrees and will undertake the following work:

1. Handling of sensitive strings

   "Further discussions are needed between the GAC and the ICANN Board to find a mutually agreed and understandable formulation for the communication of actionable GAC consensus advice regarding proposed new gTLD strings."

2. Communications: Government objection processes

   "The GAC cannot determine whether the Board's commitment to fund at least one objection per individual national government will be sufficient, in view of the as-yet-unknown number of new gTLD strings that may be considered controversial, objectionable, or to raise national sensitivities. The GAC therefore advises the Board that its Communication Outreach program should specifically identify the options available to governments to raise objections to any proposed string."

3. Root scaling: complete documentation

   "The GAC looks forward to the final implementation of GAC advice and to the publication by ICANN of a single authoritative document describing the monitoring system and reporting mechanisms. This document should be ready before the launch of the new gTLD program."

4. Operating practices for Community TLDs

   "The GAC requests information from the Board regarding how the GAC's concerns the aims, functionality and operation of the Clearinghouse would benefit from incorporating the current GAC proposals as well as any unforeseen questions and issues that may arise following the launch of the round.

"The post-launch review should establish whether the automated IP Claims system should be enhanced to include key terms associated with the goods or services identified by the mark, and typographical variations identified by the rights holder.

"The GAC advises that the review should include:

a) a consultation with registry providers, registrants and rights holders on the benefits or otherwise of extending the period of the Clearinghouse notifications beyond 60 days;
b) an analysis of the impact of the operation of the Clearinghouse notifications on the commercial watch services market;
c) an assessment of the likely resource requirements for extending the operation of the Clearinghouse notifications to potential registrants for the life of each new registry."

b. The Clearinghouse tender or request for proposals

"With regard to the issue of non-exact matches … the GAC … recommends that the request for proposal (RFP) that ICANN will issue to potential Clearinghouse providers includes a requirement that the candidate assess whether domain names that include a mark at the beginning or the end of an applied for second level domain could be included in the services."