

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
INDEPENDENT REVIEW PANEL**

**Between:**

**Donuts, Inc. (Applicant)**

**-and-**

**Internet Corporation for  
Assigned Names and Numbers  
(ICANN) (Respondent)**

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**ICDR Case No. 01-14-0001-6263**

**FINAL DECLARATION OF THE PANEL**

**Independent Review Panel:**

PHILIP W. BOESCH

JACK J. COE, JR. (CHAIR)

RAYNER M. HAMILTON

## LIST OF ACRONYMS AND ABBREVIATIONS

**BGC:** ICANN Board Governance Committee.

**Donuts:** Donuts Inc. (Claimant).

**DRSP:** Dispute Resolution Service Provider.

**GAC:** Government Advisory Committee.

**gTLD:** Generic Top-Level Domain.

**Guidebook:** gTLD Applicant Guidebook published by ICANN, September 19, 2011.<sup>1</sup>

**ICANN:** Internet Corporation for Assigned Names and Numbers (Respondent).

**ICANN Articles:** Articles of Incorporation of Internet Corporation for Assigned Names and Numbers.

**ICANN Board:** Board of Directors of Internet Corporation for Assigned Names and Numbers.

**ICANN Bylaws:** Corporate Bylaws of Internet Corporation for Assigned Names and Numbers.

**ICC:** International Chamber of Commerce.

**ICC Expertise Rules:** International Chamber of Commerce Expertise Rules (2003 version).

**IR:** Independent Review (“IRP” in quoted material).

**IRB:** International Rugby Board (objector to .RUGBY application).

**ITF:** International Tennis Federation.

**NGPC:** New GTLD Program Committee.

**RFR:** Request for Reconsideration.

**SA:** SportAccord (objector to .SPORTS application).

## LIST OF SHORT-FORM IR CASE NAMES

**Booking.com IR:** *Booking.com v. ICANN*, ICDR IR Case No. 50-20-1400-0247.

**DCA IR:** *DotConnectAfrica Trust v. ICANN*, ICDR IR Case No. 50-2013-001083.

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<sup>1</sup> Citations to the Guidebook are to page numbers or section numbers, depending on the context.

**ICM IR:** *ICM Registry, LLC v. ICANN*, ICDR IR Case No. 50-117-T-00224-08.

**Merck IR:** *Merck KGaA v. ICANN*, ICDR IR Case No. 01-14-0000-9604.

**Vistaprint IR:** *Vistaprint Ltd. v. ICANN*, ICDR IR case No. 01-14-0000-6505.

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## I. INTRODUCTION

1. This Declaration is the product of an Independent Review (IR) authorized under the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN). Those Bylaws contemplate that:

ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.<sup>2</sup>

2. Under those Bylaws, standing is conferred on: “[a]ny 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.”<sup>3</sup>

3. These proceedings arise out of separate applications by subsidiaries of the complainant, Donuts, Inc., to manage specific gTLDs available under the New gTLD Program authorized by a decision of the ICANN Board in June 2011.<sup>4</sup> That Program was designed to make available for use an extensive range of new gTLDs and constitutes, according to ICANN, “by far ICANN’s most ambitious expansion of the Internet’s naming system.”<sup>5</sup> It was undertaken with a view to “enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ....”<sup>6</sup>

4. The Program had been several years in development, and reflects diverse input from “representatives from a wide variety of stakeholder groups.”<sup>7</sup> The resulting policies and details of implementation are largely consolidated in the “Applicant Guidebook” (Guidebook)<sup>8</sup>—an essential document to which reference will often be made below.

## II. THE PARTIES

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<sup>2</sup> ICANN Bylaws, Article IV, Section 3.

<sup>3</sup> Id., para. 2.

<sup>4</sup> Preamble to Guidebook.

<sup>5</sup> Remarks attributed to ICANN by the Booking.com IR Panel, Declaration of March 3, 2015, para.16.

<sup>6</sup> Id.

<sup>7</sup> Specifically:

[G]overnments, 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.

Guidebook, (Preamble).

<sup>8</sup> Guidebook, at 1-1, states in relevant part: “This....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.”

5. The entity requesting review in this proceeding, Donuts, Inc., (Donuts) is a Delaware corporation, having its principal place of business in Washington State. Donuts is the sole owner of Steel Edge, LLC and Atomic Cross LLC, the two applicants for the strings giving rise to this IR.

6. It is in the nature of an IR that ICANN is the responding party. ICANN is organized under California law as a “non-profit public benefit corporation” and has its principal place of business in California. By its articles of incorporation, ICANN is restricted to operating “exclusively for charitable, educational, and scientific purposes within the meaning of...the Internal Revenue Code.”<sup>9</sup> Its Articles elaborate on these purposes and give a sense of ICANN’s distinctive character:

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... pursue the... purposes of lessening the 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 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).<sup>10</sup>

7. As stated by the *ICM Registry Panel*, “ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN.”<sup>11</sup>

### III. THE PANEL’S MANDATE IN BRIEF

8. As more fully discussed below in connection with the Panel’s Analysis of the Parties’ arguments, the Panel’s mandate is highly limited. The Panel is called upon to evaluate only acts (and certain failures to act) of the ICANN Board. The Panel is asked to judge such conduct against ICANN’s Bylaws and Articles, and to do so in light of a prescribed standard of review. The Panel serving in the Merck IR<sup>12</sup> described the exercise as follows:

[T]he Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is

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<sup>9</sup> ICANN Articles, Article 3.

<sup>10</sup> ICANN Articles, Article 3.

<sup>11</sup> ICM Registry IR Declaration of Feb. 19, 2010, para. 136.

<sup>12</sup> Merck IR Declaration of Dec. 10, 2015.



required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.<sup>13</sup>

#### IV. SOURCES OF PROCEDURAL AND SUBSTANTIVE GUIDANCE

9. This IR is administered by the International Centre for Dispute Resolution (ICDR) under its Arbitration Rules as augmented by the “ICDR Supplementary Procedures for [the ICANN] Independent Review Process.” The latter ICDR text was produced pursuant to a mandate, found in the ICANN Bylaws.<sup>14</sup>

10. Given the Panel’s mandate, substantive guidance necessarily comes from ICANN’s Articles and its Bylaws. Additional sources include the Guidebook, as the principal embodiment of ICANN’s documented policies, and “relevant principles of international law and applicable international conventions and local law.”<sup>15</sup>

11. The parties have debated underlying facts and the meaning of provisions within certain ICANN constituent sources, including, in particular, ICANN’s Articles, Bylaws and the Applicant Guidebook. They have not, however, appreciably relied on particular bodies of substantive law, and correspondingly have not offered any conflicts of law analyses.

#### V. PROCEDURAL HISTORY

##### A. Procedural Events before this Proceeding

12.

On June 13, 2012, Donuts, through its subsidiary Steel Edge, LLC, applied for the string .SPORTS.

On June 13, 2012, Donuts, through its subsidiary Atomic Cross, LLC, applied for the string .RUGBY.

On March 13, 2013, the International Rugby Board (IRB) filed a community objection to Donuts’ application to manage the .RUGBY registry.

On March 13, 2013, SportAccord (SA) filed a community objection to Donuts’ application to manage the .SPORTS registry.

On January 21, 2014, ICC Expert Jonathan Taylor issued his determination sustaining Sport Accord’s objection to Steel Edge’s application to administer the registry for .SPORTS.

On January 31, 2014, ICC Expert Mark Kantor issued his determination sustaining IRB’s objection to Atomic Cross’ application to administer the registry for .RUGBY.

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<sup>13</sup> Merck IR Declaration, para. 22.

<sup>14</sup> See Bylaws, Article IV, Section 3, para. 8. In the event “there is any inconsistency between [the ICDR] Supplementary Procedures and the [ICDR] Rules, [the ICDR] Supplementary Procedures will govern. ICDR Supplemental Procedures, Section 2.

<sup>15</sup> ICANN is charged with carrying out its activities in conformity with “relevant principles of international law and applicable international conventions and local law.” ICANN Articles, Article 4.

On March 24, 2014 (approximately), Donuts sought assistance from ICANN Ombudsman Chris LaHatte in connection with objection rulings including those pertaining to .SPORTS and .RUGBY.

On July 8, 2014, Ombudsman Chris LaHatte, in a letter opinion, ruled that his competency was limited to considering certain matters of process fairness, and thus was not authorized to review the complained-of interpretations of Guidebook principles and law.

B. Procedural Events during this Proceeding

13.

On October 8, 2014, Donuts filed a Request for IR with the ICDR.

On October 8, 2014 Donuts filed with the ICDR a request for relief under ICDR's emergency arbitrator Rules.

On November 14, 2014, ICANN filed a Consolidated Response to Donuts' Request.

On November 21, 2014, Donuts agreed to withdraw its request for emergency relief in exchange for certain undertakings by ICANN.

On July 14, 2015, between 10 and 11:30 a.m. the IR Panel convened with the Parties by phone to conduct an organization meeting.

On July 17, 2015, the Panel issued its Procedural Order No. 1.

On August 7, 2015, the Panel issued its Procedural Order No. 2.

On August 11 and 12, 2015, the Panel received from the Parties "post-scripts" on the subject of ICANN Bylaws, Article XI-A, Section 1 and its bearing on Donuts' requests for document production.

On August 14, 2015, the Panel issued its Procedural Order No. 3.

On August 20, 2015, Donuts filed its Supplemental Memorandum in Support of its Request for Independent Review.

On September 7, 2015, the Panel issued its Procedural Order No. 4.

On September 21, 2015, ICANN filed its Response to Donut's Supplemental Memorandum in Support of Request for Independent Review.

On September 24, 2015, the Panel by letter ruling informed the Parties that it had decided not to admit the submissions of certain third parties.

On October 8, 2015, the Hearing for Argument was held at the AAA offices at 725 South Figueroa Street, Suite 400, Los Angeles, CA.

On October 29, 2015, the Parties submitted Post-Hearing Briefs.

By email correspondence between January 4 and January 22, 2016, the Panel put questions to, and received answers from, the Parties concerning, inter alia, aspects of the Record.

VI. ICANN GUIDING PRINCIPLES AND VALUES

14. Both parties to this IR rely on interpretations of ICANN's Articles and Bylaws. IR Panels in turn are required to compare Board conduct to those constituent documents. It has become customary for IR Declarations to set out somewhat fully the more oft-relied upon provisions of those sources. This Declaration follows that pattern.

15. First, ICANN's Articles contain the following mandate:

[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.<sup>16</sup>

16. Article III of ICANN's Articles requires ICANN constituent bodies to the "maximum extent feasible" to practice transparency and to pursue fairness.<sup>17</sup>

17. The ICANN Bylaws, Article II, Section 3, requires, inter alia, that disparate treatment be justified by a "substantial and reasonable" cause.

18. Finally, ICANN Bylaws, Article I, Section 2 enumerates "Core Values." Those values are to guide decisions and actions of ICANN and its constituent bodies, but are not rules in a technical sense.<sup>18</sup> The enumerated values relied upon by Donuts in particular, are Nos. 6 through 10, as follows:

./...

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.

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<sup>16</sup> ICANN Articles, Article 4.

<sup>17</sup> ICANN Bylaws, Article III, Section 1, state: "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."

<sup>18</sup> In this connection, the Bylaws advise:

[The enumerated] 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.

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

/....

## VII. THE APPLICATION AND OBJECTION PROCESSES INVOLVED IN THIS CASE

### A. Donuts' Applications

19. The Guidebook requires that all applicants specify if their application is “community-based” (as opposed to “standard”—the default designation).<sup>19</sup> A community-based gTLD is one that is “operated for the benefit of a clearly delineated community.”<sup>20</sup> The designation is intended “for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string.”<sup>21</sup> By contrast, a “standard” applicant “may or may not have a formal relationship with an exclusive registrant or user population [and it] may or may not employ eligibility or use restrictions.”<sup>22</sup>

20. The Guidebook provides that “[a] standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement.”<sup>23</sup>

21. Rather than pursuing community-based applications in connection with .SPORTS and .RUGBY, Donuts made “standard” applications, as it was fully entitled to do. Consequently, it was not required to “substantiate [by written institutional endorsements in support of the application] its status as representative of [a] community it names in the application”<sup>24</sup> nor to “demonstrate an ongoing relationship with a clearly delineated community” nor to represent that it was applying for a string “strongly and specifically related to” a specific named community. Other community-related conditions also did not apply because Donuts’ applications were of the standard type.<sup>25</sup>

22. Importantly, as seen in these proceedings, the fact that an application is not designated as community-based does not preclude a “community objection” from being raised against it.

### B. The Objections

#### 1. In General

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<sup>19</sup> Guidebook, at 1-25 through 1-26.

<sup>20</sup> Guidebook, at 1-25.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Donuts, for instance, was not required to formulate, for later formalization in its registry agreement, “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.” Guidebook, at 1-25. Similarly, unlike a successful community applicant, Donuts would not have been required, after delegation, to undertake “certain ... contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation.” Id. at 1-27.

23. The Guidebook informs applicants that a formal objection may be filed against any application.<sup>26</sup> In contrast to earlier IRs to have arisen out of objections of different kinds, this IR originates in two “community” objections.<sup>27</sup> In pertinent part, the Guidebook provides:

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.<sup>28</sup>

24. Community objections are distinctive in several ways. They may be brought by a competing applicant, provided that entity has standing. They are marshaled by institutions, not natural persons.<sup>29</sup> Community objections are not based on a superior legal claim, but rather depend on there being the requisite level of opposition to the application by a “community”, and upon certain other factors outlined below.

25. As evidenced by this case, community opposition may well be a reaction to the applicant for the string (or the applicant’s intended registration policies). The right to object arises because the string in question is associated with the community represented by the objector and the application (or the applicant’s registration policies) creates a certain level of perceived risk that the community will suffer detriment.

## 2. Community Objector Standing and the Community Element

26. The successful objections prosecuted against .SPORT and .RUGBY were both of the community type. According to the Guidebook, a Community Objection is one expressing “substantial opposition to the gTLD application in question from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>30</sup>

27. With respect to community objections, there are four elements to standing: 1] the objector must be an established institution;<sup>31</sup> 2] the objector must have an “ongoing relationship” with the community in question;<sup>32</sup> 3] the community in question must be “clearly delineated;”<sup>33</sup> and 4] the community in question must be “strongly associated with” the gTLD string involved.<sup>34</sup>

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<sup>26</sup> Guidebook, at 1-26.

<sup>27</sup> The four grounds upon which an objection may be filed include one alleging superior legal rights to the string, one invoking the public interest in the observance of norms of morality and public order, one based on confusing similarity between the applied-for string and an existing string, and the one involved in this IRP, which asserts the existence of substantial opposition to the gTLD application from a significant portion of a community to which the gTLD string may be explicitly or implicitly targeted—i.e., a “community objection”. Guidebook, at 3-4.

<sup>28</sup> Guidebook, at 1-25.

<sup>29</sup> Guidebook, at 3-7.

<sup>30</sup> Guidebook, at 3-4.

<sup>31</sup> *Id.*, at 3-7 through 3-8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 3-7

28. The Guidebook provides two lists of factors that may be balanced to determine if standing requirements have been satisfied,<sup>35</sup> but notes that the lists are not exhaustive; that is, the expert appointed to decide the objection may consider “other relevant information.”<sup>36</sup> Nor is it “expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.”<sup>37</sup>

29. The Guidebook references to community objections are somewhat at variance with each other on the question of whether a gTLD can target more than one community. On the one hand, it describes a community objection as being founded on “substantial opposition to the gTLD application from a significant portion of *the* community to which the gTLD string may be explicitly or implicitly targeted.”<sup>38</sup> Elsewhere, however, the Guidebook states that the objector must be an “established institution” with “an ongoing relationship with *a* clearly delineated community.”<sup>39</sup>

30. The notion that there may be more than one community to which a string alludes is not inconsistent with guidance found in an Implementation Guideline included in the GNSO Final Report of August 8, 2007,<sup>40</sup> and with the Guidebook’s instructions that the decision maker (in this case, an ICC Expert) may balance numerous factors in determining if the “clearly delineated community” standing condition has been met.<sup>41</sup>

### 3. The Substantive Elements in Community Objections

31. The merits portion of the analysis requires the expert to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. The expert is instructed to test the objection against four requirements. A successful objection requires that each be met, and the burden is on the objector to prove each of the four.<sup>42</sup> They are, to paraphrase: 1] the community invoked by the objector is a clearly delineated

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<sup>35</sup> As to whether the objector is an established institution the list consists in: [l]evel of global recognition of the institution; [l]ength 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 Guidebook adds: “The institution must not have been established solely in conjunction with the gTLD application process.” *Id.*, at 3-7.

Regarding whether there is the required on-going relationship with a clearly delineated community, the list includes: [t]he presence of mechanisms for participation in activities, membership, and leadership; [i]nstitutional purpose related to the benefit of the associated community; [p]erformance of regular activities that benefit the associated community; and [t]he level of formal boundaries around the community. *Id.*, at 3-8.

<sup>36</sup> *Id.*, at 3-8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, at 3-4 (emphasis added).

<sup>39</sup> *Id.*, at 3-7 (emphasis added).

<sup>40</sup> See Implementation Guideline P (“[C]ommunity should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted”). In describing the notion of “community”, the Guideline does not seem to distinguish between the standing and merits contexts.

<sup>41</sup> See Guidebook, at 3-8.

<sup>42</sup> See *Id.*, at 3-22 through 3-25.

community; 2] that community's opposition to the application is substantial;<sup>43</sup> [3] there is a strong association between the community invoked and the applied-for gTLD string (or 'targeting');<sup>44</sup> and [4] the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.<sup>45</sup>

32. The Guidebook instructs that if opposition by a number of people or entities is established, and yet the group represented by the objector is not clearly delineated community, the objection will fail.<sup>46</sup>

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<sup>43</sup> The objector's burden is to demonstrate "substantial" opposition within the community it has identified itself as representing; the presence of less-than-substantial opposition must lead to the objection failing. To closely paraphrase the Guidebook at 3-23, the non-exhaustive list of factors an expert might consider in testing substantiality includes:

[n]umber of expressions of opposition relative to the composition of the community; [T]he representative nature of entities expressing opposition; Level of recognized stature or weight among sources of opposition; [d]istribution 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 the costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.)

<sup>44</sup> Targeting—that is, a strong association between the applied-for gTLD string and the community represented by the objector—is essential for a community objection to prevail. It may be determined by considering, among other factors: [s]tatements contained in application or publically made by the applicant; and associations by the public. If there is some association, but not a strong one, the opposition must fail. Guidebook, at 3-24.

<sup>45</sup> The Guidebook notes that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment." Guidebook, at 3-24. As with the other four factors, the Guidebook, at 3-24 through 3-25, identifies, non-exhaustively, factors that might be considered by the expert. These are:

[n]ature 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; [e]vidence 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; [i]nterference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; [d]ependence of the community represented by the objector on the DNS for its core activities; [n]ature 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 [l]evel of certainty that alleged detrimental outcomes would occur.

<sup>46</sup> Guidebook, at 3-13 (paraphrase). In determining whether the community expressing opposition can be regarded as a "clearly delineated", an expert can balance many factors, according to the Guidebook. The non-exhaustive list provided by the Guidebook includes:

"[t]he level of public recognition of the group as a community at a local and/or global level; [t]he 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.

Guidebook, at 3-22 through 3-23.

## IIX. THE NATURE OF ICC OBJECTION PROCEEDINGS

### A. The ICC-ICANN Relationship

33. The Guidebook contemplates that resolution of objection disputes will be overseen by outside institutions. In the case of “community” objections, duties of administration were committed to the ICC’s Center for Expertise, as evidenced in a Memorandum of Understanding (the MOU). The MOU is broken into a “whereas” introductory segment and a main body which restates agreed terms; these two lists overlap with each other and cite as authorization provisions in the Guidebook. Together they help understand the ICC’s role and its relationship with ICANN. They are accordingly excerpted at length:

Whereas:

ICANN has developed a program for the introduction of new generic top-level domain names (“gTLD” and the “New gTLD Program”); [and]

The rules and procedures for the New gTLD Program are set out in the Applicant Guidebook (the “Guidebook”), the most recent version of which was published by ICANN on 11 January 2012; [and whereas]

The Guidebook, Module 3, includes a procedure by which third parties may object to an application for a new gTLD; [and whereas]

A formal objection may be filed on any one of the following four grounds: (i) String Confusion Objection; (ii) Legal Rights Objection; (iii) Limited Public Interest Objection; and (iv) Community Objection;<sup>[47]</sup> [and whereas]

Objections to applications for new gTLDs may be submitted after ICANN posts the public portions of all applications considered complete and ready for evaluation./...;<sup>[48]</sup>[and whereas]

A formal objection to an application triggers a dispute between the objector and the applicant that shall be heard and decided by an independent expert panel; [and whereas];

A Dispute Resolution Service Provider (“DRSP”) shall administer the proceedings, and shall appoint the panel of experts that will preside over the objection proceedings; [and whereas]

Disputes triggered by objections shall be resolved in accordance with the New gTLD Dispute Resolution Procedure (the “Procedure”) and the rules of procedure of a particular DRSP that have been identified as being applicable to specific objection proceedings under the Procedure (the “DRSP Rules”); [and whereas]

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<sup>47</sup> Citing Guidebook, § 3.2.1.

<sup>48</sup> Citing Guidebook, §§ 1.1.2.2 & 1.1.2.6.



Upon publication by the DRSP, the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process;<sup>[49]</sup> [and whereas]

The DRSP Rules for Limited Public Interest Objections and Community Objections are the Rules for Expertise of the International Chamber of Commerce (the "ICC [Expertise] Rules"), including any applicable Appendices and other supplements to such Rules that may be adopted by the ICC; [and whereas]

The Centre shall select experts and administer dispute proceedings in accordance with the Procedure and the ICC [Expertise] Rules and any supplements to the Rules as adopted by ICC; [and whereas]

The Centre, with advice and support from ICANN, shall establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner; [and whereas]

ICANN and the Centre shall communicate regularly with each other and seek to optimize the service that the Centre provides as a DRSP in the New gTLD Program; [and whereas]

The International Centre for Expertise of the ICC (the "Centre") has agreed to act as DRSP for ...Community Objections for at least the first round of applications in the New gTLD Program.

ICANN and ICC therefore agree as follows:

[T]he Centre shall for at least the first Round of the New gTLD Program act as DRSP and administer all disputes arising from Limited Public Interest Objections and Community Objections, as foreseen by Guidebook § 3.2.3 and Procedure Article 3.

The DRSP Rules for...Community Objections are the Rules for Expertise of the International Chamber of Commerce (the "ICC [Expertise] Rules"), including any applicable Appendices and other supplements to such Rules that may be adopted by the ICC.

The Centre shall select experts and administer dispute proceedings in accordance with the Procedure and the ICC [Expertise] Rules and any supplements to the Rules as adopted by ICC.

The Centre, with advice and support from ICANN, shall establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner.

ICANN and the Centre shall communicate regularly with each other and seek to optimize the service that the Centre provides as a DRSP in the New gTLD Program.

B. The Procedural Framework Governing ICC Expert Evaluations

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<sup>49</sup> Citing Guidebook, § 3.4.6.

34. Community objections to gTLD applications are filed directly with the ICC, which is charged with subjecting objections to an administrative review and checking for compliance with certain procedural rules. The Guidebook sets limits of form and length on such objections.<sup>50</sup> Under the Guidebook, applicants were required to file timely responses upon being notified of an objection.<sup>51</sup>

35. The ICC Expertise Rules contemplate that the ICC will appoint an expert only after considering “the prospective expert’s qualifications relevant to the circumstances of the case” and related factors.<sup>52</sup>

36. Unless otherwise agreed in writing by the parties, experts are to be “independent of the parties involved in the expertise proceedings,” and are required to execute a “statement of independence” along with a written disclosure to the Centre of “any facts or circumstances which might be of such a nature as to call into question the expert’s independence in the eyes of the parties.”<sup>53</sup> Such disclosed information is communicated to the parties, who are entitled to object that the expert does not have the necessary qualifications, including independence.

37. The Applicant Guidebook provides that one expert will serve. The Rules identify the expert’s principal task as being to present findings in a written report “after giving the parties the opportunity to be heard and/or to make written submissions.”<sup>54</sup>

38. The Rules as published by the ICC state that, unless otherwise agreed by the parties, “the findings of the expert shall not be binding upon [them].”<sup>55</sup> However, the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (version 2012-01-11), which supplements the ICC Expertise Rules for use in community objection proceedings, reverses that provision; the parties are deemed to have agreed that the expert report is binding upon them. In this regard, the Guidebook also provides that:

“In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. [Likewise,] an objector accepts the applicability of this gTLD dispute resolution process by filing its objection. Upon publication by the DRSP, the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”<sup>56</sup>

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<sup>50</sup> Attachment to Guidebook Module 3, at Article 8.

<sup>51</sup> Guidebook, at 3-11 through 3-14.

<sup>52</sup> ICC Expertise Rules, Article 3(2).

<sup>53</sup> *Id.*, Article 3.

<sup>54</sup> *Id.*, Article 12(3).

<sup>55</sup> *Id.*

<sup>56</sup> “Guidebook, Section 3.2 (Public Objection and Dispute Resolution Process) citing Guidebook Section § 3.4.6. In turn, the ICC Practice Note states in relevant part: “By accepting the process as defined in Article 1(d) of the [New gTLD Dispute Resolution] Procedure, parties are deemed to have agreed that the expert determination shall be binding upon [them within the meaning of Article 12(3) of the ICC Expertise Rules]. See Practice Note, version 2012-01-11, item 8.

39. On the subject of immunity, the Rules provide the “neither the experts, nor the Centre, nor ICC and its employees...shall be liable to any person for any act or omission in connection with the expertise procedure.”<sup>57</sup>

## IX. THE EXPERT DECISIONS IN THIS CASE

### A. In General

40. Broadly speaking, Donuts’ dissatisfaction with the performance of the ICC experts involved in this IR relates to two broad categories. First, it complains that the experts misapplied the grounds for community objections and consequently incorrectly found that the objector in each case had carried its burden with respect to them. The second type of flaw, by contrast, consists in what Donuts alleges was a failure by one of the experts to fully disclose relationships he had with organizations affiliated with the objector.

41. In this section, the Panel will describe, in summary fashion only, the two experts’ respective determinations on the merits. The Panel will defer to a later section its discussion of issues related to expert disclosures. Although the Panel will not recount in detail the arguments of both sides or the full reasoning of the respective ICC experts, it will endeavor to touch upon what Donuts characterizes as the errors giving rise to this proceeding.

### B. The .RUGBY Objection Proceeding

42. Donuts applied for .RUGBY in competition with International Rugby Board (IRB). IRB lodged a community objection. Central to the objection was Donut’s stated policy with respect to the access it intended to accord to the string. It reflects the same general philosophy associated with all of Donut’s 307 applications. Donut’s intended:

[T]o make each domain open to all legitimate uses of the multiple meanings that Internet users may ascribe to the common, English-language words chosen for those strings.” .... [which along] with the other TLDs in the Donuts family, ...will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN’s new TLD program.<sup>58</sup>

43. With respect to .RUGBY in particular, Donuts also posited:

[.RUGBY] is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is con-

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<sup>57</sup> The Guidebook includes a similar immunity provision, which is nevertheless broader: 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.

Article 22, New gTLD Dispute Resolution Procedure (version 2011-09-19).

<sup>58</sup> See Application of June 13, 2013 by Atomic Cross for .RUGBY, Item 18(a).

sistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation.<sup>59</sup>

44. The expert ruled in favor of IRB. Donuts cites as error before this Panel the expert's analysis concerning the likelihood of material detriment<sup>60</sup> to the relevant community<sup>61</sup> posed by Donut's proposed registration policies and practices.

45. An examination of the expert's reasoned determination shows that the expert considered several forms of potential detriment, and in assessing them was influenced by what it found to be a close association between the string and one or more communities. In this respect, the expert disagreed with Donut's characterization of the string as "generic." To closely paraphrase the expert's material detriment analysis:

Objector argues that granting the [Donuts] Application would be likely to cause material detriment...for several reasons.

First, Objector points out that...Donuts has applied for gambling-related strings [enumerated] ...[and] seeks to operate gambling-related strings along with ".RUGBY" and other sports-related strings, without limitations and protections to mitigate the adverse consequences...[and] argues that association [with gambling strings] would harm the rugby community.<sup>62</sup>

46. The expert found the objector's gambling-related thesis "persuasive", in light of measures taken by the rugby community to minimize the adverse effects of gambling and certain regulations and codes of conduct precluding: "Unions, Associations, Rugby bodies, clubs and persons [from engaging] in conduct that would undermine the integrity of the sport or bring it into disrepute."<sup>63</sup> The expert observed additionally that "Host Union Agreements prohibit any improper association with gambling-related sponsorships".

He concluded:

[O]peration of the ".RUGBY" gTLD by [Donuts] will create a likelihood of material detriment to the rugby community due to Donuts' proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure.<sup>64</sup>

47. Considering the objector's further theories of material detriment, the expert continued:

[O]bjector claims that persons associated with [Donuts] have a track record for weak operation of domains. [It is objector's] understanding that "the founder and CEO of Donuts was formerly President of [a certain company] with a well-known [negative] track record in the ICANN Community.

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<sup>59</sup> Id.

<sup>60</sup> Regarding this objection element, see notes 43-46, supra, and accompanying text.

<sup>61</sup> Regarding the relevant community, see notes 30-34, 46, supra, and accompanying text.

<sup>62</sup> Objection Expertise in IRB v. Atomic Cross, CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), issued January 31, 2014, paras. 81-83.

<sup>63</sup> Id., para. 83.

<sup>64</sup> Id., para. 84.

[Objector further alleges] that the public record shows that [during his tenure there were] allegations of cybersquatting – the registration, trafficking in, or using [of] domain name[s] with bad-faith intent to profit from the goodwill of a trademark belonging to another [and that] [d]uring this time, [that company and its subsidiaries] lost twenty-six...domain names disputes brought under ICANN’s Uniform Dispute Resolution Policy rules [resulting in many findings].... that “the disputed domain name ha[d] been registered and used in bad faith.”<sup>65</sup>

48. The ICC expert noted Donuts’ silence with respect those alleged former practices. For the expert, the CEO’s history in managing domains, while “not dispositive” did “weigh in the balance.”<sup>66</sup> He further reasoned that:

The [Donuts] Application [also]...does not propose protection for intellectual property interests other than registered trademarks.... [T]hat approach is insufficient protection for a worldwide community characterized by so many small participants, especially in resource-poor communities and in the developing world.

The [Donuts] Application also does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community. The governance structure for a community-associated domain must necessarily be more protective of the interests of that community than the governance structure for a generic domain.

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[It is persuasive also that Donuts] has no links at all with the worldwide rugby community [and] seeks to operate gambling-related strings along with “.RUGBY” and other sports-related strings, without limitations and protections to mitigate the adverse consequences....Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER.” The failure to have links with a sports-related community with which the domain is strongly associated, together with the prospect of cross-linkage with gambling sites, is a topic that must be the object of discussion with leading voices in the rugby community, as well as the U.K. Government<sup>[67]</sup> and other Governments and institutions with a strong interest in the integrity of the sport...

[Although Donuts] has committed to employ a compliance staff to enforce intellectual property protections and restrain fraudulent activity [and] points to “eight additional measures” to protect users... [a] review of the measures [Donuts enumerates as its program to protect intellectual property] shows that few, if any, are new and innovative....

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<sup>65</sup> Id., para. 85.

<sup>66</sup> Id., para. 86.

<sup>67</sup> In a preceding portion of the ruling, the expert observed that the strong opposition to the application voiced by the UK was “an extremely important factor in the balance, in view of the substantial role the U.K. plays with respect to the rugby community.” In particular, it was the “unequivocal view...of the Government of the United Kingdom...that these Applicants do ‘not represent the global community of rugby players, supporters and stakeholders [and that they] should withdraw their application.’” See, Id., para. 49.

[Donuts] claims “its absence from the rugby industry enables it to ensure groups and individuals unaffiliated with Objector and its affiliates will have the same opportunity for expression on the TLD as those with incumbent interests.” [However, that response focuses] only on Objector and its affiliates, rather than the rugby community as a whole [and]...fails to take account of the strong association between the rugby community and the particular string “.RUGBY.”

[Donuts] argues that “a group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection in any TLD.” That ...presumes that only registered trademarks are properly entitled to protections. While that may be true for generic domains, it is an overstatement with respect to gTLDs strongly associated with a particular global community. Small, resource-poor and non-commercial participants in a community require protection as well as larger commercial enterprises....

Finally, ...[Donuts] asserts that Objector has failed to show any level of certainty that [Donuts’] operation of the string “.RUGBY” creates a likelihood of material detriment, and no reasonable quantification of such an outcome. There is no quantification threshold in the Procedure for a “material detriment” showing. Since the question is inherently forward-looking for new domains, quantification of likely future harms cannot reasonably be expected to be easy to show. The ICANN process does not require such a rigorous empirical showing.

In light of the foregoing, the [Donuts] Objection is successful and the Objector thus prevails with respect to that Objection.<sup>68</sup>

### C. The .SPORTS Objection Proceeding

49. SportAccord (SA)<sup>69</sup> opposed the application of Donuts based on an alleged material detriment to a delineated community likely to occur from Donuts’ registration policies. According to SA, the relatively free access to the .SPORTS registry contemplated by Donuts would allow registrants not sanctioned by organized sports to nonetheless convey the seeming imprimatur of that community (a community referred to by the expert as the “Organized Sports Movement”).<sup>70</sup>

50. The objectors argued also that a perception of an association between a .SPORT registrant and the community would interfere with the community’s anti-drug, anti-gambling, anti-racism messaging by diluting such campaigns with unsanctioned messaging on the same topics.

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<sup>68</sup> Id., paras. 87-100 (passim).

<sup>69</sup> SportAccord (SA) is described by the expert as a not-for profit “umbrella organization and representative body” formed under Swiss law in 1967. Its members are international sports federations and organizers of sporting events recognized by the International Olympic Committee. Objection Expertise in SportAccord v. Steel Edge, CASE No. EXP/486/ICANN/103 issued January 21, 2014, para. 13.2. SA applied for the gTLD “.SPORT” (as distinct from “.SPORTS”—the gTLD for which Donuts applied).

<sup>70</sup> Id., paras. 41.1.2 & 41.2.2.

Further, the objector asserted that the registry practices of Donuts would enable ambush marketing, brand-jacking, and use of sports themes in connection with pornography.<sup>71</sup>

51. Donuts' defense questioned both SA's standing<sup>72</sup> and the merits of its objection; the delineated community requirement was central to both aspects of that defense. Donuts maintained that .SPORTS potentially targets a community nearly impossible to effectively delineate,<sup>73</sup> being much broader than merely those persons that identify with *organized* sports.

52. Accordingly, argued Donuts, while the putative community of the "Organized Sports Movement" (as the expert characterized it) might be sufficiently targeted by a gTLD denominated less generically, the more generic .SPORTS string implies associations so numerous and diverse that SA cannot claim to have an ongoing relationship with them; nor could the narrow subset consisting in "the Organized Sports Movement" claim to be strongly enough associated with the .SPORTS gTLD to have standing to object.<sup>74</sup>

53. On the merits, the substantial opposition to its application among SA members was, according to Donuts, merely the opposition of a narrow subset of all those for whom sport (in all its forms and modes of appreciation) is a concept. For Donuts, the argument for "substantiality" was weakened accordingly. It followed in Donut's view that a likelihood of detriment to the subset of organized sports bodies and their members and patrons does not equate to a likelihood of detriment to the entire class of natural and juridical entities implicitly targeted by .SPORTS.

54. The expert's analysis differed with that of Donuts. On the critical question of community delineation, the expert interpreted the Guidebook and certain background materials to anticipate that there may be more than one community impliedly targeted by a given gTLD.<sup>75</sup> The expert interpreted SA's pleadings as referring to organized sports, rather than with all sports activities.<sup>76</sup> For the expert, .SPORTS readily conjured a strong association with the Organized Sports Movement, a community that could be identified with sufficient precision to confer standing, and likewise to be amenable to assessments of potential detriment and analyses of related objection requirements.

55. One consequence of the expert's finding of a close association between .SPORTS and the Organized Sports Movement was that the requirement of "a likelihood of material detriment" could be more easily satisfied, which ultimately it was deemed to be.<sup>77</sup>

56. A recurrent theme in the expert's reasoning was that impairment of legitimate interests would likely result from Donuts' openly stated intention to "not limit eligibility or otherwise exclude legitimate registrants in second level names"<sup>78</sup> Not unlike the analysis applied by the expert in the .RUGBY objection proceeding, the .SPORTS expert report devotes several paragraphs to the

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<sup>71</sup> Id., paras. 41.2.1 through 41.2.5.

<sup>72</sup> Id., paras. 13.3, 14.3, 14.6 15.3 and 16.2.

<sup>73</sup> Id., paras. 14.3, 14.6.

<sup>74</sup> Id., paras. 14.3.

<sup>75</sup> Id., paras. 14.1, 14.6, 15.3, 19 & 20.

<sup>76</sup> Id., paras. 14.2 & 14.4.

<sup>77</sup> Id., para. 43.

<sup>78</sup> Id., paras. 42.2, 43.2.

potential consequences for the relevant community of Donut's open policy.<sup>79</sup> In analysis broadly similar to that explicated by the .RUGBY expert, the .SPORTS expert also found such protections as are instituted through the registration agreement to not catch many of the practices that the objector fears will be promoted by Donuts' liberal approach to granting registrations.

## X. ARGUMENTS OF THE PARTIES

### A. Introduction

57. As more fully developed below, this proceeding is instituted to allow an independent panel to compare the actions and certain inactions of the ICANN Board to the obligations attaching to it under ICANN's Articles, its Bylaws and potentially other documents central to the new gTLD program. This Panel is not authorized to assess acts and omissions by other actors unless those can be attributed to the Board on some basis. A core disagreement between the parties is the extent to which any Board action or inaction cognizable by this Panel has been demonstrated by Donuts. Because the Board ordinarily is not directly involved in processing objections, Donuts has faced a difficult obstacle—the need to show an equivalency between the activities of the ICC and its appointed experts on the one hand, and the Board on the other, or alternatively, to show inaction by the Board that is inconsistent with the Articles or Bylaws.

58. What follows is a brief summary of the parties' submissions to help place in context the Panel's analysis below, which analysis will involve a further examination of the parties' positions.

59. The Panel views the arguments as falling under two broad headings. The first category focuses on the acts of the ICC, and more particularly, its experts and, impliedly, proceeds on the basis that those acts are equivalent to, or attributable to, the Board. As such, Donuts would have this Panel judge them directly against the prescriptions and value guides that govern Board conduct. According to Donuts, those acts include manifest errors by the experts in applying the grounds for community objections set out in the Guidebook<sup>80</sup> and, in the case of one expert, a failure to fully comply with disclosure requirements applicable to ICC Experts.<sup>81</sup>

60. Under the second heading are theories of recovery arising largely, but not fully, out of the same facts as the first category; these allege an unfulfilled duty on the Board's part to act in some remedial fashion, or to adjust the scope of remedial actions it has already taken in other contexts.

### B. Alleged Misapplication of Community Objection Standards.

#### 1. In General

61. Donuts alleges that it has been prejudiced by misapplications of the rules established for determining community objections. According to Donuts, several of the principles binding ICANN in executing its mandate<sup>82</sup> have been abridged in the process. In particular, the invention of new rules by experts in sustaining objections constitutes disparate, discriminatory, treatment

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<sup>79</sup> Id., para. 43.

<sup>80</sup> See, e.g., Donuts Request for IR, para. 3 (experts "completely misconstrued" community objections), and para 8 ("clear violations of the Guidebook" in application of the grounds).

<sup>81</sup> See, e.g., id., paras. 41-42; Donuts Post-Hearing Brief, paras. 7-8.

<sup>82</sup> See notes 16-18, supra, and accompanying text.



of Donuts, in violation of ICANN's non-discrimination policies;<sup>83</sup> correspondingly, Donuts has detrimentally relied on what it sees as Guidebook promises concerning who is entitled to manage registries. In turn, the unpredictability generated by what Donuts sees as expert fiat is a form of non-transparency; as such it is inconsistent with express Articles and Bylaws provisions.<sup>84</sup> Finally, the rules applied by experts, according to Donuts, have the effect of favoring "entrenched interests" in contravention of ICANN's undertaking to value competition.<sup>85</sup>

## 2. The .RUGBY Expertise

62. Donuts asserts that the expert's analysis, in effect, imposes the duties of a community applicant on a standard applicant for the registry in question.<sup>86</sup> Donuts highlights the following passage in the expertise:

Donuts' application creates a likelihood of material detriment because it "does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community [and] the governance structure for a community-associated domain must necessarily be more protective of the interests of that community than [that]...for a generic domain."<sup>87</sup>

63. Donuts maintains that the above reasoning reveals a misapplication of the Guidebook to favor certain objectors and a variation in rule application that promotes unequal treatment, and discrimination:

Donuts... applied for new gTLDs legitimately expecting that ICANN would honor the Guidebook. For its sizable investment, Donuts depends upon predictability and consistency in decision-making. Erratic application of Guidebook standards and divergent results in like cases undermine the system. The results have singled out Donuts for disparate treatment in violation of the Bylaws' anti-discrimination creed.<sup>88</sup>

## 3. The .SPORTS Expertise

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<sup>83</sup> The ICANN Bylaws, Article II, Section 3, require, *inter alia*, that disparate treatment be justified by a "substantial and reasonable" cause. See also ICANN Bylaws, Article I, Section 2, Core Value No. 8. ("Making decisions by applying documented policies neutrally and objectively, with integrity and fairness").

<sup>84</sup> Donuts relies, *inter alia*, upon ICANN's Articles. See especially, Article 4 ([ICANN] shall...carry[] out its activities ...to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes..."); See also Bylaws, Article III.1 ("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."); cf. ICANN Bylaws, Article I, Section 2, Core Value No.7 ("Employing open and transparent policy development mechanisms").

<sup>85</sup> See ICANN Articles, Article 4 (mandating processes...that enable competition and open entry in Internet-related markets.) See also ICANN Bylaws, Article I, Section 2, Core Value No. 6 (Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest).

<sup>86</sup> Donuts' Request for IR, para. 54 (.Rugby ruling "essentially requires Donuts to operate the TLD as a community"); and see *Id.*, para. 72 (under expert holdings, Donuts would have to operate as a community).

<sup>87</sup> Excerpt from ICC Expert determination in IRB objection (.Rugby) of January 31, 2014, para. 88.

<sup>88</sup> Donuts' Request for IR, October 8, 2014, para. 9.

64. Donuts' submissions examine the reasoning of the .SPORTS expert in relative detail. Putting aside its allegation of bias (discussed below), Donuts asserts that the expert disregarded the strict standing and merits requirements established by the Guidebook for community objections, and failed to place the burden on the objector, as required by the Guidebook. Instead, states Donuts, the expert liberalized the requirements for successful objections in general and, in particular, in connection with what constitutes a "clearly-delineated-community."<sup>89</sup>

65. In community objection analysis, the manner in which the community is demarked affects both standing and success on the merits. Donuts' alleges that the expert too readily found a close association between the .SPORTS gTLD and what Donuts maintains is a contrived community: organized sports (or the "Organized Sports Movement").<sup>90</sup> For Donuts, the string has reference not only to organized sports, but to a much larger and more highly diffuse group of persons who identify with sporting activity in all the modes in which it is experienced.

66. Donuts also questions the experts' approach to the other community objection requirements<sup>91</sup> and stresses the expert's apparent failure to apply the Guidebook's admonition that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment."<sup>92</sup>

#### C. Expert Procedural Misconduct; Bias: The .SPORTS Objection

67. Donuts asserts that the expert that decided the .SPORTS objection had represented organizations which are members of SportAccord (SA), the organization that brought the objection.<sup>93</sup> The disclosures he made at the time of his appointment were, according to Donuts, incomplete and misleading. In some of its submissions, Donuts combines that premise with what it regards as his one-sided reasoning on the merits to conclude that the expert was motivated by its affiliations with the objector to reach a result favorable to the objector.<sup>94</sup>

#### D. Alleged Board Failures to Act

##### 1. In General

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<sup>89</sup> See notes 30-46, *supra*, and accompanying text.

<sup>90</sup> According to Donuts, the objector's own definition of the relevant community was broad and diffuse—the opposite of clearly delineated. According to the objector, it included: "(i) 'individuals and organizations who associate themselves with Sport;'" (ii) "practitioners as well as organizers, supporters and audience;" (iii) "individual practitioners of sport, ... spectators, ... fans and sponsors;" and (iv) "any person in the world." Donuts Request for IR, para. 63.

In its Request, Donuts complained that, rather than finding this capacious delineation to be fatal to the objection, "the expert 'strain[ed] to find a 'clearly delineated' community, by proposing without providing evidentiary support, that:

"when the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model [atop which SA claims to sit]." *Id.*

<sup>91</sup> These will not be recited by the Panel.

<sup>92</sup> Donuts' Request for IR, October 8, 2014, para.73 (quoting Guidebook at 3-24).

<sup>93</sup> *Id.*, paras. 63-67.

<sup>94</sup> *Id.*, paras. 63-64.

68. Donuts maintains that although the Board must “‘apply[ ] documented policies neutrally and objectively, with integrity and fairness,’ it has allowed the .SPORTS...and RUGBY panels to exceed their authority and violate this mandate.” In like fashion, it avers:

[t]he expert decisions contested in this case allow community objections to be used “as anti-competitive weapons”, permitting the objectors to “hijack “generic” terms (“sports” and “rugby”) in a manner that ICANN did not intend.

69. Donuts has specified or alluded to three forms of Board inaction: 1] failure to train ICC experts on the proper application of community objection standards, which failure has led to errors in the application of that standard that prevented Donuts’ applications from advancing; 2] failure to institute a review mechanism to regulate the community objection decisions of ICC experts; and 3] failure to intervene in this individual case. These are taken in turn.

## 2. Failure to Train

70. Donuts failure-to-train argument relies in part on the DCA case summarized below<sup>95</sup> and endeavors to establish a duty to act—to inform, to provide oversight, to ensure—flowing from the powers and responsibilities it attributes to the Board with respect to the new gTLD program. The following excerpt is from a Donuts’ submission:

The facts and reasoning of the DCA Case similarly apply to the second primary point of Donuts’ Request – namely, that the Board had an obligation to see to it that experts designated to hear new gTLD objections were “well informed,” applied the “documented policies” of the Guidebook concerning such objections “neutrally and objectively, with integrity and fairness,” and did not apply such standards so as to single out Donuts (or any applicant) for disparate treatment.... ICANN argues that “no ICANN Board Action was the cause” of the violations of which Donuts complains.

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Significantly, the DCA Case held the Board responsible for oversight of the acts of ICANN’s “constituent bodies,” such as the GAC, that share ICANN’s obligation to adhere to its Bylaws and other governing documents. GAC “advice” amounts to nothing unless and until ICANN acts upon it. Similarly, the [ICC expert] determinations of new gTLD objection panels constitute “expert advice” that have no effect until accepted by ICANN. Only the Board has the power to appoint or provide for the appointment of such experts. It also has ultimate authority over the new gTLD program. As such, the Board has an obligation to assure compliance with ICANN policies and procedures by DRSPs and experts ruling upon new gTLD objections.<sup>96</sup>

ICANN’s argument to the contrary ignores the obligations of the Board and advisory bodies<sup>[97]</sup> such as the DRSPs and their objection panelists. It further overlooks basic principles of causation and agency. ICANN may not view the Board itself as having actually caused Donuts’ injury, and instead prefers to hide behind the ICC and the

<sup>95</sup> See notes 116-28, *infra*, and accompanying text.

<sup>96</sup> Donuts’ Supplemental Memorandum of August 20, 2015, paras. 26-28.

<sup>97</sup> As to the premise that the ICC is an “advisory body”, see notes 183-89, *infra*, and accompanying text.

expert panelists who rendered the decisions that Donuts contends failed to comply with “documented policies” and other governing principles. Certainly, the Board could reasonably foresee that panels may not follow the sole grounds established by the Guidebook for sustaining community objections, or may not apply them consistently.

Donuts therefore asserts that the Board should have provided for training to “inform” DRSPs and experts retained by ICANN regarding the application of the standards for new gTLD objections, as well as requirements of the Bylaws and other governing documents pertaining to conflicts of interest and non-discrimination. Failing to do so would make the Board, under rudimentary legal principles, a proximate cause of harm to Donuts.<sup>98</sup>

### 3. Failure to Install a Review Mechanism

#### 71. According to Donuts’ Request for IR:

The Board [has also] failed to provide for review in cases of inconsistent results and clear violations of the Guidebook, [such as when] ...each panel finds “material detriment” on the perception that Donuts is not as valid a “steward” of the respective “communities” described...as the objectors themselves – a ground which the Guidebook expressly forbids, and one not followed by other objection panelists.<sup>99</sup>

72. Although this allegation can be examined in several ways, it seems to contain at least two theories of relief. One is that had such an appeals mechanism been in place, either its clarifying jurisprudence, or its availability to Donuts in the case at hand, would have prevented or mitigated the effects of what Donuts believes were errant expert determinations. The second thesis is that by failing to implement such a mechanism, the Board favored certain applicants (those facing certain string similarity objections) over Donuts. Donuts suggests:

The Board [proposed] in February 2014 an avenue to review certain perceived inconsistent “string confusion” objection results. Donuts commented in support of the proposal and urged its extension to inconsistent community objection determinations.

The Board refused to act on such requests. Instead, it adopted in October 2014 the limited review mechanism it had proposed eight months earlier. The Board cited its “ultimate responsibility” for the new gTLD program as authority for its action.<sup>100</sup>

#### 73. In its post-hearing submission, Donuts alleged:

While the Board has the same power over new gTLD objections, it admits to having chosen consciously not to use it. ICANN made that choice discriminatorily and despite specific and sustained exhortations to take action from a broad constituency including Donuts.

Specifically, Donuts joined with a number of other applicants, large and small, in a November 2013 letter urging the Board to act to correct and prevent community

<sup>98</sup> Donuts’ Supplemental Memorandum of August 20, 2015, paras. 29-30 (citations omitted).

<sup>99</sup> Donuts’ Request for IR, para. 8.

<sup>100</sup> Donuts’ Post-Hearing Brief, para. 14.

objection rulings exceeding or failing to apply documented Guidebook standards. The letter suggested, among other things, a review mechanism and panelist training. The Board did not respond.<sup>101</sup>

4. Failure to Act Remedially in .RUGBY and .SPORTS

74. It is suggested in some of Donuts' submissions that even if not acting programmatically to install safeguards, the Board might have acted in its individual case:

The Board knew how to act when presented with an inequity. It had acted in other contexts ...by establishing advance procedures or participating in decision-making to maintain predictability for applicants. It did nothing to protect against *or rectify* the failure to apply the Guidebook's documented policies *in the case of .SPORTS and .RUGBY*, despite having notice of such failures and inconsistencies from Donuts and others.<sup>102</sup>

E. ICANN's Position

75. ICANN's position is straight-forward. It maintains that the acts and omissions about which Donuts complains are not acts or omissions of the Board, and that they therefore are not subject matter falling within the proper scope of an IR:

Donuts has not identified any conduct by the ICANN Board that was inconsistent with ICANN's Articles or Bylaws. In fact, no Board action took place here at all.

Donuts argues that the Board had an obligation to create an appellate review of expert determinations, and that the failure to do so demonstrates the Board's lack of accountability. Yet, Donuts does not identify the source of such an obligation because none exists...Nothing in the Articles or Bylaws states that appellate mechanisms (or anything of the sort) are required for the New gTLD Program. At best, Donuts alleges Board *inaction* in this regard, but in the absence of an affirmative duty to create an appellate mechanism, the Board's failure to do so cannot result in a violation of the Articles or Bylaws.

Next, Donuts invokes Article I, Section 2.7 of the Bylaws, alleging that the Board failed to "promote well-informed decisions based on expert advice" as required therein, but...this portion of ICANN's "Core Values" refers to policy development (e.g., the policy recommendations that were implemented through the New gTLD Program), not expert determinations resolving objections administered by third-party dispute resolution providers. In short, the cited provision is inapplicable to the procedures at issue in this IRP, and Donuts has therefore failed to identify any violation of it (or any other Article or Bylaws provision).

Donuts does not allege any other action or inaction on the part of the ICANN Board. Instead, the remainder of Donuts' arguments challenge the substance of the community objection determination or the ICC's implementation of its own rules, such as those

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<sup>101</sup> Id., paras. 12-13.

<sup>102</sup> Id., para. 16 (emphasis added).

related to purported conflicts of interest on the part of the expert panelist; however, there was no Board action related to the alleged conflict because the ICC is an independent dispute resolution provider that the Board is not required to oversee.

Moreover...Donuts did not file a reconsideration request, by which it might have brought to the Board's attention its concerns about the ICC's implementation of the objection proceedings, including (for example) whether the ICC should have disqualified an expert for bias.

Donuts does not identify any Board action in connection with Donuts' Applications for .SPORTS and .RUGBY that violates ICANN's Articles or Bylaws....<sup>103</sup>

## XI. PRECEDENTS

### A. In General

76. This is not the first IR proceeding to have arisen out of the new gTLD program. Several declarations have been issued by other Panels. They are to enjoy "precedential value" according to ICANN's Bylaws.<sup>104</sup> The Panel takes that to mean that it should take account of the reasoning of other Panels in pursuing its own analysis, and should, to the extent warranted, seek consistency. It is not feasible or helpful to survey the existing Declarations in detail; a summary of each, however, will give important background to the Panel's analysis of the case before it.

### B. Booking.com<sup>105</sup>

77. Booking.com (Booking), is a limited liability that conducts an online hotel reservation service. Its principal focus is on English-language markets. It applied for the .HOTELS string. That string was placed in a contention set with .HOTEIS, with the result that neither applicant could proceed to delegation. That left Booking.com with the options of either privately negotiating with the applicant for .HOTEIS, or proceeding to an auction to settle the contention issue.<sup>106</sup>

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<sup>103</sup> Id., paras. 16-20.

<sup>104</sup> Article IV, Section 3.21 states, in part: "The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."

<sup>105</sup> Booking.com v. ICANN, ICDR Case No. 50-20-1400-0247.

<sup>106</sup> According to the Guidebook, as traversed by the Booking.com panel (Booking.com IR Declaration, paras. 60-62), within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names and other applied-for TLD strings (among other items) for "visual string similarities that would create a probability of user confusion" (Guidebook, at 2-21 et seq.). If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Guidebook. If a contention set is created, only one of the strings within that contention set may be approved for delegation. In the specific case of Bookings, InterConnect Communications ("InterConnect") performed the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted InterConnect's report, which included two non-exact match contention sets (.hotels/.hoteis and .unicom/.unicom) as well as 230 exact match contention sets. <http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm>. The String Similarity

78. Booking.com unsuccessfully pursued a Request for Reconsideration (RFR) of the decision to place .HOTELS in a contention set with .HOTEIS. It viewed the two strings as quite distinguishable from each other. It subsequently sought an IR.

79. The IR Panel found that Booking.com's allegations of Board failings were of two kinds: 1] those that related to the string similarity review process, essentially as instituted by ICANN; and 2] those that related to the specific processing of the .HOTELS objection.

80. The first category addressed alleged Board conduct "in establishing and overseeing the process by which so-called string similarity reviews are conducted." In particular, it was alleged that the manner in which the Board set up, implemented and supervised "the entire...string similarity review process" and its related failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout were acts that were "inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("Guidebook")."<sup>107</sup>

81. As to the first category of allegations, the Panel underscored the distinction between challenges to "validity or fairness of the process as set out in the Guidebook" and those that address "the way in which that process was... implemented and supervised by (or under the authority of) the ICANN Board." That distinction disposed of many of Booking.com's allegations of Board misconduct.

[T]he time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.

[I]f Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.....As did all stakeholders, [it had an opportunity to do so].<sup>108</sup>

82. This was true despite the Panel's recognition that the process in place had weak elements, some of which it recounted:

[T]he Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD

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Review was performed in accordance with documentation posted at <http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf>. As part of ICANN's acceptance of the InterConnect's results, a quality assurance review was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

<sup>107</sup> Booking.com IR Declaration, para. 67.

<sup>108</sup> Id., paras. 129-30.

algorithm [and] it provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user."<sup>109</sup>

83. Equally, noted the Panel:

The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.

Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms - for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations - which Booking.com claims are required under the applicable rules.<sup>110</sup>

84. Nevertheless, ultimately, the Panel concluded:

[T]he fact is that the sort of mechanisms that Booking.com asserts are required (and which [certain] NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.<sup>111</sup>

85. Under the second category of alleged Board failings, Booking.com cited the Board's failure to intervene in the Booking.com application process, either to reconsider and overturn a decision to place .HOTELS in a string contention set or to countermand the result of the Request for Reconsideration.

86. Before the Booking.com IR Panel, this line of argument also faltered. The Guidebook process had been followed with respect to the application in question and that process either did not call for the Board to act or gave the Board discretion not to act.

87. The analysis was not affected by the conclusions reached by Booking.com's expert, that: "[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone."<sup>112</sup> Nor was it affected by the allegation that the Board was, or should have been, alerted to the errant determination and had ample time to reverse the alleged error "using the authority accorded it by Module 5-4 of the Guidebook to 'individually consider a gTLD application'".<sup>113</sup>

88. The IR Panel found that the Board had not failed to discharge any of its obligations of fairness and transparency. The Panel ruled that:

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<sup>109</sup> Id., para. 127.

<sup>110</sup> Id., paras. 127-28.

<sup>111</sup> Id., para. 129 (emphasis in original).

<sup>112</sup> Id., para. 140.

<sup>113</sup> Id., para. 138.



[T]he Board's acceptance of the SSPs determination did not constitute Board action (or inaction), or a Board decision made (or not made), or by any other body to accept the SSP's determination. The Guidebook provides that when the applied-for strings are determined by the SSP to have the visual similarity likely to give rise to user confusion, they "will be placed in contention set".<sup>114</sup>

89. "Simply put," reasoned the Panel: "under the Guidebook the Board is neither required nor entitled to intervene at [that] stage to accept or not accept the SSP's determination."<sup>115</sup>

90. In turn, when acting through the BGC and, subsequently, through the NGCP in response to Booking.com's RFR, the Board discharged its duty to exercise due care and independent judgment. The IR Panel found the BGC's assessment to be detailed and carefully reasoned; the NGCP in turn had given extensive consideration to the BGC Recommendation before accepting it.<sup>116</sup>

91. The Panel agreed that in theory the Board could have stepped in under Section 5.1 (Module 5-4) of the Guidebook—that is to "individually consider [the] application...to determine whether approval would be in the best interest of the Internet community." The Panel found no fault in its failure to do so, however. It observed:

"the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com."<sup>117</sup>

92. In the case at hand:

[T]he Panel [did] not believe that the Board's inaction...in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case.

### C. DCA Trust<sup>118</sup>

93. DCA Trust, was a non-profit organization established under the laws of the Republic of Mauritius for the charitable purpose of, "among other things, advancing information technology

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<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Booking.com cited as compelling evidence of ICANN's failure in this regard statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's RFR was denied. The Panel took those views into account, but concentrated its inquiry on whether the Guidebook process had, or had not, been followed.

<sup>117</sup> Booking.com IR Declaration, para. 138.

<sup>118</sup> DotConnectAfricaTrust (DCA Trust) v. ICANN, Case No. 50 2013 001083.

education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa...<sup>119</sup> DCA Trust applied to ICANN for the delegation of the gTLD .AFRICA. It did so in competition with a South African company called ZACR. DCA Trust's application was opposed by ICANN's Governmental Advisory Committee (GAC), in a "Consensus Advice" that caused the NGPC to stop processing DCA Trust's application.<sup>120</sup>

94. Thereafter, DCA Trust pursued an RFR of NGPC's decision to halt processing of the application. It was unsuccessful; in August of 2013 the BGC recommended to the NGPC that it deny DCA Trust's Request, and the NGPC followed the BGC's recommendation."<sup>121</sup>

95. According to the Guidebook:

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 may 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.<sup>122</sup>

96. The GAC can offer advice on any application, and that advice can take several forms. The advice it gave in the DCA Trust case communicated that it was the consensus of the GAC that DCA Trust's application "should not proceed." According to the Guidebook, such an advice "will create a strong presumption for the ICANN Board that the application should not be approved."<sup>123</sup>

97. The established procedure calls for ICANN, upon receipt of such an Advice to publish it, and:

[E]ndeavor to notify the relevant applicant(s) promptly, [after which] [t]he applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.<sup>124</sup>

98. In considering the GAC Advice, the Board "may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure..."<sup>125</sup>

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<sup>119</sup> DCA Trust IR Declaration of July 9, 2015, para. 2.

<sup>120</sup> Id., para. 5.

<sup>121</sup> Id., paras. 6, 107.

<sup>122</sup> Guidebook, at 3-1 through 3-2.

<sup>123</sup> Guidebook, at 3-2.

<sup>124</sup> Id., at 3-3.

<sup>125</sup> Id.

99. In the IR, DCA Trust sought a declaration that ICANN Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by, inter alia: "failing to apply ICANN's procedures in a neutral and objective manner", with a level of transparency requisite to procedural fairness, when—"without reasonable investigation"—it accepted the supposedly consensus-based decision behind the GAC's Advice, and when it approved the Board Governance Committee's (BGC)'s recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice.

100. Ultimately, the DCA Trust Panel held that, indeed, by acts and failures to act attributable to the Board, it conducted itself in a manner "inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook."<sup>126</sup>

101. Although the applicant advanced myriad allegations of deficient Board behavior, at the core of the Panel's dispositive analysis was Article III of ICANN's Bylaws (Transparency), Section 1 of which provides:

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.

102. The Tribunal ruled that, the Article III transparency mandate applied to the GAC because under Article XI of the ICANN Bylaws the GAC was a "constituent body" of ICANN, albeit one performing only of an advisory function and having no power to bind the Board.<sup>127</sup>

103. In finding that transparency had not been practiced, the Panel was influenced by testimony from the then-Chair of the GAC and other evidence tending to show that the GAC decision was the product of obscure political maneuvering and was accompanied by no rationale (e.g., analysis or findings explaining potential violations of national laws or reporting on sensitivities bearing on the application in question, as one might have expected from consulting the Guidebook).<sup>128</sup>

104. Additionally:

DCA Trust was never given any notice or an opportunity... to make its position known or defend its own interests before the GAC reached consensus...and that the Board of ICANN did not take any steps to address this issue.<sup>129</sup>

105. The acts and omissions chargeable to the Board consisted in the NGPC's uncritical acceptance of the GAC supposed consensus that DCA Trust's application should be opposed, the failure of BGC during the RFR to take account of GAC's deficient process when declining to recommend reconsideration (despite the BGC having been empowered to investigate and fact-find) and the NGPC's ultimate acceptance, again without critical examination, of the BGC's decision recommending against reconsideration.

106. The Panel observed:

The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact

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<sup>126</sup> DCA Trust IR Declaration, para.148.

<sup>127</sup> DCA Trust IR Declaration, paras.101-02.

<sup>128</sup> Id., paras. 102-111.

<sup>129</sup> Id., para. 109.

with national laws or international agreements, ...that GAC advice is developed through consensus among member nations [and] that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

In light of the clear “Transparency” obligation[s]...found in ICANN’s Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application [and][t]he Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA.<sup>130</sup>

D. Vistaprint<sup>131</sup>

107. The Vistaprint IR stemmed from a “string confusion” objection, in which the objector prevailed. Applying the Guidebooks criteria,<sup>132</sup> the expert held that the gTLD .WEBS so nearly resembled .WEB “visually, aurally and in meaning” that it is likely to cause confusion in the mind of the average, reasonable Internet user.<sup>133</sup> As a consequence, Vistaprint’s applications (one standard, the other community-based) did not advance, but became subject to the contention set process.<sup>134</sup>

108. There followed a RFR in which the conduct of the expert (treated as analogous to ICANN “staff” for RFR purposes<sup>135</sup>) was evaluated.<sup>136</sup> The BGC (to whom RFRs are addressed) expressly limited its review to whether the expert violated any established policy or process in reaching its determination, a mandate that did not include performing an evaluation of the correctness of expert’s determinations on the merits.<sup>137</sup> The BGC concluded after a detailed analysis that there was no indication that the ICDR or the expert had violated any policy or process, or applied the wrong standard, in reaching its determination.<sup>138</sup>

109. In the IR that followed, Vistaprint alleged that the ICDR expert was bound by ICANN’s articulated policies, which he purportedly violated by making certain procedural errors, misapplying the burden of proof,<sup>139</sup> and incorrectly and arbitrarily assessing the Guidebook’s standards governing string confusion objections.<sup>140</sup> Vistaprint also questioned the expert’s independence and impartiality (or, alternatively, his qualifications) based on “the cursory nature

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<sup>130</sup> Id., paras. 113-14.

<sup>131</sup> Vistaprint Ltd. v. ICANN, ICDR Case No. 01-14-0000-6505.

<sup>132</sup> Under the Guidebook, Section 3.5.19 (at 3-18), the question is whether the applied-for gTLD string is likely to result in “string confusion”, which exists when “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.

<sup>133</sup> Vistaprint IR Declaration of October 9, 2015, paras. 23-24.

<sup>134</sup> Id., para. 30.

<sup>135</sup> Id., para. 33.

<sup>136</sup> Id., paras. 31-39.

<sup>137</sup> Id., para. 38.

<sup>138</sup> Id., para. 37.

<sup>139</sup> Id., paras. 85 (vii), 166.

<sup>140</sup> Id., para.70.

of the Decision and the arbitrary and selective discussion of the parties' arguments...."<sup>141</sup> It followed, according to Vistaprint, that it had not received a fair opportunity to present its case to the expert,<sup>142</sup> and that accordingly the Board should not have accepted the expert's determination, but rather should have rejected it based on the Board's "ultimate responsibility for the New gTLD Program" and the right it reserved "to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community."<sup>143</sup> Equally, acting through the BGC during the subsequent RFR, the Board, it was argued, should have intervened to address the process deficiencies in question.<sup>144</sup>

110. The Vistaprint Panel ruled that it was not empowered "to review the actions or inactions of ICANN's staff or any third parties, such as the ICDR or [objection] experts, who provided services to ICANN."<sup>145</sup> By contrast, the Board's actions when acting through the BGC (which exercises delegated Board authority when considering a RFR), may be assessed in an IR according to the Panel.

111. The Panel reasoned additionally that when petitioned by an applicant to do so, "the ICANN Board has no affirmative duty to review the result in any particular [string confusion] case."<sup>146</sup> In a related observation, the Panel noted:

"[w]hile Guidebook...permits ICANN's Board to individually consider new gTLD applications, such as through the RFR mechanism, it does not require that the Board do so in each and every case, sua sponte."<sup>147</sup>

112. In reaching the above conclusions, the Panel noted that the availability of the RFR procedure meant an applicant was not without recourse.<sup>148</sup> The Panel also consulted a fuller excerpt of the same Guidebook provision (§ 5.1) relied upon by Vistaprint:

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 the use of an ICANN accountability mechanism.

113. The Panel noted that the Guidebook example of the "exceptional circumstances" in which the Board might individually intervene was when the applicant had pursued an accountability mechanism, most notably an RFR.<sup>149</sup>

114. Vistaprint also made discrimination claims; there were two related strands to these: One line of argument was that while its application had resulted in a contention set, other applications involving strings said by Vistaprint to be more likely to cause confusion were allowed to proceed

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<sup>141</sup> Id., para. 26.

<sup>142</sup> Id., para. 83.

<sup>143</sup> Id., paras. 153, 156.

<sup>144</sup> Id., para. 70.

<sup>145</sup> Id., para. 150.

<sup>146</sup> Id., paras. 153, 157.

<sup>147</sup> Id., para. 156.

<sup>148</sup> Id., para. 154.

<sup>149</sup> Concerning Requests for Reconsideration, see notes 180-82, 227, *infra*, and accompanying text.

to delegation;<sup>150</sup> the second theory was that as to some string similarity cases involving inconsistent expert appraisals, the Board had authorized a further review mechanism selectively to operate, but did not accord Vistaprint the same opportunity.<sup>151</sup>

115. Vistaprint complained that the BGC had denied its RFR without considering whether such a review mechanism might also be appropriate for dealing with the string confusion determination involving .WEBS/.WEB.<sup>152</sup>

116. The Panel concluded that the Board violated no Article or Bylaw by not establishing a generally available appeals mechanism for string cases, but concurrently found itself challenged by the question whether, on balance, the string cases before it were distinguishable from those in which selective review had been recently authorized. It resolved, however, that it would be premature to rule on that question disparate treatment claim:

The IRP Panel is mindful that it should not substitute its judgment for that of ICANN's Board. The Board has not yet considered Vistaprint's claim of disparate treatment, and the arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board. Without the exercise of judgment by ICANN's Board on this question of whether there is any inequitable or disparate treatment regarding Vistaprint's .WEBS gTLD applications, the Board would risk violating its Bylaws, including its core values.<sup>153</sup>

117. The Vistaprint Panel thus found:

[T]hat due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the timing of ICANN's consultation process and subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD applications that were the subject of adverse SCO decisions, the ICANN Board has not had the opportunity to exercise its judgment on the question of whether, in view of ICANN's Bylaw concerning non-discriminatory treatment and based on the particular circumstances and developments noted above, such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications. Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN's Board – and not this Panel – should exercise its independent judgment on this issue, in light of all of the foregoing considerations.<sup>154</sup>

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<sup>150</sup> Id., paras. 176 et seq.

<sup>151</sup> See id., para. 181. This latter contention is separate from the question whether the Board should have established a general appeals mechanism to review the merits of string confusion determinations, which contention was rejected by the Vistaprint panel. See id., paras. 174, 175(5).

<sup>152</sup> Id., para. 181. The principal provision implicated by this question was Article II, Section 3's of the Bylaws which prohibits ICANN from applying "its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause..."

<sup>153</sup> Id., para. 190.

<sup>154</sup> Id., para. 191.

E. Merck KGaA<sup>155</sup>

118. The Merck IR arose out of a Legal Rights Objection (LRO)<sup>156</sup> instituted by Merck with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure.<sup>157</sup> Merck and another company, MSD, had each filed applications with ICANN for new gTLDs incorporating the word “Merck.” Both had objected to the other’s application. By determinations issued in 2013, the sole expert rejected both objections.

119. Merck then instituted an RFR. In that proceeding, the BGC ruled against Merck, concluding:

There is no evidence that the [expert] Panel either applied the improper standard or failed to properly evaluate the parties’ evidence. The expert had “correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered [factors used under analogous regimes]) only as a means to further provide context to one of the eight factors.”<sup>158</sup>

120. In the IR that followed, Merck argued, inter alia, that ICANN acted without due diligence and care when it “accepted” the expert determination reflecting what were alleged to be noticeable mistakes in applying ICANN’s LRO standards and that the BGC’s assessment of the relevant circumstances during the RFR was too narrow. Additionally, Merck maintained that the ICANN Board had discriminated against Merck by providing “the possibility for third-party review of some prima facie erroneous expert determinations” but denying the same to similarly situated parties such as Merck.<sup>159</sup> The IR Panel reflected on Merck’s complaints about the ICC expertise and the RFR process as follows:

Merck effectively wanted the BGC to overturn the Sole Panel Expert’s decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel

<sup>155</sup> Merck KGaA v. ICANN, Case No. 01-14-0000-9604.

<sup>156</sup> According to the Guidebook, a holder of existing legal rights (such as trademark) may object that those rights are infringed. Such objections are heard by one expert (unless the parties agree to have three) “with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.” Guidebook, Section 3.4.4 (at 3-16). In circumstances such as that involved in Merck, the expert’s mandate is to 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”. When the objection is based on trademark rights, the panel is instructed to consider a list of non-exclusive factors enumerated in the Guidebook. These include, for example:

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....

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....

<sup>157</sup> Merck KGaA v. ICANN, IR Declaration of December 10, 2015.

<sup>158</sup> Determination of the Board Governance Committee (BGC) Reconsideration Request 14-9, April 29, 2014, at 1-2.

<sup>159</sup> Merck IR Declaration, para. 53.

Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had 'been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the [expert] panel's deliberations, and the panel elected to decide the case on inapplicable grounds.'<sup>160</sup>

121. The Merck IR Panel prefaced its analysis by underscoring its limited mandate, and in particular the role of the Standard of Review in confining that charge. Concerning the level of deference, the Panel noted that nothing in the governing disputes architecture required it to approach alleged Board action with deference. Nevertheless, in approaching the BGC's determinations, it also was "clear that the Panel may not substitute its own view of the merits of the underlying dispute"<sup>161</sup> The Merck IR Panel thus limited its mission to examining, not the expert's performance in making the objection determination, but rather the conduct of the BGC in ruling on the RFR (indisputably ICANN Board conduct).<sup>162</sup>

122. Applying the IR Standard of Review to the BGC's processing of the RFR, the Panel concluded that there was no evidence that the BGC had failed to carefully and with due diligence equip itself with a reasonable amount of facts in making its assessment or that it failed to consider those facts fully. The Panel declined to assess whether the expert had applied the correct standards, or to perform a de novo review in place of that performed by the BGC. The BGC had determined that the expert had not applied the wrong standards; the Panel considered itself to be without jurisdiction to review the correctness of that finding. It reasoned:

Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.

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<sup>160</sup> Id., para. 46.

<sup>161</sup> Id., para. 21.

<sup>162</sup> To some extent, this followed from the fact that the BGC itself was not empowered to replace the expert's merits determinations with its own, but rather was limited to verifying that certain processing standards had been met. The IR Panel thus observed: "None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits. Id., para. 47.



Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. [T]his is not a basis for action by this Panel[.]<sup>163</sup>

123. The Panel also found Merck's discrimination claim lacking. The Panel reasoned that:

[I]t was within the discretion of the BGC and Board...to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.<sup>164</sup>

## XII. MANDATE OF THE PANEL

### A. In General

124. The IR Process is one of two review mechanisms intended to ensure that ICANN remains accountable "to the community for operating in a manner that is consistent with [its] Bylaws, and with due regard for the core values set forth in Article I of [those] Bylaws."<sup>165</sup> Both are intended to "reinforce the various accountability mechanisms otherwise set forth in [the] Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout [the] Bylaws"<sup>166</sup>

125. As an IR, the current process is to be distinguished from an RFR, the other accountability process authorized by the Bylaws (Article IV, Section 2), and featured in the IR precedents surveyed above. While both are types of review, the two processes are different in terms of the persons and subject matter falling within their respective remits.

126. The IR mechanism was established to allow "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 [to] submit a request for independent review of that decision or action."<sup>167</sup> As implied in that description of standing, under the Bylaws (Article IV, Section 3), an IR Panel must compare "contested actions of the Board to the Articles of Incorporation and Bylaws, and [must declare] whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Additionally, as an IR Panel, we are duty-bound to focus on three questions (the "Standard of Review"), as underscored by the Merck Panel in its Declaration, summarized above:

1] Did the Board act without conflict of interest in taking its decision;

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<sup>163</sup> Id., paras. 49-50.

<sup>164</sup> Id., para. 61.

<sup>165</sup> ICANN Bylaws, Article IV, Section 1.

<sup>166</sup> Id.

<sup>167</sup> Id., Article IV, Sec. 3 ("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").

2] Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; and

3] Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>168</sup>

127. The ICDR Supplemental IRP Rules replicate the Bylaws as to the above focus questions, but add:

8. Standard of Review. ./.... If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

128. Additionally, our ruling as a Panel must be “based solely on the documentation, supporting materials, and arguments submitted by the parties....”<sup>169</sup>.

B. Board Actions and Failures to Act

129. It seems to have become common ground between the parties to this IR that under some circumstances the requester may legitimately complain of the Board’s failure to take action as well as its affirmative acts. Other Panels are in accord.<sup>170</sup> Not all inaction is actionable, however. Rather, in the Panel’s view, “actionable inaction” is a failure that is inconsistent with a duty to act, whether that duty is formally established by ICANN’s constitutive documents, generated by some other explicit or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present. In assessing alleged failures to act, the question is not whether the Board has the power to act, or whether to act would be consistent with the Articles and Bylaws, but whether the Board must act given all the circumstances.

C. Level of Deference

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<sup>168</sup> The Bylaws contemplate that, at least sometimes, the complained-of Board action will be evidenced by “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.” ICANN Bylaws, Article IV, Section 3.3.

<sup>169</sup> The Bylaws place page limits on Requests for IR and ICANN’s response thereto, but allow each party to submit “documentary evidence supporting [its position] without limitation.” See ICANN Bylaws, Article IV, Section 3, para. 5.

<sup>170</sup> See e.g., Vistaprint IR Declaration, paras.127-128:

It appears that ICANN’s focus in this statement is on affirmative action taken by the BGC in rejecting Vistaprint’s Reconsideration Request; however, this does not eliminate the IRP Panel’s consideration of whether, in the circumstances, inaction (or omission) by the BGC or the full ICANN Board in relation to the issues raised by Vistaprint’s application would be considered a potential violation of the Articles or Bylaws....[T]he Panel considers that a significant question in this IRP concerns one of “omission” – the ICANN Board, through the BGC or otherwise, did not provide relief to Vistaprint in the form of an additional review mechanism, as it did to certain other parties who were the subject of an adverse SCO determination.

130. The corporation laws in most states contain a rich and not fully consistent body of jurisprudence addressing the extent to which boards of directors should be protected in their decision making by one or more presumptions that they acted with due care and in good faith. The law of California, for example, has such jurisprudence.

131. If this were a matter of first impression, this Panel would be required to consider in some detail the applicability of such doctrines in this proceeding. The several Panels to have already addressed the question, however, have done so with relative consistency. In their view, IR Panels are not to accord normal Business Judgment Rule style deference to the work of the ICANN Board, but rather are to pursue “objective” review.<sup>171</sup> This conclusion results from the implications of the word “independent”, the explicit standard of review to which the Panel is already bound (which functions in place of the more general Business Judgment Rule jurisprudence) and related justifications. This Panel finds those Declarations sufficiently persuasive that it need not depart from what seems to be the established trend and general approach.

132. Although an IR panel is not bound to accord the Board a presumption of requisite due care, good faith, and the like when examining acts and alleged actionable inaction, the notion that review is objective requires some clarification for the purposes of an IR. In particular, this Panel subscribes to the following furthers parameters:

133. First, whatever label one uses to describe the approach (e.g., “objective,” “de novo,” or “independent”) that approach does not allow the Panel to base its determinations on what it, itself, might have done, had it been the Board. The explicit standard of review—for better or worse—is much narrower than that. In the view of the Booking.com Panel:

[T]here can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled - indeed, required - to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws...[or] with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”<sup>172</sup>

134. The present Panel has developed a similar sense of the setting in which it must judge such Board action or inaction as may be identified. As did the Booking.com Panel, this Panel finds that, in the absence of a demonstrable conflict of interest, affording a margin of appreciation to Board action and inaction is to some extent dictated by the Bylaws themselves. As noted in the

<sup>171</sup> See Vistaprint IR Declaration, para. 126:

The Panel considers that the question on this issue is now settled. Therefore, in this IRP the ICANN Board’s conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.

<sup>172</sup> Booking.com IR Declaration, para. 129.

above quote from Booking.com, those Bylaws contemplate that ICANN bodies are expected to assess relevance and strive for “an appropriate and defensible balance among competing values” while understanding that:

[T]he 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 [that] because [the Core Values] are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.<sup>173</sup>

135. Second, a measure of self-restraint is also dictated by the Standard of Review to which this Panel is bound, expressed as it is in terms of whether the Board made “a reasonable inquiry” as opposed to, for example, an “exhaustive” inquiry to determine if it had “sufficient facts available.”<sup>174</sup> Relatedly, to the extent possible given what may be the rather limited fact-finding that can be pursued in an IR, due account ought to be given to such contextual factors as the actual information available to the Board at the relevant time and the array of competing considerations with which it was faced.

136. Finally, complaints about the community objection process as adopted, however well-founded, must be viewed in light of the time bar established in the Bylaws<sup>175</sup> and applied by other Panels.<sup>176</sup> That said, this Panel believes that it may not always be improper to consider *the manner* in which the process, as established by ICANN, was conducted, and in particular the extent to which relevant actors deviated from that process.<sup>177</sup>

#### XIIV. PANEL’S ANALYSIS REGARDING ACTS EQUATED TO BOARD ACTS

##### A. Panel’s Approach

137. ICANN has argued that the conduct of the ICC and the experts it appoints is neither tantamount to Board action nor properly the basis of any duty on the part of the Board to act. In light of Donuts’ arguments to the contrary, and this Panel’s mandate, the following multipart inquiry arises: should the actions of the ICC or its experts be deemed to be: 1] those of the Board, 2] attributable to the Board, or 3] such as to require the Board to take particular action, which action it in turn did not take.

##### B. The Extent of Direct or Imputed Equivalency between the Board and the ICC and its Experts

###### I. In General

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<sup>173</sup> ICANN Bylaws, Article I, Section 2.

<sup>174</sup> See ICDR Supplemental Procedures for ICANN Independent Review Process, Article 8 (essentially restating the Standard of Review set forth in ICANN Bylaws, Article IV, Section 3.4).

<sup>175</sup> See ICANN Bylaws, Article IV, Sec 3(3).

<sup>176</sup> See Booking.com IR Declaration, at para. 129 (“Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws”). See note 108, *supra*, and accompanying text.

<sup>177</sup> This was the approach taken by the Bookings.com Panel. See, e.g., para.163 “[O]ur role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.”

138. Some of Donuts' arguments equate the acts of ICC experts, and of the ICC, with those of the Board. There is some variation in how Donuts' explains this equation, but the following, taken from Donuts' Request for an IR, is representative:

Only the Board has the power to appoint or authorize experts to help it make decisions. Under the Guidebook, in fact, it may directly "consult with ... experts ... designated to hear objections." The Board wields ultimate authority over the entire new gTLD program, including to consider any application individually. *As such, the ... objection rulings against Donuts amount to Board action* reviewable and reversible by this proceeding.<sup>178</sup>

139. Similarly, in its Supplemental written submission, Donuts maintains:

ICANN contends that its Board has no obligation to ensure that *its* appointed experts act without conflict of interest. However, *appointment of an expert with conflict of interest is clearly a Board action* in violation of ICANN's Bylaws, which, as stated under Bylaws Art. IV § 3.4.a, makes that an express subject of IRP review...*[The Board, in allowing] that panelist subsequently to rule on the same objector's case against .SPORTS transgresses not only the anti-conflict provision of the Bylaws, but also its non-discrimination mandate at Art. II § 3.*<sup>179</sup>

2. Do the Bylaws Support Treating as Equivalent to Board Actions those of the ICC and ICC-Appointed Experts?

140. The Panel starts by examining the Bylaws' Article IV (titled: Accountability and Review). With respect to IRs, the focus is on a "decision or action by the Board" alleged to be inconsistent with the Articles of Incorporation or Bylaws. The explicit focus on Board conduct coincides with the heading: "Independent Review of Board Action" and is redoubled in the ICDR Supplemental Rules developed for IRs; the latter Rules essentially repeat the Standard of Review by instructing this Panel to ask, inter alia: did the *ICANN Board...* make a reasonable inquiry to determine it had sufficient facts available; *did ICANN Board members ha[ve] a conflict of interest in participating in the decision*", or produce a decision not "believed *by the ICANN Board* to be in the best interests of the company..."<sup>180</sup>

141. When that same accountability Article within the Bylaws authorizes RFRs, by contrast, it does so with a broader explicit reach. It makes the process available not only to address the acts and failures to act of the Board<sup>181</sup> but also those of ICANN staff, to the extent conduct of the latter "contradict established ICANN policy(ies)". Consistent with this broader reach, ICANN

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<sup>178</sup> Donuts' Request for IR, para. 5 (emphasis added).

<sup>179</sup> Emphasis added; bracketed insert inferred.

<sup>180</sup> ICDR Supplemental Rules for IRP, Article 8.

<sup>181</sup> In particular:

[O]ne 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

[O]ne 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.

has acknowledged that the acts and omissions of institutions administering objection proceedings and of the experts they appoint qualify as “staff” conduct, and thus may be the basis of a RFR.<sup>182</sup>

142. No doubt the architects of the IR mechanism could have made the Board directly accountable for designated acts or omissions committed by the ICC and the experts it appoints, either by equating them to Board action or by opening the process to “staff” conduct. The close proximity within the Bylaws of the two accountability processes suggests that differences in the manner of delineating scope were purposeful, not accidental. This seemingly uncontroversial reading of the Bylaws would, however, not preclude attribution to the Board of the conduct of other actors under certain circumstances.

### 3. Deemed Equivalency; Attribution Theories

143. Donuts does not suggest that in delimiting IR jurisdiction the Bylaws expressly equate the Board with the ICC and its experts. Rather, its position seems to be that ICC experts, in effect, are appointed by the Board by virtue of a delegation of that power to the ICC, which specialized institution in turn makes the appointments on behalf of the Board. As the Panel understands Donuts’ theory, the Board is then accountable for prejudicial errors committed by the ICC or its experts in the course of discharging the mandates given them by the Board. Donuts reasons:

Only the Board has the power to appoint or authorize experts to help it make decisions. Under the Guidebook, in fact, it may directly “consult with ... experts ... designated to hear objections.” The Board wields ultimate authority over the entire new gTLD program, including to consider any application individually. As such, the ... objection rulings against Donuts amount to Board action reviewable and reversible by this proceeding.<sup>183</sup>

144. Donuts relies in particular upon Bylaws Article XI-A, Section 1, Paragraph 4, which it interprets as establishing a close relationship between the experts appointed by the ICC and the Board. Section 1 of Article XI-A authorizes the Board to seek “external advice” from sources other than the Committees that may be available to it. The Section’s first paragraph states that “[t]he 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.” The Section refers to entities commissioned to give advice as “Expert Advisory Panels” which may consist in “public or private sector individuals or entities.” The Section provides that such panels may be appointed by the Board “on its own initiative or at the suggestion of any ICANN body.”

145. In relevant part, Paragraph 4 of Section 1, expressly relied upon by Donuts, states:

Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President... shall be made pursuant to terms of reference describing the

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<sup>182</sup> See Vistaprint IR Declaration, at note 60 (citing BGC Recommendation on Reconsideration Request 14-5 dated February 27, 2014 (“BGC Determination”), at p. 7, n. 7, Request, Annex 26, and available at <https://www.icann.org/en/system/files/files/determination-vistaprint-27feb14-en.pdf> (last accessed on Sept. 14, 2015)).

<sup>183</sup> Donuts’ Request for IR, para. 5.

issues on which input and advice is sought and the procedures and schedule to be followed.

146. ICANN offered a different understanding of that provision:

[The relied upon provision] has nothing whatsoever to do with the retention of experts for objections under the Applicant Guidebook for the New gTLD Program or the Board's decision to outsource the objection process to entities such as the [ICC], which have experts that can be appointed to resolve objections asserted against individual gTLD applications. Accordingly, the ICANN Board did not retain the ICC pursuant to Article XI-A of the Bylaws for the New gTLD Program....

Article XI-A of the Bylaws applies to external expert advice sought for the purpose of "allow[ing] the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN." (Bylaws, Art. XI-A, Section 1.1.). This "policy development process" is the process by which ICANN's various Supporting Organizations develop policy recommendations for ICANN (such as the recommendation by ICANN's Generic Names Supporting Organization to permit a broad expansion of the number of gTLDs).

147. The Panel understands why Donuts invites it to find that the work of ICC experts must have been authorized under Article XI-A. That would show a somewhat direct link between the Board and the ICC experts in this case, and would perhaps imply some level of focused Board processing of individual expert rulings in every case. This would follow from subsequent paragraphs in that article, which elaborate:

[E]xternal advice pursuant to this Section...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 [and that] "prior to any decision by the Board" an opportunity to comment on such advice is to be given to "the Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees."<sup>184</sup>

148. The Panel agrees with Donuts that when the Guidebook states that an ICC expert's finding "will be considered an expert determination"<sup>185</sup> it is not illogical when finding no other specific Bylaw provision on point to assume that Bylaw XI-A may be relevant.

149. The Panel nevertheless agrees with ICANN that the more natural construction of Bylaws Article XI-A is that it authorizes the Board to engage outside experts to aid in policy development, and that by language and structure it appears not to have within its contemplation seriatim ICC appointments to settle objection disputes with a view to generating whatever incremental policy advice might be gleaned from such individual adjudications.

150. Equally, it is difficult to conceive of the MOU between ICANN and the ICC<sup>186</sup> as constituting a Board request for advice on a particular policy. In any event, determinations based on the distinctive set of facts that exists in each objection case seem ill-suited to providing such

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<sup>184</sup> ICANN Bylaws, Article XI-A, Section 1, para. 5.

<sup>185</sup> See Guidebook, at 3-17.

<sup>186</sup> See notes 46-51, *supra*, and accompanying text.

“advice” in a form that promotes “the policy-development process within ICANN.”<sup>187</sup> The Guidebook account of the objection process also states that ICC expert rulings will be “...advice that ICANN will accept”, which diverges from Bylaw XI-A’s statement that “[e]xternal advice pursuant to this Section...is advisory and not binding, and is intended to augment the information available to the Board....”

151. Ultimately, of course, there is no need to fit the ICC and its expert regime under Bylaws Article XI-A for such activities to enjoy authorization, or otherwise to be consistent with ICANN’s constituent documents. The California statute under which ICANN operates provides that a corporation of the ICANN type:

[I]n carrying out its activities, shall have all of the powers of a natural person, including, without limitation, the power to: ... (j) Participate with others in any...association, transaction or arrangement of any kind whether or not such participation involves sharing or delegation of control with or to others.<sup>188</sup>

152. Additionally, the Panel recalls that ICANN’s Articles entitle ICANN to “cooperate as appropriate with relevant international organizations.”<sup>189</sup>

153. To rule, as we do, that Bylaws Article XI-A does not reveal a direct connection between the appointment of ICC experts and the Board, however, does not fully exhaust the ways in which the work of the ICC and its experts might be imputed to the Board. Under certain circumstances, general principles of agency might justify such attribution.

154. Although the precise basis upon which Donuts might wish the Panel to find an agency relationship has not been supplied by Donuts, Donuts’ broader argument in connection with Article XI-A and elsewhere seems to allude to the rudiments of such a theory. It notes, for example, that under AGB § 5.1 the Board “ultimate responsibility for the New gTLD Program” and “reserves the right to individually consider an application for a new gTLD  
....<sup>190</sup>

155. Had the agency theory been more fully addressed by the parties,<sup>191</sup> the propriety of imputing directly to the Board the acts of the ICC and its experts would most likely depend on how the relationship between the ICC and ICANN is characterized; under the general principles of law known to the Panel that would probably turn upon the level of control that ICANN exerts or is entitled to exert over the ICC’s operations in respect of objection proceedings.

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<sup>187</sup> It is true that the decisions produced by ICC experts are “written” as required by Article XI-A, Section 1, para. 5, but they do not function with the ICANN system as “advisory and not binding [advice]... intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities.” Nor do they seem to fit within an architecture that requires that “prior to any decision by the Board” an opportunity to comment on such advice is be given to “the Governmental Advisory Committee, Supporting Organizations and other Advisory Committees.”

<sup>188</sup> Cal. Corporations Code, Section 5140(j).

<sup>189</sup> ICANN Articles of Incorporation, Article 4.

<sup>190</sup> See Donuts Supplemental Memorandum, para. 21.

<sup>191</sup> An antecedent step in elaborating such an argument would be to determine what body of law should be consulted by the Panel.



156. Given that the matter was not elaborated upon by Donuts, let alone briefed by the parties, the Panel will not do more than suggest why it considers that, on balance, there is not enough evidence of control in the record to attribute the acts of the ICC and its experts to the ICANN Board. In this regard, the Panel finds the terms of the ICANN-ICC MOU illuminating, if by no means conclusive.

157. Under the MOU, it is for the ICC to select experts and administer the proceedings according to the ICC Rules and any supplements thereto. It is also for the ICC to “establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner” (although it is to do so with “with advice and support from ICANN”).

158. The MOU confirms that the ICC-ICANN relationship is a collaborative one under which the ICC enjoys many elements of independence in keeping with its established expertise with respect to the endeavors in question. Moreover, the persistent reference in official ICANN documents to the ICC as a “service provider” when viewed most favorably to Donuts is at most neutral on the question of whether it should be considered an independent contractor as distinct from an agent of ICANN.

159. This Panel concludes given the foregoing, and in accord with the reasoning of other Panels, that the relationship between ICANN and the ICC is not such as to allow an IR Panel “[to] review the actions or inactions of ICANN’s staff or any third parties, such as the [DRSP or objection experts] who provided services to ICANN.”<sup>192</sup> The notion that administering institutions, such as the ICC, are third-party service providers, and not “constituent entities” of ICANN generally or alter egos of the ICANN Board in particular is consistent with most of what one finds in the reasoning other IR Panels.

#### 4. The Theoretical Consequences of Attribution of Substantive Errors

160. Even if this Panel deemed itself authorized as Independent Reviewers to equate the work of ICC experts in their rulings on objections to that of the Board, however, it would stop well short of acting as a plenary review body concerned with errors of fact or the correct application of substantive standards. We would be required to consult the explicit Standard of Review to which we are bound. Thus, we would ask:

1] did the [expert] act without conflict of interest in taking its decision?;

2] did the [expert] exercise due diligence and care in having a reasonable amount of facts in front of [him]?; and

3] did the [expert] exercise independent judgment in taking the decision[.]

161. As to the .RUGBY application, Donuts does not offer an assessment of how the work of Mr. Kantor failed any of these tests; rather, Donuts argues that he misapplied the community objection standards adumbrated in the Guidebook. If in fact that is true—and the Panel’s review of the Mr. Kantor’s reasoning by no means leads to that conclusion—such errors on the merits would fall beyond the three lines of inquiry this Panel is obliged to pursue. In the absence of

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<sup>192</sup> Vistaprint IR Declaration, para.150.

further elaboration by Donuts, the .RUGBY proceeding seems readily to clear the hurdles posed by all three questions. Nothing established by Donuts, or apparent from or the record of that proceeding, indicates that a conflict of interest or a lack of independence was present in the work of Mr. Kantor. In turn, the ICC expertise process, which he followed, is one designed to acquaint him with a reasonable amount of facts. Ultimately, to impute Kantor's work to the ICANN Board is to impute conduct not at variance with the Articles or Bylaws, especially when that conduct is considered in light of the required Standard of Review.

162. If other circumstances were equal, the above Standard of Review analysis would apply with equal force to the objection ruling in .SPORTS. Assuming that Mr. Taylor were the agent (or sub-agent) of the Board, his putative errors in applying community objection standards would not be cognizable under the Standard of Review to which this Panel is bound.

163. As is true with respect to the report of the .RUGBY expert, on its face the .SPORT expert opinion shows good conversancy with the parties' arguments and the controlling texts. Whether Donuts agreed with it or not, the reasoning in both cases followed from what appeared to be reasonable fact finding, was lucid, and adopted plausible interpretations of the factual and legal elements involved in those community objections.<sup>193</sup>

164. The .RUGBY and the .SPORTS ruling are not, however, on an equal footing. Donuts alleges that the .SPORTS process was materially defective by virtue of the expert's failure to make sufficient disclosures.

165. If such conduct were deemed by some theory of attribution to be that of the Board, this Panel would struggle with those prongs of the Standard of Review requiring independent, conflict-free, decision making. This Panel finds an insufficient basis, however, for such imputation, for reasons given above.<sup>194</sup> In particular, the deficient case for attribution is not improved merely because alleged conduct in question is the expert's non-disclosure rather than his misapplication of community objection standards. The Panel is not empowered to develop theories on behalf of a party, but must base its declaration on the documents and arguments before it.<sup>195</sup> That Record does not establish a basis for attribution.<sup>196</sup>

166. The Panel examines below whether the Board had a duty to act in light of what Donuts alleges were insufficient disclosures by Mr. Taylor when accepting his appointment as the ICC expert for the .SPORTS objection.<sup>197</sup>

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<sup>193</sup> Putting aside the question of the expert's alleged conflicts of interest, which explains everything according to Donuts, the outcome in .SPORT expert proceeding seems in part attributable to the expert's firm disapproval of some of Donuts' arguments. See note 214, *infra*, and accompanying text.

<sup>194</sup> See notes 178-92, *supra*, and accompanying text.

<sup>195</sup> ICDR Supplemental ICANN IR Rules, Article 10(a).

<sup>196</sup> No submission by Donuts explains why Mr. Taylor should be regarded as other than an agent, employee or independent contractor of the ICC (itself an independent contractor of ICANN), under which alternative assumptions common law agency principles, absent more, would preclude attribution. Donuts ultimately had the burden of demonstrating under governing law how such attribution might be called for, and it did not do so.

<sup>197</sup> See notes 208-229, *infra*, and accompanying text.

#### XIV. PANEL'S ANALYSIS REGARDING BOARD FAILURES TO ACT

##### A. In General

167. Donuts has advanced an analytically distinct set of arguments, which faults the Board for failures to act remedially to ameliorate, prospectively or retroactively, prejudice resulting from errors of substance and procedure committed during the two objection determinations giving rise to this IR. To restate the three main allegations, ICANN failed: 1] to train ICC experts to correctly apply community objection standards; 2] to institute a secondary regime to reconcile inconsistent community objection rulings; and 3] to intervene in this individual case to correct what Donuts argues are obvious substantive errors and a failure of due process by reason of deficient expert disclosure.

168. As outlined above, the Panel considers that some but not all failures to act are cognizable by it. In the Panel's view, "actionable inaction" is a failure by the Board that is inconsistent with a duty to act, whether that duty is formally established by ICANN's constitutive documents, established by some other explicit or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present.

169. It follows that not every circumstance in which the Board might be empowered to act gives rise to a duty to act. In particular, when the complaining party points not to an explicit promise to act or a specific obligation to act substantiated in ICANN's constituent documents, but rather relies on the circumstances and more general sources of obligation, actionable inaction would seem to assume circumstances: 1] that are, or ought be, known to the Board; 2] that forcefully impinge on relevant values and principles; and 3] that could reasonably have been expected to be mitigated by Board action. Importantly, even when the three factors just enumerated are present, the inaction must be judged in light of the Standard of Review (that is: it might be that determined inaction is well-informed, independent and conflict-free).

170. As outlined earlier, in accord with what other Panels have concluded,<sup>198</sup> at any given time the Board is confronted with the range of options and is entitled, indeed required, to balance the competing values listed in the Bylaws when deciding what, if anything, to do. The Board need not react merely because it has been petitioned to do so by a stakeholder, commentator or other observer.<sup>199</sup>

##### B. Merits-Related Board Failures to Act

###### 1. In General

171. To the extent that Donuts complains of jurisprudential errors and disarray, its arguments assume that timely action by the Board would have led to added legal certainty, more transparency, higher levels of due process and—by extension—unsuccessful objections in the specific cases here involved through the proper application of community objection standards.

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<sup>198</sup> See, e.g., Booking.com IR Declaration, para. 138.

<sup>199</sup> See Id.

## 2. Failure to Train ICC Experts

172. It is common ground that ICC experts have access to the Applicant Guidebook and other documentation concerning the adaptation of the ICC Expert process for use in determining community objections, but that they received no specific training by ICANN concerning community objection standards. Equally, however, the Board is not specifically required by any constituent document known to the Panel to institute training; nor has it represented that it would perform such training. Consistent with this, Donuts does not argue that it somehow relied on assurances that any expert appointed to decide an objection filing would have received particular training by ICANN.

173. The Panel believes that Donuts has not carried its burdens on this allegation. It has considered several factors:

174. First, the situation is not one in which the Board simply provided no instruction to the experts. The Guidebook itself provides a considerable measure of guidance. It identifies myriad factors for experts to consider in processing community objections, repeats admonitions about an objector's burdens and adds caveats about the need to find all elements satisfied.

175. Further, the Guidebook requires that the experts appointed to each proceeding be appropriately qualified<sup>200</sup> and this requirement is restated in the ICC Rules which require the ICC to consider the prospective appointees' qualifications to be considered before an appointment is made.<sup>201</sup>

176. Second, it is to be expected given the Guidebook's multi-factor tests, diversity of factual patterns and the role of advocates that variations in way experts frame issues and apply the governing factors will be perceived; these may or may not reflect genuine differences of approach or the deficiency of one approach compared to another. As a general matter, it would be surprising if among the corpus of reasoned objections to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected.

177. Moreover, the errors of which Donuts complains in the current case are said by it to be obvious under the Guidebook. If that is true, training would not necessarily have made any difference. An expert that would ignore the Guidebook would likely also ignore any subsequent training based on the Guidebook. In any event, the Panel's study of the reasoned opinions of the experts involved in this IR—done strictly for fact finding purposes<sup>202</sup>—found that neither expert failed to apply the Guidebook factors, nor reached an absurd result.

178. The Panel does not exclude the possibility that jurisprudential disarray might become so acute and prolonged with respect to community objections that the Board would be required to act to improve upon the original manner of equipping experts; Donuts has not demonstrated that such a state of affairs exists, however.

179. The Panel notes as well that, to a large extent, Donuts seems to complain of the system as it was originally instituted, one without training for experts beyond the instruction found in the

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<sup>200</sup> Guidebook, Section 3.4.4.

<sup>201</sup> ICC Expertise Rules, Article 3(2).

<sup>202</sup> The Panel is not entitled under the guise of an IR to propose an authoritative construction of the Guidebook's community objection standards.

Guidebook. As such, Donuts arguably faces the time bar applicable to such complaints, as recognized by other IR Panels.<sup>203</sup>

### 3. Failure to Institute Appellate Review

180. Similar considerations to those identified with respect to the training of experts apply in assessing the failure of the Board to inaugurate an appeals mechanism of some kind for community objection cases. Donuts argued:

Donuts and others had specifically urged the Board to implement a means for reviewing new gTLD objection rulings inconsistent with ICANN's "documented policies" governing such procedures in the Guidebook....Several months after that... the NGPC proposed...a mechanism for addressing perceived inconsistent results in certain [string confusion] objection cases.... The NGPC specifically cited, as authority for its determination, Guidebook section 5.1, which provides in part as follows:

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.

181. The Panel believes that to install some sort appeals mechanism might add predictability of outcome and produce greater satisfaction with the process by some. The Panel assumes, without opining, that the Board has the power to institute such a mechanism, and it believes that to do so in a sound fashion after careful study would be consistent with ICANN's Articles and Bylaws.

182. Equally, however, absent jurisprudential disarray so urgently in need of a top-down remedy that the Board would not be entitled to establish other priorities, it may indeed refrain from exercising the power it has already exercised in connection with certain string similarity cases.

183. Even if the record reflected a concrete decision by the Board to take an incremental approach to the implementation of review mechanisms, perhaps delaying in-depth study of the possibility, that Board strategy would be judged against the Standard of Review, and the Board's duty to balance all relevant factors, including those that argue against wholesale adoption of some form of appeals mechanism. In the Panel's view, absent compelling facts to the contrary, the Board need not rush into adding another layer of adjudication or review, whether or not urged to do so by Donuts and others.

### 4. Failure to Intervene in the Individual Case

184. Relying on the Board's reserved "right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community," Donuts faults the Board for not intervening in its individual case.<sup>204</sup> To the extent it relies on

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<sup>203</sup> See, e.g., reasoning of the Booking.com IR Panel, discussed at note 106, supra, and accompanying text.

<sup>204</sup> Quoting Guidebook, Section 5.1.

putative errors in the application of the community objection standards, the above analysis applies; the Board can, in the Panel's view, pursue other priorities. Apart from questions about whether the errors alleged by Donuts are as obvious as it asserts, a hypothetical Board policy of ordinarily not responding to ad hoc petitions to intervene with respect to individual applications would seem prudent on its face.

185. Accordingly, the Panel agrees with the Vistaprint Panel, who ruled that "the ICANN Board has no affirmative duty to review the result in any particular...case."<sup>205</sup> As Donuts does in this case, Vistaprint had relied upon the Guidebook's reference to individual Board consideration of applications. As the Vistaprint Panel observed, however, the Guidebook's example of the "exceptional circumstances" that involve individual assessment by the Board is when the disappointed applicant engages the Board through an accountability process such as the RFR.<sup>206</sup>

186. True, the RFR example, being only that, does not preclude an ad hoc intervention by the Board; it does however remind one of context, and to consider Board inaction in light of the other grievance mechanisms available to applicants, most notably in this case the RFR option.<sup>207</sup>

#### XV. PANEL'S ANALYSIS REGARDING FAILURE TO INTERVENE IN THE .SPORTS PROCESS TO ACCOUNT FOR DEFICIENT EXPERT DISCLOSURE.

##### A. The Disclosure Standard

187. With respect to the .SPORTS objection, Donuts relies heavily on what it considers to have been Mr. Taylor's deficient disclosure. The Panel has suggested above that it does not equate any such failing to direct Board conduct, but Donuts also has advanced a failure to act argument.

188. The ICC Expertise Rules in force at the relevant time contemplated that the ICC would appoint an expert only after considering "the prospective expert's qualifications relevant to the circumstances of the case"<sup>208</sup> and that, unless the parties agree otherwise in writing, the experts appointed are to be "independent of the parties involved in the expertise proceedings."<sup>209</sup>

189. Experts are to execute a "statement of independence" along with a written disclosure to the Centre of "any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties." Such disclosed information is communicated to the parties, who are entitled to object that the expert does not have the necessary qualifications, including independence.<sup>210</sup>

190. There is an obvious tension between the desire to find experts with suitable qualifications (which often implies experience in the relevant sector) and the default rule that experts are to be independent of the parties. To a large extent this struggle of opposing considerations is resolved by the expert making the required disclosures, and the system thus heavily depends on the expert to do so.

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<sup>205</sup> Vistaprint IR Declaration, para. 157.

<sup>206</sup> Id., para. 156 ("For example, the Board might individually consider an application as a result ... of the use of an ICANN accountability mechanism.").

<sup>207</sup> See notes 181-82, supra, and 227 infra, and accompanying text.

<sup>208</sup> ICC Expertise Rules, Article 3(2).

<sup>209</sup> Id., Article 3(3).

<sup>210</sup> Id.

191. An examination of the disclosure rule as formulated confirms that disclosure is intended to be relatively broad. It is not, for example, limited to circumstances “likely to call into question” the appointee’s independence, but refers instead to matters that “might” do so. Nor is it to be judged in terms of objective, reasonable, parties; the test, instead, is a subjective one asking the prospective expert to determine what should be disclosed when viewed through “the eyes of the[se] parties”.<sup>211</sup>

#### B. The Respective Actors’ Roles in Disclosure

192. It might be argued that Donuts has mainly itself to thank for not being prompted to investigate Mr. Taylor further by what one finds on his resume. His c.v., after all, records in several places that he has represented “sports bodies”, and in diverse contexts.<sup>212</sup> Given the wide membership enjoyed by SA, it is reasonable to expect that Donuts would have been cued to investigate Mr. Taylor’s background more fully by these disclosures; there would seem to have been a high probability that he had acted on behalf of one or more of SA’s members. Additionally, Donuts should have come to know his c.v. in detail by virtue of its unsuccessful, contemporaneous, attempt to challenge Mr. Taylor in connection with the .SKI objection proceeding.<sup>213</sup>

193. The sophistication with which Donuts is capable of operating during the appointment process is evidenced moreover by its successful challenge of Mr. McClaren in connection with .RUGBY objection proceeding.<sup>214</sup> One might also note that essentially the same Taylor resume supplied to Donuts led dot SPORT’S representative, Mr. Young, to seek disqualification of Mr. Taylor based on Taylor’s connections to SA, the same objecting entity against whom Donuts defended in the present case. Moreover, in doing so, Mr. Young seems to have relied on information largely available through a rudimentary internet search.<sup>215</sup>

194. When a disputant fails to discover, or under appreciates, putative conflicts until after receiving an unfavorable result, questions naturally arise about that party’s level of due diligence during the appointment process. Concurrently, Mr. Taylor, to be fair, may well have had in mind rules of disclosure pertaining to other systems, such as those governing under a national arbitration law, while assuming that those standards equaled or surpassed the ICC standard. Nor does it follow, necessarily, from what this Panel regards as his impermissibly abridged disclosures that Taylor was a partisan, such that his determination was the product of bias. While it is true that Mr. Taylor was critical in some respects of the manner in which Donuts’ conducted its defense, the irritation expressed by him may well have been heart-felt, and perhaps justified, rather than an expression of partisanship (the Panel is not in a position to judge).<sup>216</sup>

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<sup>211</sup> This would not in every case lead to a duty to err on the side of disclosure; the parties may by involvement in the field both know well the expert and any relevant affiliations he or she has.

<sup>212</sup> Taylor c.v. as attached to ICC Statement of Independence and Impartiality.

<sup>213</sup> Recounted by Donuts in its Request for Independent Review of October 8, 2014, paras. 41, 46- 48.

<sup>214</sup> Recounted by Donuts at id., para. 53.

<sup>215</sup> July 1, 2013 letter to ICC by Mr. Young challenging Mr. Taylor’s appointment in relation to .SPORT objection by Sport Accord.

<sup>216</sup> See Taylor expertise, paras. 16.4-16.5. The expert characterized as “extremely misleading” and “(at the very least) unfortunate” that, upon investigation, a document said by Donuts to establish the policy of ICANN and the Guidebook in fact represented the not-adopted view of a certain private entity, and

195. As for Mr. Taylor's reasoned determination on the merits, at least on its face, it seems to be a thorough, balanced, and lucid examination of the community objection grounds that flows logically to a conclusion. Whether he was correct in his appreciation of the merits is not for this Panel to assess.

196. Whatever obligations a party has to investigate a potential appointee (and the Panel believes these are not negligible) ultimately it is primarily the ICC expert's disclosure practices, and not the parties' due diligence, upon which the integrity of the ICC expertise system depends. A prospective appointee's failure to be forthcoming, combined with selective disclosures capable of assuaging the concerns of one of the parties, allows the later-dissatisfied party to complain justifiably about the process while also giving it a plausible reason for not itself investigating more deeply.

197. Even without consulting the IBA Conflicts Rules relied on by Donuts' expert, (which do not apply formally to an ICC Expert proceeding), the Panel would have expected Mr. Taylor to have been more specific in making disclosures based on the above analyzed ICC disclosure formula. He should have identified the members of SA for whom he had recently acted. That would have included listing his advocacy on behalf of the International Tennis Federation (ITF), the conflict which Donuts' expert found to be most troubling.<sup>217</sup> In this respect, the Panel notes that the ICC disclosure statement he signed advises, in underscored text, that "any doubt must be resolved in favour of disclosure."<sup>218</sup>

### C. Partial Dissent

198. In light of what all three Panel members regard as disclosure by Mr. Taylor that was on its face insufficient, one member would declare Donuts the prevailing party with respect to the .SPORTS application. He explains why he so holds in a separate document not forming part of this Declaration. Although the majority proceeds on a different basis, it understands how reasonable minds could conclude that the ICC expertise system, as adapted for use in community objection cases, has a systemic defect evident in the case at hand. That defect may allow conflicts to go undetected, and un-remedied, at critical times given that the system combines heavy reliance on adequate candidate disclosure, the absence of court review,<sup>219</sup> single-member

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constituted on the part of Donuts "a contrived argument" intended to defeat the objection but which instead gave rise to a negative inference and questions about Donut's credibility.

<sup>217</sup> Savarian Report of October 7, 2014, at para. 32 (ongoing representation of ITF a 'Waivable Red List' conflict).

<sup>218</sup> ICC Disclosure Form ("Statement of Impartiality and Independence") completed by Jonathan Taylor, June 17, 2013.

<sup>219</sup> Whether a binding expert determination would be regarded as subject to a set aside proceeding is likely to vary with the national arbitration law in question. With respect to potential lawsuits against ICANN itself, the Guidebook stipulates (emphasis in the original) that:

APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. 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



expert tribunals, and a binding process in substitution for the original ICC default rule under which expert determinations are merely advisory.<sup>220</sup>

199. Language in at least one precedent, in turn, arguably condones a more plenary review than that which the majority pursues in this case. The Booking.com Panel summarized its investigation as follows:

The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, *including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP)*, that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (*or any staff or third party*) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (*or any staff or third party*) in relation to the string similarity review of .hotels in particular.<sup>221</sup>

200. A similar search in the case at hand might well support a finding that, unlike what was resolved in Booking.com, conduct of certain third parties (Mr. Taylor) was “inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook” to quote again Booking.com. At least arguably, moreover, no time bar would operate because the complaint is not about the system as installed by ICANN, but rather concerns a failure of the system as designed to be followed in this particular case.

#### D. The Majority's Position

##### 1. In General

201. The Panel majority finds the views expressed by our colleague to be cogent—indeed, forceful. We take a somewhat different approach, however, and reach a different conclusion.

202. We start by recalling how very narrow our mandate is, and how that confinement is redoubled by the standard of review. Our task is not to assess whether everything worked perfectly in the objection process, but rather whether or not the Board can be said to have violated ICANN's Articles and Bylaws. For reasons discussed above, the requisite Board action cannot be established by equating directly the expert's deficient disclosure, or the ICC's failure to require better disclosure, to a Board failure to disclose or require disclosure, even though some of

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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.

Guidebook, at 6-3.

<sup>220</sup> See notes 56, *supra*, and accompanying text.

<sup>221</sup> Booking.com IR Declaration, paras. 144-45 (emphasis added).

Donuts' submissions have made that leap. More would be needed before this Panel's majority could consider either the ICC or Mr. Taylor to be a partner or agent of the Board.

203. Nor has the ICC been shown by Donuts to be sufficiently analogous to the GAC to warrant Donuts' somewhat heavy reliance on the DCA IR Declaration. Donuts argues:

[T]he DCA Case held the Board responsible for oversight of the acts of ICANN's "constituent bodies," such as the GAC, that share ICANN's obligation to adhere to its Bylaws and other governing documents....GAC "advice" amounts to nothing unless and until ICANN acts upon it. Similarly, the [ICC expert] determinations of new gTLD objection panels constitute "expert advice" that have no effect until accepted by ICANN.<sup>222</sup>

204. This Panel's majority disagrees. It cannot, absent more, regard the ICC as a "constituent body" of ICANN. The DCA IR panel's analysis, by contrast, proceeded from its explicit finding that the GAC is a "constituent entity" of ICANN, and thus subject to its transparency undertakings. That question was the subject of considerable attention at the DAC IR hearing. Ultimately, the Panel formed a solid view of how the GAC fit within ICANN's constitutional structure.<sup>223</sup> In our case, with so many indications pointing a different direction, the case for considering the ICC a "constituent entity" is far from obvious, and in the majority's view, Donuts has not made its case on that point.

205. The majority also considers that the Booking.com Panel's recounting of its broad but fruitless search for actionable missteps was not a conclusive statement of the proper scope of an IR, but rather reasoning that obviated further inquiry because no missteps were found—process wide. The Panel's report also had the byproduct of not leaving unanswered allegations that experts and service providers had been sub-standard in their work.

2. In Light of Mr. Taylor's Disclosure Practices, Was the Board Required to Act?

206. Donuts, nevertheless, argues that the Board was obliged to act under the circumstances, referred to by it as "egregious." The record does not contain evidence of formal Board consideration of Mr. Taylor's conduct as an expert for this Panel to test against the governing standard of review. Nor does Donuts point to a Board undertaking, or other formal source, that expressly or by clear implication requires the Board to exercise oversight with respect to individual ICC appointments or the sufficiency of an expert's disclosure (although the RFR process arguably provides access to such oversight).

207. Donuts instead posits a duty flowing from the Board's ultimate responsibility for the new gTLD program, its reserved authority to consider individual applications, and an allegation that ICANN officers had been made aware of troubling facts concerning Mr. Taylor. In particular, Donuts avers that there were communications between ICANN and the ICC about Taylor in connection with a proceeding to which Donuts was not party, but which involved SA. Donuts alleged:

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<sup>222</sup> Donuts' Supplemental Memorandum of August 20, 2015, para.28.

<sup>223</sup> See DCA Trust IR Declaration, para.101.

Though the ICC did not provide other applicants with information regarding Mr. Taylor's potential conflicts, it certainly brought the dot Sport request to disqualify Mr. Taylor to ICANN's attention. In turn, ICANN made detailed inquiries of the ICC regarding dot Sport's conflict allegations. Dot Sport began to include ICANN Board members Fadi Chehadé and Cherine Chalaby, as well as Chris LaHatte, ICANN's Ombudsman, on its communications, after which ICANN staff made further inquiries of the ICC.<sup>224</sup>

208. In its Post-Hearing brief, Donuts reiterates: "[t]he Board has failed to act upon specific information of which it had express notice regarding the SPORTS panelist's conflict of interest."<sup>225</sup>

209. The chain of emails Donuts cites in support of its allegation that ICANN had become aware of Mr. Taylor's conflicts nevertheless do not support the proposition. Those communications related not to Mr. Taylor, but to a different expert's potential conflicts of interest, and correspondingly do not demonstrate active consideration by ICANN of circumstances related to Mr. Taylor's appointment in the .SPORTS objection proceeding.<sup>226</sup>

210. There are also problems with any suggestion that timely Board action to effect Taylor's disqualification—assuming the ICC would have allowed ICANN to so intervene in that fashion—would have led to the appointment of an expert who would have agreed with Donuts' interpretation of the community objection standards. The majority can't help but notice that both Mr. Kantor and Mr. Taylor were persuaded by similar lines of argument, flowing from Donuts' welcoming registration policy, and yet no conflicts have been attributed to Mr. Kantor.

211. In the view of this Panel's majority, however, even if the alleged biases of a particular expert are made known to ICANN officers in the ordinary course of interacting with the ICC, or because ICANN was petitioned by an applicant asking it to intervene, the Board's failure to intervene would have to be considered in light of the range of defensible options available to it and the existing ICANN mechanisms that offer a complaining applicant potential redress. Chief among these alternatives to ad hoc Board intervention is the RFR mechanism, which Donuts elected to forgo in this case.

212. Without purporting to predict the likely outcome of the RFR forgone by Donuts, the majority of this Panel does believe that it would have been an appropriate vehicle by which to address an expert's seemingly insufficient disclosure. The RFR process would have allowed an organ of the Board, with certain fact finding powers, to evaluate Mr. Taylor's conduct, and the ICC's handling of it, to determine if it amounted to: "one or more staff actions or inactions that

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<sup>224</sup> Donuts' Post-Hearing Brief of Supplemental Memorandum of August 20, 2015, para.8.

<sup>225</sup> *Id.*, para. 6.

<sup>226</sup> The Panel can only conclude that the compressed briefing schedule involved in this proceeding and the large volume of documents exchanged late in the process left Donuts insufficient time to study, or perhaps identify correctly, the correspondence upon which it relied. The Panel, nevertheless, spent considerable time in pursuing justification for arguments that, while asserted and repeated, proved to be unsupported by the documents to which the Panel was directed by Donuts.

contradict established ICANN policy(ies)”, to quote from the RFR grounds for seeking reconsideration.<sup>227</sup>

213. Had Donuts pursued an RFR, not only might some relief have been forthcoming (perhaps obviating this IR) but any RFR recommendation and subsequent processing of it would involve activities likely to fall properly within the jurisdiction of an IR Panel. Indeed, the RFR path is the one routinely taken by other disappointed applicants before resorting to the IR machinery. The Board was entitled to expect that Donuts would do likewise given the architecture in place. Correspondingly, in the view of this Panel’s majority, the Board simply was not required to pursue some other form application-specific intervention in the process.

214. Donuts is no doubt correct that it is not required to pursue an RFR. It is also correct that to the extent it sought a review of the merits, the RFR process would not be appropriate, and to that extent would be futile. The same cannot be so easily said when there is alleged conduct directly implicating the fairness and transparency of ICANN “staff”.

215. To its credit, Donuts engaged in an energetic effort to enlist the help of the Ombudsman, Mr. LaHatte. Despite being invited several times by LaHatte to identify some procedural unfairness, Donuts did not, as far as this Panel can ascertain, pin-point the weakness of Taylor’s disclosure. Donuts instead persisted in asking LaHatte to review the merits and to infer bias largely from the way in which Taylor reasoned and his connections<sup>228</sup>—to a large extent seeking the very merits review that LaHatte insisted he was not authorized to perform.<sup>229</sup> That is, based on the Donuts’ correspondence with Mr. LaHatte, fairness of process was LaHatte’s concern; given Donuts’ heavy emphasis on the disclosure question in these proceedings, that Donuts appears not to have asked LaHatte to consider the fairness implications of Taylor’s weak disclosure is surprising.

216. Ultimately, on the question of the Board’s alleged failure to act to ameliorate the consequences of Mr. Taylor’s seemingly insufficient disclosure, the majority concludes that the circumstances did not so powerfully suggest a need to act that the Board’s failure to do so transgresses the Articles or the Bylaws or otherwise raises doubts under the Standard of Review. Those circumstances include but are not limited to the availability to Donuts of the RFR process and the Board’s apparent lack of knowledge of any conflicts potentially impairing Taylor’s impartiality that remained both undisclosed and unknown to Donuts.

## XVI. DISPARATE TREATMENT CLAIM

217. As noted above, Donuts asserts that the Board has engaged in unjustified discrimination by virtue of its selectivity in installing a mechanism designed to address inconsistent “string

<sup>227</sup> See notes 181-181, supra, and accompanying text.

<sup>228</sup> See LaHatte Letter Ruling (Report) of May 25, 2014 finding no jurisdiction to examine merits of expert’s objection ruling. (“The essence of the complaint is that the dispute resolution providers have made errors in the various decisions relating to the names sought by Donuts, where they lost the dispute resolution processes.”); Letter of June 5, 2014 to from Donuts to Chris La Hatte (complaining of conflicts, bias, but not a failure of disclosure).

<sup>229</sup> See email correspondence sent by Chris Lahatte to Jonathon Nevett, May 25, 2014

confusion” objection results. Although Donuts formally supports the initiative, it urges that it should have been extended to inconsistent community objection determinations. Donuts avers:

[T]he Board... admits to having chosen consciously not to use [its power to reach community objection cases]. ICANN made that choice discriminatorily and despite specific and sustained exhortations to take action from a broad constituency including Donuts.<sup>230</sup>

218. Donuts relies on Bylaw’s Article II, Section 3. The latter commands that ICANN:

[S]hall 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.

219. By its terms, Article II, Section 3 is not violated if ICANN is justified in its line drawing by “substantial and reasonable” cause. Albeit with a slightly different application of the principle, the Panel agrees with Vistaprint IR Panel that temporal context is important. It is obvious that a fresh phase of study begins when a regime with the many operational features of the new gTLD program moves from planning to implementation. There having been extensive study and stakeholder participation before implementation of the gTLD program, the Board is more likely to violate its duties if acting precipitously rather than with deliberateness.

220. The benefits of deliberateness will in the majority’s view often constitute “substantial and reasonable cause” for selective application of new policies and new mechanisms. Moreover, in the majority’s opinion, the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances. The record does not allow the Panel to conclude that the considerable consistency issues raised in connection with string similarity cases have emerged in connection with community objection cases as a whole, or with respect to the two expert decisions giving rise to this IR.

221. On the contrary, the materials produced in this case afford ample justification for giving a priority to the string confusion cases,<sup>231</sup> which readily give the impression of containing a certain percentage of irreconcilable outcomes. The opprobrium raised among observers, stakeholders and others in reaction to the string confusion cases, correspondingly, seems to have been of a kind and a degree not occurring with respect to community objections.<sup>232</sup>

## XVII DONUTS’ CONTRACT THEORIES

222. In its pleadings, Donuts made reference to contractual theories by which it was entitled to relief; these were left under-developed by Donuts.<sup>233</sup> Nevertheless, for the sake of completeness, the majority observes that no contractual analysis it has considered would lead to a different result than that reached above. Under Donuts’ occasional characterization of itself as being a

<sup>230</sup> Donuts’ Post-Hearing Brief of Oct. 29, 2015, para. 12.

<sup>231</sup> See, e.g., Booking.com IR Declaration, paras. 119-30.

<sup>232</sup> Cf. Vistaprint IR Declaration, paras. 188-92.

<sup>233</sup> In its Request for IR, para. 80, Donuts provided its most complete explanation of its contract theory (“Applicant agrees to the terms of the Guidebook by applying for a new gTLD, thus forming a contract on those terms with ICANN”). The jurisprudential support for its contract formation thesis was not supplied, however.

contracting party, with ICANN being its counter-party, it is the premise that Board conduct that is not consistent with the Guidebook would be a breach of contract. It follows from the analysis adopted above that, assuming arguendo the existence of a contract, no breach has occurred, including no violation of duties of good faith. The same is true of any reliance-based theory the Panel can envision in the absence of focused pleading on the question.

## XIIX DECLARATION

223. To a great extent, Donuts' own initial pleading foreshadowed the majority's rulings in this case. It referred to certain post-ICM case "obstacles" instituted by ICANN, such as "subjecting only Board action to scrutiny, and attempting to narrow the scope of review."<sup>234</sup> Perhaps this was intended by Donuts to suggest that ICANN had acted unfairly to insulate itself from accountability. Whatever the intimation, these are not "obstacles" this Panel is free to ignore. As the Bookings.com IR panel observed in considering the case of another disappointed applicant:

In launching this IRP, [the applicant] no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws.<sup>235</sup>

224. As an IR Panel, we are required under the ICANN Bylaws<sup>236</sup> to:

[D]eclare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws<sup>237</sup>

225. Pursuant to this authority, the Panel (by a majority) declares that Donuts has not met its burden to demonstrate action or inaction by the Board that violated ICANN's Articles or its Bylaws.

226. The Panel also has authority to:

[R]ecommend 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[.]

227. There is precedent for taking a broad view of this prerogative.<sup>238</sup> Even though an IR is an accountability mechanism, it also has the potential to serve an advisory function, inasmuch as it represents the views of three independent neutrals. These considerations prompt the majority to offer the following further thoughts.

228. First, the majority cannot say that the .SPORTS expert was motivated by partiality favoring the objector, only that his failure to elaborate on what he may have thought was already implied in his resume erred too heavily on the side of non-disclosure, and was thus unhelpful to the process. Opting for less than robust disclosure is harmful because, at a minimum, when discovered it may create the impression of bias and thus undercut a party's confidence in the

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<sup>234</sup> Donuts' Request for IR, para. 21.

<sup>235</sup> Booking.com IR Declaration, para.141.

<sup>236</sup> ICANN Bylaws, Article IV, Section 3.

<sup>237</sup> Id., Section 3, para. 1(d).

<sup>238</sup> See Booking.com IR Declaration, para. 4; Vistaprint IR Declaration, paras. 186-90.

system. A more substantial peril is realized when weak disclosure is only a precursor to a determination in fact motivated by partisanship.

229. The majority believes that rather than using single expert panels, the community objection process might to advantage employ panels composed of three experts. In such circumstances, partisans can only do limited damage and, correspondingly, any party concerned about the prospect of biased expert determinations should be reassured to a considerable extent by three-person tribunals. In the majority's view, even with the added costs involved, it would be economically justifiable in the long term and not inconsistent with ICANN's values and principles to adopt a three-neutral model as the default in community objection cases.

230. Concerning the community objection proceeding brought by SportAccord in connection with .SPORTS, the majority believes it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts). In the event that should happen, the applicant and objector would presumably be highly efficient in presenting their respective cases, having already prepared them fully once.

231. The majority also considers that the cases before this Panel involve a predictable conflict of expectations. The Guidebook authorizes a prospective applicant, who espouses a relatively open registration policy, to pursue a standard application to administer a string prone to be associated with one or more communities; not uncharacteristically, those communities will espouse and be galvanized by formal policies and common perspectives that are likely to be incompatible with unrestrained access to the string involved. The majority suggests that the assumptions and policies that lead to this kind of tension warrant further study.

## XIX COSTS

232. The Supplemental Rules, which augment the ICDR arbitration Rules for IR proceedings, state:

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.<sup>239</sup>

233. The majority of this Panel has determined that Donuts has not prevailed. The majority does not find that the circumstances warrant departing from the general rule that, ordinarily, "the party not prevailing in an IRP shall...be responsible for bearing all costs of the proceedings."

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<sup>239</sup> Supplementary Procedures for ICANN Independent Review Process, Article 11.

234. The majority considers that any contribution to the public interest Donuts might have made by focusing attention on the proper level of disclosure by ICC experts and related matters has been offset by the tenuousness of some of Donuts' positions.<sup>240</sup>

235. Accordingly, Donuts is to bear all of the fees and expenses of each Member of this Panel, all of the fees and expenses of the ICDR in this IRP, and all expenses of the hearing in Los Angeles on October 8, 2015, including hearing room costs, the fees and expenses of the reporter, and the cost of the transcript.

236. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$4,840.00 shall be borne by Donuts, and the compensation and expenses of the Panelists totaling US\$165,895.34 shall be borne by Donuts. Therefore, Donuts shall reimburse ICANN the sum of US\$83,067.66, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

237. As to legal fees and similar costs incurred by ICANN, because Donuts availed itself of the cooperative engagement process, the Panel is not *required* to "award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees." The Panel interprets Article 34 of the ICDR Rules as according it discretion to hear the parties on the question of legal fees and to make an award of such fees in whole or in part.<sup>241</sup>

238. Nevertheless, recent precedents—notably Booking.com, Vistaprint, and Merck—(while taking different approaches to the allocation of DRSP and Panel fees) have seemingly established the practice of leaving each party to shoulder its own legal fees. This Panel, in keeping with that trend, unanimously decides that each side should bear its own legal fees and similar costs. It will thus not ask the parties to address through further briefing the proper allocation of such fees in this case.

239. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the final Declaration of this IR Panel.

240. As contemplated in Article 30 (2) of the ICDR Arbitration Rules, this Declaration carries two signatures instead of the usual three. Mr. Boesch dissents, in part, and has written separate remarks.

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<sup>240</sup> See, e.g., notes 183-89, 226, *supra*, and accompanying text.

<sup>241</sup> The ICDR Rules, Article 34, state in pertinent part:

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case. Such costs may include:...d. the reasonable legal and other costs incurred by the parties;...



Philp W. Boesch \_\_\_\_\_ Rayner M. Hamilton \_\_\_\_\_

Date:

Date:

Professor Jack J. Coe, Jr. (Panel Chair) \_\_\_\_\_

Date:

Philp W. Boesch \_\_\_\_\_ Rayner M. Hamilton \_\_\_\_\_

Date:

Date:

Professor Jack J. Coe, Jr. (Panel Chair)

A handwritten signature in cursive script, appearing to read "J.J. Coe, Jr.", written over a horizontal line.

Date: *May 5, 2016*

Philp W. Boesch \_\_\_\_\_

Rayner M. Hamilton



Date:

Date:

May 5, 2016

Professor Jack J. Coe, Jr. (Panel Chair) \_\_\_\_\_

Date:

**I, Philip W. Boesch, Jr., Panel Member, decline to sign the Final Declaration of the Panel, for the reasons outlined in this statement, which I respectfully request be attached to and incorporated with the Declaration executed by the other two Members of this Panel.**

A. The Promise of Independence, Transparency and Accountability Has Been Violated. There is no disagreement on this Panel and on any Panel considering previous matters, that ICANN is “no ordinary non-profit,” but instead is a “regulatory authority of vast dimension and pervasive global reach.” The very origin of ICANN’s authority relies upon ICANN’s “Affirmation of Commitments” with and to the United States Department of Commerce, which lists as the first “key commitment” by ICANN, to “ensure” that decisions are made in the public interest “and are accountable and transparent.”<sup>1</sup> (Emphasis Added). ICANN Article Section 4 sets forth ICANN’s commitment to “open and transparent processes.” (Emphasis Added). Article 3, Section 1 requires that ICANN “shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” (Emphasis Added). The ICANN Guidebook requires the decisions to be made by “an independent expert Panel.” (Emphasis Added).

It is the independence of judgment, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulation authority. These essential principles, in this Member’s opinion, should be at the forefront of this Panel’s review, because ICANN’s position in this review seeks a rubberstamping of decision-making that was not independent, that was not transparent, and that has not been held accountable. This Member cannot abide the Expert decision in the .SPORTS Application and would not sustain the Objection filed to that Application.

The Expert who decided the .SPORTS Objection, “impermissibly abridged disclosures,” the Majority holds, but then the Majority accommodates by stating that there is no evidence that the Expert really was a “partisan,” and by accepting ICANN’s speculation that the Expert’s decision-making “may” have been “heart-felt.” When ICANN receives its extraordinary power and authority, based on the promise of independent judgment, transparency, and accountability, there is no room for whitewashing the egregious failure of disclosure here. The decision-maker was the lawyer for undisclosed clients directly benefited by his ruling. ICANN argues to let this

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<sup>1</sup> Affirmation of Commitments No. 3.

stand because the procedures it argues are applicable do not permit any other options. This Member disagrees. This is the failure of the promise of independent, transparent, accountable decision-making and it should not stand.

B. The Requirement of Conformity With Law. This Panel accepts the notion that ICANN must carry out its activities in conformity with “relevant principles of international law and applicable conventions and local law.” But in this context the Majority discusses the “California business judgment rule,” finds it inapplicable and discusses no other laws, relying on the arguable lack of briefing on conflicts of law. Because the procedures in this case cloak the “expert” with the decision-making power of a judge or arbitrator, the “relevant principles of international law” and “local law” should be those which apply to independent, transparent and accountable decision-making. Conflicts of laws would not seem to deserve much discussion on this point, because there likely are no conflicting laws that permit an arbitrator to decide matters where the arbitrator’s undisclosed clients or business associates would directly benefit from his or her ruling. Laws and rules governing disclosures and the independence of the judiciary and the transparency of decision-making, even AAA and ICDR Rules, do not focus on the need to prove that the decision-maker actively promoted the interests of undisclosed clients as direct beneficiaries of his or her judicial ruling. It is the necessity to avoid the appearance of impropriety that dictates the fullest disclosures.

C. There is and There Should Be A Remedy for “Impermissible” Non-Disclosures. Ultimately it should be the ICC experts’ disclosures and not the parties’ private investigation into the expert’s background, upon which the integrity of the ICC expertise system depends. This also is true for judges, and for arbitrators acting pursuant to the California Arbitration Act or in compliance with the Federal Arbitration Act, or in compliance with ICDR Rules. In fact, this Expert’s signature on his “impermissibly abridged disclosures” actually appears just below the ICC Disclosures Statement, which advises in underscored text that “any doubt must be resolved in favour of disclosure.”

Even though the Expert’s conduct in failing to disclose was “impermissible,” the Majority suggests for a variety of reasons that there is no remedy for this failure—even while the integrity of the ICC expertise system depends on it. With the very integrity of ICANN’s system at issue, this Majority has determined that there are no remedies. If there is no remedy for such a fundamental failure of the independence, transparency and accountability requirements, then this is a systemic defect that required and requires Board action.

This Panel Member also believes, however, that there is and should be a remedy, even within the standards of review, interpretations, and procedures outlined by ICANN and by the Majority.

D. Application of The “Standards of Review” Should Permit a Remedy in This Case. This Panel, as with all Panels, discusses the “standard of review” typically by focusing on whether the Board acted “without conflict of interest,” whether the Board exercised “due diligence and care” and whether the Board exercised “independent” judgment. Though this Member takes issue with the narrow interpretation by the Majority of “actionable inaction,” it is clear enough from other decisions and even from the Majority in this case, that inaction as well as action may form the basis for the review. In this case, the Board’s inaction was not without conflict of interest; the failure of a remedy affecting the integrity of the IRP system does not suggest due diligence; and allowing this Expert opinion to stand is not the achievement of independent judgment.

The Majority finds many reasons not to act, holding that its mandate is so “very narrow” as to be almost non-existent, and how that “confinement” must be “redoubled by the standard of review.” Opinion at 57.

But the Panel majority also states: “Concerning the community objection proceeding brought by SportAccord in connection with .SPORTS, the majority believes it would not be inconsistent with ICANN’s values and principles to provide for a rehearing of that objection, by a different expert (or three experts).” This seems to be an advisory opinion that Donuts can and perhaps should petition for a rehearing, and that it would “not be inconsistent” with ICANN principles for a rehearing to be granted by some entity in authority.

For the Panel to find that it cannot act except at best in an advisory capacity, and that its neutered role is not a systemic problem, is unsatisfactory and unsatisfying. To this Member, after hundreds of thousands of invested dollars in filing fees and in these proceedings, the advice to Donuts to seek a rehearing (“[a]t least arguably, moreover, no time bar would operate”) is analogous to a punt on first down if not an abdication of responsibility.

Although the Majority analyzes the deference to be or not to be accorded the Board’s actions or inactions, the first question, whether the Board action or inaction is “without conflict of interest,” is a flawed inquiry in the context of this case. Every time the Board or its agents or delegated decision-makers consider action or inaction of any kind, in addressing the decision of the Board’s delegated decision-maker, the Board is acting with and not without conflict of

interest. If the Board promulgates or leaves in place a procedure or standard of review, stacked in favor of its delegated decision-maker, the Board is acting with and not without a conflict of interest. If ICANN's argument is that the standard of review only refers to "certain kinds of conflicts of interests," that is not an apparent conclusion to draw from the language of the Guidebook or the Articles. Not only should no deference be accorded the decision under review, but also the basic principles justifying ICANN's authority—independent judgment, transparency, and accountability—mandate that the procedures and standards for review not be stacked in any way in favor of ICANN's delegated decision-maker, or applied in a manner that suggests that they are. This Panel Member would find that a remedy is available within the existing standards of review, however the Majority seeks to narrow or "confine them."

E. Application of Contract Law Confirms a Remedy. The promise of independent judgment, transparency and accountability, as to decision-making that is essentially judicial in nature, regarding matters of extreme public import and interest, should not be set aside by resort to technical rules of construction contrary both to equity and to applicable principles of law.

Donuts argues, among other things, that it entered into a simple contract by paying its \$185,000 and by filing its Application in accordance with the ICANN Guidebook. No conflicts of laws issues were raised with respect to the basic formation of a contract, and the substantial amounts involved do not suggest anything other than a significant business relationship and mutual commitment. Part of a mutual commitment like this includes, under California law, a covenant of good faith and fair dealing to make certain that the benefits of the contract are achievable by both sides. With the promise of fair dealing, the applicant had every right to expect independent decision-making, transparent decision-making, and accountability of the decision-making, in accordance with fair and reasonable processes. That is a clear covenant by and responsibility of the ICANN Board. This Member also is of the opinion that the applicant had the right to expect that its application would be handled as represented in the Guidebook, without additional terms imposed upon it, including that it operate for the benefit of any one community. ICANN does not persuasively reply—and does not reply at all to the substance of this argument.

F. This Case Should Not Turn on the Majority's View of Agency Law. The Panel Majority bases its opinion on the fiction that the Board's delegated decision-maker is a "third-party," even though it is the Board's delegation that sets up this isolation. And, the Majority posits, the outcome of this proceeding might have been different "[h]ad the agency theory been

more fully addressed by the Parties...” (Opinion 48, ¶155). Because this Panel’s century of experience leaves it capable of dealing with the briefings on “agency theory,” this again seems to this Member more like an abdication of responsibility than its articulated focus on burden of proof.

Trying to draw narrow distinctions between whether delegated decision-making is the work of an agent or an independent contractor is just such a technical nicety that would not be acceptable in the simplest workers compensation case, much less acceptable in a matter of extraordinary public interest. The Guidebook makes no such distinction. It acknowledges that experts appointed by or under authority of the Board, pursuant to the Bylaws, shall determine Objections. “The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.” See Guidebook, §3.4.6.

In its analysis in the Booking.com IRP, that Panel summarized its investigation:

The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, *including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook.* This includes the challenged actions of the Board (*or any staff or third party*) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (*or any staff or third party*) in relation to the string similarity review of .hotels in particular.<sup>2</sup> (Emphasis Added)

In this case, the conduct of the delegated decision-maker was “inconsistent with ICANN’s Articles of Incorporation [and] Bylaws [and] with the policies and procedures established in the Guidebook,” and it is the opinion of this Member that it disserves the integrity of the system for an opinion to rely upon whether the delegated decision-maker is an agent of the Board, a staff member reporting to the Board, a Board member, or an “independent contractor” of the Board.

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<sup>2</sup> Booking.com Declaration, paras. 144-45.



G. The DCA Case is Not Only Instructive; It Addressed as This Panel Should, the Fundamental Integrity of the System. Similarly, the distinction that is made regarding the DCA case is not only a technical one but one that exalts form over substance. There seems to be very little question that the odor of corruption and impropriety hung over the air of the DCA review; it was the fact that the decision presented a direct and blunt assault on the integrity of the entire process, that led to the DCA conclusion, not the distinctions that might be presented in some state's law between constituents, affiliates, agents, independent contractors, and the like. As stated by the DCA Panel, the Board's failure to maintain its own accountability in any other way leaves the IRP as "the only and ultimate 'accountability' remedy for an applicant."<sup>3</sup>

In this case, all Panel members agree that the integrity of the system is predicated upon the fullest and complete disclosures by the experts. If experts are appointed who are, charitably, unaware of the requirements of disclosure, unaware of the need to avoid the appearance of impropriety, or aware only of some allegedly lesser standard of disclosure, then that is the system's failure. Whether that is an inadequacy in training, as Donuts argues, whether that result is the failure to intervene in an egregious action, as Donuts argues, or whether that is the emergence of bias over reason, as Donuts argues, or all three, the result of this review should be the same. It is not acceptable to the integrity of the process to speculate that the expert's decision "might have been heart-felt." It is not acceptable for a lawyer, whose undisclosed clients shall directly benefit from his decision, to issue the judgment that he did.<sup>4</sup>

H. This Member Would Not Uphold the Objection to Donuts' Application for .SPORTS. This Member of the Panel would furthermore reverse and deny the Objection. It is incredulous to the Panel Member that this Expert construed "community" in a way that SportAccord explicitly had *not* defined it, stating that it was "self-evident" the community "refer[s] to the individuals and organisations who associate themselves with organized sport," which he calls the "Organised Sports Movement." This Expert strained to find a "clearly delineated" community, even though the objecting party itself had "delineated" it to include: (i) "individuals and organizations who associate themselves with Sport;" (ii) "practitioners as well

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<sup>3</sup> DCA Declaration, para. 15

<sup>4</sup> This Member finds it persuasive that this same Expert was disqualified in virtually an identical context and matter. This Member also finds the discussion essentially blaming Donuts' investigation and response not only to be unpersuasive but a slap at the integrity of the system that depends on disclosure.

as organizers, supporters and audience;” (iii) “individual practitioners of sport, ... spectators, ... fans and sponsors;” and (iv) “any person in the world.”

Nevertheless, without any evidence, the Expert made up his own definition of the “community”:

...[W]hen the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model [atop which SportAccord claimed it sat].

This Expert also cited as evidence of “substantial opposition” a letter from one of his own clients, and cited as legal authority for one of his conclusions a case in which he acted as counsel for another of his clients. Without any evidence to support his “self-evident” community definition, and plenty of evidence that undisclosed “organized sports” clients are served by the lawyer acting as decision-maker, this Member is left with the self-evident proposition that there is no other excuse for it than allegiance to the entrenched “organized sport organizations” which the Expert and his lawfirm serve as counsel.

The conclusion that the Objection should be denied is reasonable and consistent with the goals and responsibilities of independence, accountability and transparency. The delegated decision-making process, in this case without adequate accountability and independent review, should not be promoted as a fair process. To this Panel Member, it wasn't.

I. This Member Agrees With the Majority Decision to Donuts Application for .RUGBY Affirming the Objection. The integrity of the system is not implicated by the decision on the .RUGBY Objection in the same manner and to the same degree in which it was and is with respect to the .SPORTS Objection. Notwithstanding the opinions presented here that would apply to both Objections, this Member cannot conclude on this record that the delegated decision-making resulted in violation of fundamental principles or covenants, or that the Expert should have reached a different conclusion for other reasons; and therefore this Member does not disagree with the conclusion reached by the Majority with respect to the .RUGBY application.

J. The Awarding of Costs. Because this Member believes that the SportAccord Objection should not have been decided by this Expert in favor of the objecting party, it seems neither fair nor reasonable to award costs and attorneys' fees to ICANN. The Majority further

takes the position that “any contribution to the public interest Donuts might have made by focusing attention on the proper level of disclosure by ICC experts and related matters has been offset by the tenuousness of some of Donuts’ positions” (Opinion 64). What this Member finds even more tenuous than this vague reference are the IRP Panel’s conclusions that it would not be inconsistent with ICANN principles to award a rehearing of the SportAccord Objection, that the IRP Panel can do nothing about the problem it sees, and that even though the Panel cannot act, the problem really is not systemic in nature. The lack of accountability here, to address a blatant failure of disclosure that cuts at the integrity of the process, exposes the failed promises of independence, transparency and accountability and frankly discourages justifiable challenges to ICANN in the future. This Member would have each side bear its own costs and fees under the circumstances.

Dated: May 5, 2016

Respectfully submitted,



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Philip W. Boesch, Jr.  
Member of the Panel